Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

17 July 2014*

(State aid — Restructuring of WestLB — Aid to remedy a serious disturbance in the economy of a Member State — Article 87(3)(b) EC — Decision declaring the aid compatible with the common market under certain conditions — Action for annulment — Individual concern — Legal interest in bringing proceedings — Admissibility — Collegiality — Obligation to state reasons — Guidelines on State aid for rescuing and restructuring firms in difficulty — Proportionality — Principle of non-discrimination — Article 295 EC — Article 7(4) of Regulation (EC) No 659/1999)

In Case T-457/09,

Westfälisch-Lippischer Sparkassen- und Giroverband, established in Münster (Germany), represented initially by A. Rosenfeld and I. Liebach, and subsequently by A. Rosenfeld and O. Corzilius, lawyers,

applicant,

v

European Commission, represented initially by L. Flynn, K. Gross and B. Martenczuk, and subsequently by L. Flynn, B. Martenczuk and T. Maxian Rusche, acting as Agents,

defendant,

ACTION for the annulment of Commission Decision 2009/971/EC of 12 May 2009 on State aid C 43/08 (ex N 390/08) which Germany proposes to grant towards the restructuring of WestLB AG (OJ 2009 L 345, p. 1),

THE GENERAL COURT (First Chamber, Extended Composition),

composed of H. Kanninen (Rapporteur), President, I. Pelikánová, E. Buttigieg, A.M. Collins and S. Gervasoni, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2013,

gives the following

* Language of the case: German.

Judgment

Facts

1. *Beneficiary*

1 At the material time, WestLB AG was a commercial bank operating internationally, based in the German federated State (Land) of North Rhine Westphalia ('the Land of North Rhine Westphalia'). With total assets of EUR 286.5 billion (at 31 December 2007), it was a major German financial services provider. As the central institution for the savings banks in the Land of North Rhine Westphalia and the Land of Brandenburg (Germany), it acted as their link to the global financial markets. WestLB offered the full range of products and services of a universal bank.

2 The owners of WestLB ('the owners') were, at the material time, first, the applicant, namely Westfälisch-Lippischer Sparkassen- und Giroverband, secondly, Rheinischer Sparkassen- und Giroverband, thirdly, the Land of North Rhine Westphalia, fourthly, Landschaftsverband Westfalen-Lippe and, fifthly, Landschaftsverband Rheinland.

3 The applicant and Rheinischer Sparkassen- und Giroverband are two associations of savings banks in, respectively, the Westphalia-Lippe region (Germany) and the Rhineland region (Germany) and, at the material time, each held 25.03% of the capital of WestLB. As regards the Land of North Rhine Westphalia, it held 37.4% of that capital. Finally, Landschaftsverband Westfalen-Lippe and Landschaftsverband Rheinland are two associations of local authorities in, respectively the Westphalia-Lippe region and the Rhineland region and each held 6.09% of that capital.

2. *WestLB's financial difficulties and notification of the bad bank*

4 Since mid-2007, a structured investment portfolio of WestLB with a nominal value of EUR 23 Billion, which included subprime real estate loans ('the EUR 23 billion portfolio'), had been falling in value. Unable to refinance that portfolio on the market, WestLB had to consolidate it on its own balance sheet, thereby recording substantial losses.

5 On 20 January 2008, at an emergency meeting, the owners decided, first, to inject up to EUR 2 billion into WestLB in order to offset the expected losses for 2007 and temporary write-downs and, secondly, that WestLB would put in place restructuring plans and negotiate a possible merger with the Landesbank (regional bank) of the German Federated States (Länder) of Hessen and Thüringen ('Helaba').

6 On 7 February 2008, the Federal Republic of Germany informed the Commission of the European Communities that, in the absence of support measures, WestLB was in danger of falling below the statutory capital requirements by 31 March 2008.

7 On 8 February 2008, the owners reached an agreement entitled 'the document on the principal issues' (Eckpunktepapier). That agreement included a measure to replace those proposed on 20 January 2008, namely the creation of a bad bank ('the bad bank') intended to isolate WestLB from the risks resulting from the EUR 23 billion portfolio. On the same day, the Federal Republic of Germany informed the Commission of the existence of the agreement, which was notified on 27 March 2008.

8 On 31 March 2008, the owners approved the creation of the bad bank, subject to the agreement of the parliament of the Land of North Rhine Westphalia.

3. *Description of the bad bank*

9 The creation of the bad bank involved the sale, with effect from 31 March 2008, of the EUR 23 billion portfolio, at its nominal value, to a special-purpose vehicle established in Ireland, Phœnix Light SF Ltd ('Phœnix Light'). That company undertook to continue refinancing that portfolio.

10 In order to pay the purchase price, Phœnix Light issued notes equal to the nominal value of EUR 23 billion. The notes were issued in two tranches. The first tranche consisted of senior notes ('the senior notes') having a total nominal value of EUR 18 billion. The second tranche consisted of junior notes ('the junior notes') having a total nominal value of EUR 5 billion.

11 The Land of North Rhine Westphalia guaranteed payment of all the capital covered by the junior notes to the holders of those notes. In accordance with the Eckpunktepapier, it was entitled to claim compensation from the other four owners in proportion to their holdings in WestLB for any payment made under the guarantee thus established ('the guarantee at issue'), within a limit of EUR 2 billion. If the additional EUR 3 billion was called upon, the Land of North Rhine Westphalia was entitled to demand that those owners transfer to it a corresponding number of their WestLB shares. The owners could also agree to a cash payment.

12 Phœnix Light had to pay annual commission on the guarantee at issue. It also had to pay the holders of the notes. Those costs and the administrative costs of the bad bank were to be borne out of the return on the securities transferred to Phœnix Light.

13 WestLB then purchased the junior notes. There are two reasons for this. First, since those notes were guaranteed by the Land of North Rhine Westphalia, the auditors of WestLB considered that they would not have to correct the value of the notes downwards in WestLB's accounts, as they would have been obliged to do in the case of the EUR 23 billion portfolio. Secondly, the junior notes could be used as collateral to raise the funds required in order to buy them.

14 WestLB also purchased the senior notes.

4. *Supplementary notification*

15 On 11 April 2008, the Federal Republic of Germany sent a supplementary notification to the Commission concerning the bad bank. It stated that, following the approval of the parliament of the Land of North Rhine Westphalia, the bad bank had been created and, acknowledging that its creation involved the granting of State aid, requested its immediate approval as rescue aid. The Federal Republic of Germany undertook to submit to the Commission, within a period of six months, expiring on 8 August 2008, either a restructuring plan for WestLB or proof of the complete termination of the guarantee at issue. It stated that, in the latter case, WestLB would have to refund any 'payments' made to it and all the economic effects of the guarantee would be reversed.

5. *Authorisation of the guarantee at issue for a period of six months*

16 On 30 April 2008, the Commission adopted Decision C(2008) 1628 final concerning the bad bank created by the Federal Republic of Germany for the benefit of WestLB (Aid NN 25/2008, ex CP 15/08) ('the provisional decision').

17 In that decision, in the first place, the Commission considered that the guarantee at issue was State aid within the meaning of Article 87 EC (recitals 28 to 39 of the provisional decision).

18 In the second place, the Commission noted that the aid referred to in the preceding paragraph was not intended to remedy a serious disturbance in the economy of a Member State. Accordingly, it could not be considered to be compatible with the common market under Article 87(3)(b) EC. However, having examined the aid in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2, 'the rescue and restructuring guidelines'), the Commission considered that it could be authorised under Article 87(3)(c) EC (recitals 41 to 58 of the provisional decision).

19 In that regard, the Commission found, first, that WestLB was a firm in difficulty within the meaning of the rescue and restructuring guidelines. The Commission noted that, if the guarantee at issue had not been provided, on the one hand, WestLB would not have been able to comply with the statutory capitalisation requirements and, on the other hand, its credit rating would have been downgraded, thereby making its refinancing difficult and causing further losses which could have resulted in its going out of business in the medium term (recitals 44 and 45 of the provisional decision).

20 The Commission found, secondly, that the guarantee at issue was equivalent to a 'capital loan' allowing WestLB to comply with the statutory capitalisation requirements and therefore to continue its business activities. The Commission noted that that guarantee complied with the limitations provided for by the rescue and restructuring guidelines, in so far as, on the one hand, it was created for a period of six months and was reversible and, on the other hand, the element of aid which it involved was the minimum necessary to ensure continuity of the business (recitals 47 to 49, 52, 54 and 55 of the provisional decision).

21 The Commission found, thirdly, that the aid granted was justified on serious social grounds, had no unduly adverse effects and that no other rescue or restructuring aid had been received by WestLB over the preceding 10 years, as required by the rescue and restructuring guidelines (recitals 56 and 57 of the provisional decision).

22 In the operative part of the provisional decision, the Commission concluded that the guarantee at issue constituted State aid pursuant to Article 87(1) EC, put into effect in breach of Article 88(3) EC and compatible with the Common Market pursuant to Article 87(3)(c) EC. It stated that the Federal Republic of Germany should communicate to the Commission, not later than 8 August 2008, a restructuring plan for WestLB or proof of the complete termination of the guarantee at issue. The Commission stated that the Federal Republic of Germany had made a commitment, in the latter case, that 'the guarantee agreement between the [Land of North Rhine Westphalia] and Phœnix Light' would be rescinded. As a consequence WestLB would refund any payments made thereunder.

23 Finally, the Commission authorised the aid at issue until 8 August 2008 and stated that, if the Federal Republic of Germany communicated a credible restructuring plan to the Commission, the authorisation would, in principle, be extended until the adoption of a final decision concerning that plan.

6. *Notification and examination of the extension for the bad bank*

24 The Commission, the Federal Republic of Germany, WestLB and the owners had regular exchanges with a view to the adoption of a restructuring plan. The applicant claims that the Commission, at a meeting with WestLB and the owners on 15 July 2008, set out the criteria to which, in its view, its authorisation should be made subject, namely that that plan would make it possible, by certain mandatory deadlines, to achieve a 50% reduction in the size of WestLB's balance sheet and a change in its ownership structure.

25 By letter of 8 August 2008, the Federal Republic of Germany notified the Commission of its intention to transform the bad bank into a permanent structure. The notification was accompanied by a restructuring plan for WestLB ('the original restructuring plan') and by an agreement adopted by the owners known as 'the agreement on the principal issues' (Eckpunktevereinbarung).

26 The original restructuring plan provided, in particular, for significant measures for reducing the balance sheet and activities of WestLB and for changing its ownership structure to ensure that the owners would no longer have majority control on 30 September 2009 (the owners and the Federal Republic of Germany undertook to provide the Commission with more precise information in that regard by 31 December 2008).

27 In the Eckpunktevereinbarung, the owners undertook to find solutions to the difficulties of WestLB which were consistent with sustainable reform of the German Landesbanken sector. They indicated that they intended to submit to the Commission, by 31 December 2008, a revised restructuring plan, including reduction measures going beyond the original restructuring plan and taking into account the modification of the ownership structure.

28 By a letter of 1 October 2008 including an invitation to submit comments pursuant to Article 88(2) EC [State Aid — Germany — State Aid C 43/08 (ex N 390/08) — WestLB] (OJ 2008 C 322, p. 16, 'the opening decision'), the Commission notified the Federal Republic of Germany of its decision to initiate the formal investigation procedure provided for in Article 88(2) EC ('the formal investigation procedure') concerning the 'risk shield granted in favour of WestLB by its public owners'.

29 First of all, the Commission confirmed the assessments it had made in the provisional decision concerning the existence of State aid (recitals 34 and 35 of the opening decision) and the possibility of examining its compatibility with the common market exclusively under Article 87(3)(c) EC. It considered that the crisis on the 'subprime market' had not yet led to a serious disturbance of the economy within the meaning of Article 87(3)(b) EC (recitals 43 and 45 of the opening decision). The Commission pointed out that, since the Federal Republic of Germany intended to transform the bad bank into a permanent structure, the aid at issue should thenceforth be regarded as restructuring aid (recital 33 of the opening decision).

30 Next, the Commission expressed doubts as to whether the original restructuring plan was compatible with the rescue and restructuring guidelines and stated that it needed additional information (recital 47 of the opening decision).

31 In that regard, it pointed out that WestLB did not intend to deviate from its business model, which had proved unsustainable in the long term. More drastic changes might therefore be necessary to ensure its viability. The Commission noted that the difficulties of WestLB were probably due to its ownership structure and to the different interests among the owners and expressed its doubts as to the possibility of an appropriate strategic reorientation in the absence of a solution to those structural issues. The Commission positively assessed the fact that the original restructuring plan provided for a modification in the ownership structure, since that could bring about changes in WestLB's business model. However, since the plan contained no concrete measures in that respect, it was not possible to determine the extent to which it would restore the bank's viability (recitals 48 to 50 of the opening decision).

32 Finally, the Commission invited the interested parties to submit their comments, which only the Federal Republic of Germany submitted, on 24 November 2008.

33 On 16 December 2008, the Federal Republic of Germany requested an extension of the deadline for the communication of the concrete measures relating to the modification of the ownership structure of WestLB. The Commission extended that deadline until 31 March 2009.

34 According to the applicant, on 31 March 2009, at a meeting with the Federal Republic of Germany, the Commission presented a 'road map' containing the conditions which, according to a predetermined timetable, had to be fulfilled in order for the bad bank to be authorised as a permanent structure and stated that it might adopt a negative decision on 13 May 2009.

35 From 6 to 8 April 2009, the Commission held discussions with the Federal Republic of Germany, WestLB and the owners on the restructuring of the bank and the conditions necessary to avoid a negative decision.

36 On 30 April 2009, the Federal Republic of Germany submitted a restructuring plan incorporating some amendments, discussed with the Commission, to the original restructuring plan ('the final restructuring plan').

37 That plan provided, first of all, for a change in the ownership structure of WestLB to be put into definite terms by 31 December 2008 (by a letter of intent, for example). WestLB would be offered for sale, as a whole or in separate units, in a tender procedure launched before 31 August 2010, enabling the sale to become effective on 1 January 2012 at the latest and subject to certain conditions.

38 Next, in order to facilitate the sale of WestLB, provision was made for rationalisation measures to allow a reduction of costs and risks and a reorientation of the business, namely the closing of several establishments and a reduction of the balance sheet and risk-weighted assets by 25% by 31 March 2010 and by 50% by the end of March 2011, by reference to those of 2007.

39 Finally, the plan at issue provided for the phasing-out or reduction of several activities of WestLB.

7. *Contested decision*

40 On 12 May 2009, the Commission adopted Decision 2009/971/EC on State aid which Germany proposes to grant towards the restructuring of WestLB AG (C 43/08 (ex N 390/08)).

41 By letter of 29 May 2009, the Federal Republic of Germany informed the Commission that, in its view, that decision contained errors and inaccuracies, in particular in recital 41, worded as follows:

'... All the amendments made to the [original] restructuring plan … were discussed with the Commission, accepted by [the Federal Republic of] Germany, and submitted to the Commission on 30 April 2009 as an amendment of the plan. However, the [final] restructuring plan is still subject to official confirmation by three out of WestLB's five owners. Although it has been accepted by [the Federal Republic of] Germany and by the owners, therefore, the restructuring plan cannot be considered binding. In the course of the proceedings the Commission has observed that the owners did not meet the deadlines and delayed the procedure. The Commission consequently considers it necessary to attach conditions to its Decision.'

42 The Federal Republic of Germany claimed that the penultimate sentence of that recital was inaccurate in so far as 'reasons had been given for the extension of the deadline and it had been approved by the Commission'.

43 On 10 June 2009, the Commission made an offer to the Federal Republic of Germany to amend the wording of the penultimate sentence of that recital, stating that it constituted a mere clarification. It now reads as follows:

'In the course of the proceedings the Commission has observed that the owners have been unable to comply with the original timetable for an authorised restructuring plan, and that decision-making has fallen behind schedule.'

44 The Federal Republic of Germany having given its agreement to the new wording by electronic mail of 22 June 2009, the Commission adopted on 28 July 2009 a corrigendum to Decision 2009/971. The Commission sent that corrigendum to the Federal Republic of Germany at the same time as the thereby corrected version of that decision (OJ 2009 L 345, p. 1, 'the contested decision').

45 In the contested decision, in the first place, the Commission pointed out that it had already found, in the provisional decision, that the creation of the bad bank constituted State aid to WestLB and it noted that the amount of that aid, once the bad bank was converted into a permanent structure, would in all probability be the nominal value (EUR 5 billion) of the guarantee at issue (recitals 52, 54 to 58 and 60 of the contested decision).

46 In the second place, the Commission found, contrary to the findings it had made in the provisional decision and the opening decision, that it was possible to examine whether the aid at issue was compatible with the common market under Article 87(3)(b) EC.

47 The Commission stated that that shift in orientation was due to the fact that, after the adoption of the opening decision, it had found, in the Communication concerning the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ 2008 C 270, p. 8, 'the Communication on the measures taken on account of the financial crisis'), in the communication entitled 'The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition' (OJ 2009 C 10, p. 2) and in the Communication on the treatment of impaired assets, that the measures supporting banks were capable of remedying a threat of serious disturbance to the German economy (recitals 61 and 62 of the contested decision).

48 However, the Commission pointed out that, as it had stated in the communications cited in the preceding paragraph, the compatibility with the common market of the aid granted in connection with the financial crisis should have been assessed in accordance with the rescue and restructuring guidelines, having regard to the particular features of a systemic crisis in the financial markets (recital 63 of the contested decision).

49 In the third place, the Commission examined the compatibility of the aid with the common market. The Commission stated that it had to determine, in accordance with the rescue and restructuring guidelines, first of all, whether there existed a restructuring plan capable of restoring the long-term viability of WestLB, next, whether the aid was limited to the minimum necessary in time and amount and whether WestLB made a significant contribution to the costs of restructuring and, finally, whether the aid distorted competition to an extent contrary to the common interest. Moreover, the Commission pointed out that it could impose conditions on the beneficiary (recital 65 of the contested decision).

50 In that regard, first of all, the Commission examined the measures provided for by the final restructuring plan and concluded that they were capable of restoring the long-term viability of WestLB (recitals 66 to 75 of the contested decision).

51 Next, the Commission considered, first, that the contribution that WestLB had undertaken to make towards the restructuring costs was substantial and as great as it could be and, secondly, that the amount of the aid was limited to the minimum necessary (recitals 76 and 79 of the contested decision).

52 Finally, the Commission examined, in recitals 80 to 87 of the contested decision, whether the final restructuring plan provided for measures to mitigate as far as possible any adverse effects of the aid on competitors and, in recital 88 of that decision, concluded that, in sum, the 'compensatory measures' were in proportion to the distortive effects and ensured that the adverse effects on trading conditions were minimised as far as possible.

53 In the light of the above, the Commission considered the aid to be compatible with the common market, subject to compliance with certain conditions (recital 89 of the contested decision).

54 The operative part of the contested decision is worded as follows:

'Article 1

The aid in the form of a guarantee of EUR 5 billion which [the Federal Republic of] Germany plans to grant to WestLB … is compatible with the common market subject to the conditions set out in Article 2 and in the Annex.

Article 2

1. The [final restructuring plan] must be implemented, subject to all the conditions set out in the Annex and in accordance with the timetable announced.

2. If appropriate ... the Commission may, in response to a properly reasoned application on the part of [the Federal Republic of] Germany:

(a) allow an extension of the deadlines ...; or

(b) in exceptional circumstances, dispense with, amend or replace one or more of the conditions …

...'

55 The annex to the contested decision is worded as follows:

'With regard to Article 2(1) ...

2.1. [The] owners … are to sell WestLB, as a whole or in separate units, by 31 December 2011.

2.2. The owners … are to initiate a tender procedure … by 31 August 2010, and to conclude a contract of sale with the purchaser by 31 August 2011, so that the sale can take effect by 31 December 2011. For properly substantiated reasons the Commission may agree to a sale by private treaty or to a consolidation of *Landesbanken* ... ...

3.1. By reference to WestLB's audited balance sheet total for 31 December 2007 …, the balance sheet total is to be reduced by 25% by 31 March 2010 and by 50% by 31 March 2011 ... ...

4.1. WestLB's core business must be unbundled, and grouped in the following business areas ... by 30 October 2009:

(a) transaction banking,

(b) medium-sized companies and savings banks partnership (*Verbund/Mittelstand*),

(c) capital markets, wholesale banking and structured financing.

4.2. [Those] segmented business areas … are to be sold together or separately by 31 December 2011.

4.3. Pending the sale, none of [those] segmented business areas … may be expanded by mergers or acquisitions ... ...

4.5. … the following restrictions are to apply to capital market business pending the sale: ...

4.6. the following restrictions are to apply to wholesale banking and structured financing business pending the sale: ...

5.1. All of the following … holdings are to be sold in their entirety as quickly as possible and no later than … 2010: [sixteen holdings listed] ...

5.8. Pending the sale, in the event of a loss WestLB is to make no payments on hybrid capital instruments. If WestLB's balance sheet, without adjustment of capital reserves, shows a loss, these instruments must also participate in the loss. ...

6.1. WestLB is to be sold, as a whole or in separate units, in an open, transparent and non-discriminatory tender procedure, subject to the deadlines in points 2.1 and 2.2 [of the annex to the contested decision].

6.2. The procedure must be open to any potential buyer, domestic or foreign ... ...

6.4. The buyer:

(a) must be a third party unconnected with the owners ...

(b) must be reasonably expected to be able to obtain all necessary authorisations from all relevant … authorities ...;

(c) on the basis of its financial resources and in particular its rating, must be able to ensure the solvency of [WestLB].

6.5. Full divesture of segmented business areas is … preferred to a simple transfer of the majority of the voting rights … [That simple transfer] is admissible only if in the tender procedure no offer is made for the full divesture of one or more segmented business areas. The Commission must be informed of the award, and may enter an objection.

6.6. This is without prejudice to the possibility … of a sale by private treaty or a consolidation of *Landesbanken* with the Commission's assent. The previous owners may thereby become minority shareholders if the controlling majority [of WestLB] is lost.

6.7. Business areas and activities which are not sold are to be finally discontinued by 31 December 2011, or allowed to expire after that date upon the maturity of the underlying business. ...

With regard to Article 2(2) [of the contested decision] In applying the review clause in Article 2(2) [of the contested decision], the Commission is to have due regard to supply conditions and the situation on the capital markets.'

8. *Developments in WestLB's situation after the adoption of the contested decision*

56 After the adoption of the contested decision, the value of the EUR 23 billion portfolio deteriorated to the point that the existence of the guarantee at issue was not sufficient to enable WestLB to meet the statutory capital requirements. The Commission, by decision of 7 October 2009, provisionally authorised the granting of a new guarantee for WestLB, in the amount of EUR 6.4 billion, under Article 87(3)(b) EC (State aid N 531/2009), (OJ 2009 C 305, p. 4). The Federal Republic of Germany undertook to present further restructuring measures before 30 November 2009.

57 On 10 December 2009, the Federal Republic of Germany notified the Commission of a capital injection of EUR 3 billion into WestLB and a supplementary guarantee of EUR 1 billion, the purpose of which was to transfer assets having a nominal value of EUR 85.1 billion to a new bad bank. The Commission provisionally authorised those further measures by a decision of 22 December 2009.

58 On 15 December 2009, the Federal Republic of Germany communicated to the Commission a modified restructuring plan ('the liquidation plan').

59 On 20 December 2011, the Commission adopted a further decision on the support measures implemented in favour of WestLB between 2007 and the end of 2011 (Aid C 40/2009 and C 43/2008) ('the final decision of 2011'). In that decision, the Commission repealed the contested decision (Article 3 of the final decision of 2011). It examined as a whole, from the perspective of State aid law, the various capital injections and guarantees granted for the benefit of WestLB between 2007 and December 2011, including the guarantee at issue. The Commission considered that they constituted restructuring aid compatible with the common market under Article 87(3)(b) EC, subject to implementation of the measures provided for by the liquidation plan.

Procedure

60 By application lodged at the Court Registry on 13 November 2009, the applicant brought an action for annulment of the contested decision.

61 By separate document, lodged at the Court Registry on the same day, the applicant lodged an application for interim relief seeking suspension of operation of the contested decision. By order of 18 March 2011 in *Westfälisch-Lippischer Sparkassen-und Giroverband* v *Commission* (Case T-457/09 R, not published in the ECR), the Court hearing the application for interim relief dismissed that application and reserved the costs.

62 By letter of 26 April 2012, the Commission informed the Court of the adoption of the final decision of 2011 and claimed that, after the adoption of that decision, 'the applicant no longer [had] any legal interest in bringing proceedings, assuming there [had] ever been one'. However, it did not explain the reason for that claim.

63 The Court, in the context of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure ('the measures of organisation of procedure'), invited the applicant to comment on the conclusions to be drawn in connection with the present action from the adoption of the final decision of 2011.

64 The applicant complied with that request by letter dated 11 June 2012.

65 In the context of the measures of organisation of procedure, the Court asked the Commission, by letter of 28 November 2012, to submit its observations on the applicant's letter of 11 June 2012.

66 The Commission complied with that request by letter dated 11 January 2013. In that letter, the Commission asked the Court, stating reasons, to find that there was no need to adjudicate.

67 By letter of 4 April 2013, the applicant submitted its observations on the request for an order that there is no need to adjudicate made by the Commission.

68 By decision of 16 October 2013, the Court, on a proposal from the First Chamber, referred the case to the First Chamber, Extended Composition, under Article 14(1) and the first paragraph of Article 51(1) of the Rules of Procedure.

69 By order of 24 October 2013, the Court (First Chamber, Extended Composition) reserved until final judgment the request for an order that there is no need to adjudicate made by the Commission.

70 On 31 October 2013, the Court, in the context of the measures of organisation of procedure, put a number of written questions to the parties, which responded to those questions within the prescribed period.

71 Acting on a report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure.

72 The parties presented oral argument and replied to the questions put by the Court at the hearing of 6 December 2013.

Forms of order sought by the parties

73 In the application, the applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

74 In the defence, the Commission contends that the Court should:

— dismiss the action as partly inadmissible and partly unfounded;

— order the applicant to pay the costs.

75 In its letter of 26 April 2012, the Commission claims that the Court should:

— give the applicant the opportunity to state whether it is prepared to withdraw from the proceedings;

— if the applicant does withdraw from the proceedings, declare that the action has become devoid of purpose.

76 In its letter of 11 June 2012, the applicant claims that the Court should:

— reject the Commission's request that the Court should declare that the dispute has become devoid of purpose;

— in the alternative, in the event that the Court holds that the action against the contested decision has become devoid of purpose, authorise the adaptation of the applicant's pleas in law and form of order sought so that they thenceforth seek partial annulment of the final decision of 2011, in so far as it replaces the contested decision.

77 In its letter of 11 January 2013, the Commission submits that the Court should:

— order that there is no longer a need to adjudicate on the action;

— reject the applicant's request to adapt its pleas in law and form of order sought;

— order the applicant to pay the costs.

78 In its letter of 4 April 2013, the applicant claims that the Court should:

— reject the Commission's request for an order that there is no need to adjudicate;

— in the event that the Court holds that there is no longer a need to adjudicate, order the Commission to pay the costs;

— organise the holding of a hearing.

Law

1. *Admissibility*

The applicant's standing to bring proceedings

79 As a preliminary point, it should be noted that, since it has legal personality, the applicant, a legal person governed by public law, may bring an action for annulment under the fourth paragraph of Article 230 EC, as it correctly claims. However, since the contested decision was addressed only to the Federal Republic of Germany, it is necessary to determine, in accordance with that provision, whether the applicant is individually concerned by that decision, and it should be noted in this connection that there is no doubt that the decision is of direct concern to the applicant, which is also not disputed by the parties.

80 According to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 and Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33).

81 The applicant claims that it is individually concerned by the contested decision in its entirety for the purposes of the case-law referred to in the preceding paragraph. It submits a number of observations in that regard, which can be grouped into two main arguments, concerning, first, the fact that it took part in the adoption of the measure which the Commission classified as State aid in the contested decision and, secondly, the particular harm to it as an owner.

82 The Commission observes that the applicant is only partly concerned by the contested decision. It points out in that regard, first, that the applicant cannot base its standing to bring proceedings on its status as the body which adopted the measure classified as State aid in that decision. The Commission points out, secondly, that the applicant, as an owner, is individually concerned only by the conditions set out in the annex to the contested decision concerning the obligation of the owners to sell WestLB to an unconnected third party ('the obligation to sell').

The first argument, concerning the fact that the applicant took part in the adoption of the measure classified as State aid by the contested decision

83 It is clear from the case-law that the legal position of a body other than a Member State, which has legal personality and has adopted a measure classified as State aid in a final decision by the Commission ('the provider of the aid'), may be individually concerned by that decision if the decision prevents it from exercising its own powers, which consist, in particular, in granting the aid at issue

(see, in that regard, Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 29, and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraphs 50 and 51).

84 The applicant claims, first, that it is the joint author of the measure classified as State aid in the contested decision and, secondly, that it adopted that measure in the exercise of its own powers. According to the applicant, the contested decision prevents it from exercising its own powers, which consist, in the present case, in granting the guarantee at issue. The action is therefore admissible in accordance with the case-law referred to in the preceding paragraph.

85 In its pleadings, the Commission has not disputed that the applicant may be regarded as the provider of the aid examined in the contested decision. It noted that the applicant was not representing an interest of its own, which, according to the case-law, would prevent it from validly bringing proceedings as the provider of the aid. However, in its reply to the questions of the Court dated 31 October 2013 and at the hearing, the Commission argued that the applicant could not be regarded as the provider of the aid. The Commission considered that the aid examined in the contested decision was granted to WestLB solely by the Land of North Rhine Westphalia.

86 It follows from the operative part of the contested decision, which refers only to a 'guarantee of EUR 5 billion' (see paragraph 54 above), that the guarantee at issue is the only measure formally classified as State aid in that decision.

87 It is therefore necessary to examine whether the applicant can be regarded as having granted a part of that aid.

88 In that regard, first of all, it should be pointed out that, in formal terms, the guarantee at issue was granted to potential purchasers of the junior notes by the Land of North Rhine Westphalia and not by owners other than that Land ('the other owners'), since the involvement of the other owners, including the applicant, in the event of any call on that guarantee, is a matter which is purely internal to the owners.

89 Thus, on the one hand, while it is clear from recital 24 of the contested decision that the purchasers of the junior notes could request economic compensation from the Land of North Rhine Westphalia if they incurred losses connected with a deterioration in the value of those securities, there is nothing in the contested decision or in the case-file to suggest that they could also seek any compensation from the other owners. The intervention of the other owners in the event of enforcement of the guarantee at issue is, under the agreements reached by the owners, limited to offering compensation to the Land of North Rhine Westphalia in proportion to their share of the capital for the first EUR 2 billion paid out and, for any additional amount, transferring shares in WestLB to it or agreeing on compensation in cash (see paragraph 11 above and recital 24 of the contested decision).

90 In that respect, it should be added that the applicant itself confirmed in its response to the questions from the Court dated 31 October 2013 and at the hearing that only the Land of North Rhine Westphalia had guaranteed the nominal value of the junior notes vis-à-vis the holders of those securities and that those holders could not seek any compensation from the other owners.

91 On the other hand, it follows from recitals 24 and 26 of the contested decision and from the third indent of recital 20 of the provisional decision that the intervention of the other owners in favour of the Land of North Rhine Westphalia in the event of a call on the guarantee at issue is not automatic, but requires that an application for compensation be made in advance by that Land. The Land of North Rhine Westphalia therefore remains not only the sole guarantor of the nominal value of the junior notes vis-à-vis the holders of those securities, but also controls the allocation of the costs associated with any enforcement of the guarantee at issue between the owners, subject to compliance with the maximum limits of liability agreed upon by them.

92 Next, at the substantive level, it should be noted that, as the parties argued at the hearing, WestLB is the beneficiary of the guarantee at issue in that, under it, the operations described in paragraphs 9 to 14 above, whereby the bad bank was created, enabled it in practice to remove from its balance sheet assets whose value had seriously deteriorated and to include on its balance sheet new assets, namely the junior notes, whose nominal value, equivalent to that of the removed assets, was guaranteed. However, while the participation of the Land of North Rhine Westphalia in the guarantee at issue may have conferred an advantage on WestLB in that context, the participation of the other owners cannot be regarded as forming the basis of its creation.

93 Thus, first, contrary to what the applicant argued at the hearing, the commitment of the other owners towards the Land of North Rhine Westphalia resulting in an obligation partially to repay to that Land the costs incurred in the event of enforcement of the guarantee at issue ('the commitment of the other owners') cannot be regarded as a 'counter guarantee' for the benefit of the holders of the junior notes, in so far as that commitment does not include the obligation to pay a percentage of the nominal value of the junior notes to those holders in a situation where both, first, the guarantee at issue is called and, secondly, the Land of North Rhine Westphalia fails to honour it.

94 Secondly, concerning the question whether, as the applicant argued at the hearing, the commitment of the other owners strengthens the solvency of the Land of North Rhine Westphalia with respect to the holders of the junior notes, it should be noted that even if the risk of insolvency of the Land of North Rhine Westphalia, which is a local authority whose autonomy and powers as a public authority derive from the German constitution, is proven and that, in the event of insolvency, the Federal Republic of Germany is not required, under its national law, to lend it financial assistance to cover its debts, there is nothing in the case-file to support the view that the existence of the commitment of the other owners would be likely to enhance the right of the holders of the junior notes to enforce the guarantee at issue or to grant them priority over other creditors of that Land.

95 It follows from the foregoing that, as the Commission argues, the aid authorised in the contested decision was granted solely by the Land of North Rhine Westphalia, since the other owners cannot be regarded as the providers of any part of that aid.

96 That conclusion cannot be refuted by any of the arguments put forward by the applicant at the hearing.

97 The applicant argued, in the first place, that the Commission itself had described the other owners as providers of the aid in the contested decision.

98 In that regard, first, it should be pointed out that the question whether the applicant is the provider of the aid is an objective question, which depends on the facts set out in the contested decision, which the applicant does not dispute, and not on any assessment of those facts made by the Commission.

99 Secondly, it should be noted that, in the context of the contested decision, the Commission was not required precisely to identify the provider of the aid. As it correctly pointed out at the hearing, the Commission could confine itself to explaining why it considered that the guarantee at issue had been granted by the State from public resources. Since at no stage of the administrative procedure did the Federal Republic of Germany dispute that the guarantee at issue is attributable to the State or that there was a transfer of public resources, the question whether the other owners could be regarded as providers of the aid was therefore irrelevant in the context of that decision.

100 Thirdly, with regard to that assessment, it is certainly true that, in the first indent of recital 23 of the contested decision, the Commission states that the guarantee at issue consists, in part, of a 'a guarantee issued by the owners of WestLB in line with their respective shareholdings covering claims up to an amount of EUR 2 billion held by WestLB against Phœnix Light'. Similarly, in the fourth indent of recital 23 of the contested decision, the Commission states that Phœnix Light is to pay 'the

guarantors' an annual commission on the guarantee at issue. However, the Commission notes at the same time, in the third indent of recital 23 of that decision, that it is the Land of North Rhine-Westphalia which issued a guarantee for the junior notes as a result of which those securities are safer. Finally, it should be recalled that the Commission had stated in the operative part of the provisional decision that, if a restructuring plan was not presented to it by 8 August 2008 at the latest, the Federal Republic of Germany had made a commitment that 'the agreement between the [Land of North Rhine-Westphalia] and Phœnix Light', relating to the guarantee at issue, would be rescinded (see paragraphs 15 and 22 above).

101 In the second place, the applicant argued at the hearing that the Land of North Rhine-Westphalia would never have decided to guarantee the nominal value of the junior notes in the absence of a commitment by the other owners. That commitment was therefore a sine qua non of the guarantee at issue.

102 In that regard, it should be noted that the applicant has not substantiated its assertion with any evidence. It is therefore not possible to determine whether or not, in the absence of the commitment by the other owners, the Land of North Rhine Westphalia would have decided to grant the guarantee at issue.

103 In any event, Article 87(1) EC does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 85 and the case-law cited). Therefore, the subjective reasons leading the Land of North Rhine Westphalia to agree to become the sole guarantor of the nominal value of the junior notes vis-à-vis their holders have no bearing on whether the commitment of the other owners entails an appreciable advantage for WestLB and may be regarded as State aid to that bank.

104 In the third place, the applicant argued at the hearing that the Land of North Rhine Westphalia became the sole guarantor of the nominal value of the junior notes because it was the only conceivable option from a practical point of view. According to the applicant, since it was intended that those securities would be placed on the international financial markets, the associated guarantee had to be simple from a legal point of view and enable investors, who could not engage in detailed analyses concerning purchases of that type of security, first, easily to identify the guarantor and, secondly, not to have to contact various guarantors if the guarantee had to be enforced.

105 In that respect, it is necessary to reject from the outset the claim that investors do not engage in detailed analyses concerning the purchase of securities on international capital markets. This is a claim which is in no way substantiated and is also implausible, since a minimum duty of diligence is to be required of any investor and in particular as regards investors who decide to trade on international financial markets during a major crisis affecting those markets.

106 Next, it should be noted that the applicant's argument does not explain why, from the point of view of simplicity for the holders of the junior notes, other options were not also feasible.

107 Thus, that argument does not explain why either issuing a joint guarantee by all the owners on a portion of the nominal value of each security, accompanied by an exclusive guarantee by the Land of North Rhine Westphalia for the remaining part, or a system of counter guarantees whereby the other owners agree to cover a percentage of the liability of that Land in case of default would not have allowed the buyers of the junior notes easily to identify the guarantors of those securities and to contact a single guarantor in the event of enforcement of the guarantee. Those two alternative schemes, which could have been accompanied by internal agreements to share the costs of any enforcement of the guarantee, could, unlike the commitment by the other owners in the present case, have provided an additional benefit to the holders of the junior notes.

108 Finally, and in any event, the question whether the scheme chosen by the owners to guarantee the nominal value of the junior notes was the only feasible scheme has no bearing on the question whether the commitment by the other owners conferred a benefit on WestLB, the beneficiary of the State aid identified by the Commission in the contested decision. Accordingly, nor does that question have a bearing on whether those owners can be regarded as the providers of the aid at issue.

109 Having regard to all of the foregoing, it must be held that it has not been established that the applicant is individually concerned by the contested decision in its capacity as a provider of the aid at issue.

The second argument, concerning individual harm to the applicant as an owner

110 The applicant claims that it is individually concerned, as an owner, by the contested decision, including as regards all the conditions which are attached to that decision.

111 The Commission accepts that the applicant is individually concerned, as an owner, by the obligation to sell. However, it disputes that the applicant is individually concerned by the other conditions attaching to the contested decision.

112 According to settled case-law, an applicant must show that it has a legal interest in bringing proceedings separate from that possessed by a company which it partly controls and which is concerned by a European Union measure. Otherwise, in order to defend its interests in relation to that measure, its only remedy lies in the exercise of its rights as a member of the company which itself has a right of action (see, to that effect, Case T-597/97 *Euromin* v *Council* [2000] ECR II-2419, paragraph 50, and Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission* [2011] ECR II-1311, paragraph 62, and order of the General Court of 27 March 2012 in Case T-261/11 *European Goldfields* v *Commission*, not published in the ECR, paragraph 21).

113 It is therefore necessary to consider whether the applicant has a legal interest in bringing proceedings separate from that possessed by WestLB so far as concerns the annulment of the contested decision.

114 The applicant argues that its interest in bringing proceedings is separate from that of WestLB, in so far as the contested decision compels it to give up its property rights and to accept a radical restructuring of that bank, including a reduction of the balance sheet of 50%, substantially reducing the value of its shareholding.

115 It should be noted at the outset that, as the Commission itself acknowledges, the applicant has an interest in bringing proceedings separate from that of WestLB as regards the obligation to sell.

116 Indeed, that obligation applies only to the owners, who are forced to waive, within strict deadlines, their property rights in WestLB in order for the aid granted to that bank, and necessary for its restructuring, to be authorised. WestLB, however, is not required to take any action under that obligation, which does not affect its assets and has no bearing on its conduct on the market.

117 However, as regards the other conditions attaching to the contested decision, including those relating to the reduction of WestLB's balance sheet, it should be noted, first of all, that they relate to the commercial activity of that bank and the sale or liquidation of its assets. WestLB could itself put forward any argument, in the context of an action brought against the contested decision, relating to the unlawfulness or to the absence of necessity for those conditions.

118 Next, it should be noted that the Commission states, without being challenged by the applicant, that the non-policy-related rights of an owner of a German limited company are limited, on the one hand, to distribution of the company's profits and, on the other hand, to receiving any surplus in the event of

the undertaking's liquidation. It is therefore necessary to consider that, under German law, status as an owner does not confer rights in the assets of the undertaking. The conditions relating to the reduction of an undertaking's total balance sheet therefore cannot affect any rights of the owners.

119 Finally, it should be noted that the argument advanced by the applicant, in essence, to the effect that any decision taken by the Commission and having any negative impact on the value of a shareholding in a limited company may be challenged before the Court by the owners of that company, is incompatible with the case-law referred to in paragraph 112 above and must therefore be rejected.

120 In the light of all the foregoing considerations, it must be held that, as regards the conditions attaching to the contested decision other than the obligation to sell, including those relating to the reduction of WestLB's balance sheet, the applicant's interest in bringing proceedings is indissociable from that of WestLB and, therefore, it is not individually concerned by the contested decision. However, the applicant is individually concerned by that decision in so far as authorisation of the guarantee at issue was made subject to compliance with the obligation to sell.

Conclusion concerning the applicant's standing to bring proceedings

121 It follows from the foregoing that the applicant has standing to bring proceedings against the contested decision only in so far as the obligation to sell was attached to that decision.

122 Accordingly, the pleas and arguments submitted by the applicant in support of its application for annulment of the contested decision can be considered only to the extent that they seek to show that the inclusion of that obligation in the annex to that decision was unlawful and they must be rejected as inadmissible as to the remainder.

The applicant's interest in bringing proceedings

123 At the outset, it must be noted that, in the context of the final decision of 2011, the Commission authorised, subject to compliance with the liquidation plan, six aid measures, in addition to the guarantee at issue. Those six measures are listed in Article 1(1)(b) to (g) of that decision.

124 The liquidation plan, which replaces the final restructuring plan, involves bringing the existence of WestLB to an end and, as the Commission argues without this being disputed by the applicant, provides for:

— the hiving off of certain WestLB activities by combining them in a 'Verbundbank' (banking group) intended as a service provider for the savings banks of the Land of North Rhine Westphalia and the Land of Brandenburg and for their customers;

— the sale of a large number of WestLB's activities and holdings;

— the permanent transfer of all WestLB's remaining portfolios to a new bad bank, called EAA;

— the establishment of a service and portfolio management bank, provisionally called SPM Bank and subsequently called Portigon, responsible for providing services to EEA and the Verbundbank;

— the restriction of WestLB's universal banking licence through the removal of certain authorisations.

125 It must therefore be considered, as the Commission confirmed at the hearing, that the liquidation plan includes an orderly unbundling of WestLB's activities and the transfer of part of them to the Verbundbank, in order to ensure the continuity of certain services regarded as strategic to the savings banks for which, at the material time, WestLB, as the central institution, acted as the link to global financial markets.

126 However, the liquidation plan neither provides for an overall change in the ownership structure of WestLB, prior to its liquidation, nor makes it impossible for the owners to possess holdings of any kind, after that liquidation, in the successors to some of WestLB's activities, namely the Verbundbank, EEA or the service and portfolio management bank provisionally called SPM Bank and subsequently called Portigon.

127 In that regard, the Commission states, without being challenged by the applicant, first, that the Verbundbank was taken over by Helaba on 1 July 2012 and, secondly, that, under the agreement to transfer the Verbundbank to Helaba, the applicant became an owner of Helaba and thus, indirectly, a joint owner of the Verbundbank.

128 It is in the light of that factual context that it is appropriate to consider the request for an order that there is no need to adjudicate made by the Commission, based on the fact that the applicant lost its legal interest in bringing proceedings against the contested decision as a result of the adoption of the final decision of 2011.

129 According to settled case-law, an applicant's legal interest in bringing proceedings must exist on the day on which they are brought, failing which they will be inadmissible. Furthermore, that applicant's interest in obtaining satisfaction must continue until the final decision, failing which there will be no need to adjudicate (see, to that effect, Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 357 and Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 42).

130 It is also settled case-law that there is no longer any need to adjudicate on a claim for annulment in the event that an applicant has, on account of an event occurring since the action was brought, lost all legal interest in having the contested measure annulled, which means that the annulment of that measure is, of itself, no longer capable of having legal consequences (see Case T-475/07 *Dow AgroSciences and Others* v *Commission* [2011] ECR II-5937, paragraph 67 and the case-law cited).

131 However, as the applicant correctly argues, an applicant may continue to have an interest in securing the annulment of a measure which has been repealed, in so far as a repeal does not give rise to the same legal effects as annulment by the General Court. The repeal of a measure of an institution does not amount to recognition of its illegality and takes effect ex nunc, whereas its annulment would take effect ex tunc (see *Dow AgroSciences and Others* v *Commission*, paragraph 130 above, paragraph 68 and the case-law cited).

132 Moreover, an institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures involve, inter alia, the removal of the effects of the illegal conduct found in the judgment annulling the act. The institution concerned may thus be required to take adequate steps to restore the applicant to his original position or to avoid the adoption of an identical measure (see *Dow AgroSciences and Others* v *Commission*, paragraph 130 above, paragraph 69 and the case-law cited).

133 As stated in paragraph 59 above, the contested decision and therefore all the conditions attaching to it were repealed by the final decision of 2011. However, the contested decision was not withdrawn by the Commission. Consequently, it continued to produce legal effects in respect of the applicant's position for the period between the time when it entered into force and the time when it was repealed (12 May 2009 — 20 December 2011). In particular, as the applicant correctly maintains, during that period the contested decision imposed upon it the obligation to give up its holding in WestLB. The

annulment of the contested decision may therefore have, in itself, consequences for the legal position of the applicant, with the result that the applicant retains its legal interest in bringing proceedings (see, to that effect, *Dow AgroSciences and Others* v *Commission*, paragraph 130 above, paragraph 70).

134 In essence, the Commission puts forward two arguments to refute that conclusion.

135 First, the Commission points out that the obligation to sell was not put into effect, since it was impossible to find a buyer for WestLB, and no longer appears in the liquidation plan, and that the applicant has even become a joint owner of Helaba and, therefore, of the Verbundbank. According to the Commission, it follows that annulment of the contested decision would not change the applicant's legal situation as regards the obligation to sell. However, since the action is admissible only in so far as that obligation is concerned, the applicant could not procure any advantage if the action were upheld.

136 In that regard, it should be noted that the applicant was subject to the obligation to sell for a period of more than two years. Admittedly, that obligation was not enforced in practice. However, the applicant retains an interest in seeking annulment of the contested decision in that that obligation was attached to it.

137 An applicant may retain an interest in seeking the annulment of an act which is not enforced and which directly affects him in order to obtain a finding, by the EU judicature, that an unlawful act has been committed against him, so that such a finding can then be the basis for any action for damages aimed at properly restoring the damage caused by the contested act (see, to that effect, Case T-299/05 *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council* [2009] ECR II-565, paragraph 53 and the case-law cited).

138 That applies in the present case, since the applicant incurred costs with a view to the sale of its holding in WestLB, even though that sale ultimately did not take place. Contrary to what the Commission claims, on the one hand, those costs are a sufficiently direct result of the contested decision and, on the other hand, despite the various decisions adopted in connection with WestLB following the financial crisis, there is no reason to consider that it would be impossible properly to identify the share of the costs incurred by the claimant relating to the sales efforts which it had to make.

139 Against that background, the applicant retains an interest in having the contested decision found to be unlawful because that finding will bind the EU judicature in any action for damages and could constitute the basis for any extrajudicial negotiations between the Commission and the applicant aimed at reparation of the damage suffered by the latter (see, to that effect, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, paragraph 137 above, paragraph 55 and the case-law cited).

140 Moreover, to accept the Commission's argument would be tantamount to admitting that acts adopted by the institutions and repealed after an action for annulment has been brought but before the Court is able to give the relevant judgment would be excluded from review by the Court, unless they have been implemented. Such a situation must be regarded as incompatible with the spirit of Article 263 TFEU, under which the EU judicature is to review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the European Central Bank (ECB), other than recommendations and opinions, and of acts of the Parliament intended to produce legal effects vis-à-vis third parties. The European Union is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with its basic constitutional charter, the Treaty, or the law which derives from that treaty (see, to that effect, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, paragraph 137 above, paragraphs 56 and 57).

141 It is therefore necessary to reject the first argument put forward by the Commission to refute the conclusion that the applicant retains an interest in bringing proceedings.

142 Secondly, the Commission argues that the applicant no longer has an interest in bringing proceedings against the contested decision, in so far as all the adverse effects which the conditions attaching to that decision could have had on its legal situation are also caused by the final decision of 2011.

143 In that regard, it is sufficient to note that, contrary to what the Commission claims, the final decision of 2011 does not cause all the adverse effects referred to in the preceding paragraph. For example, that decision does not impose upon the applicant an obligation to sell and therefore enables it to possess shareholdings, in principle of any kind, in the spun off activities of WestLB.

144 The second argument submitted by the Commission to refute the conclusion that the applicant retains an interest in bringing proceedings must therefore also be rejected.

145 Having regard to the foregoing considerations, it must be concluded that the applicant retains an interest in bringing proceedings. The request for an order that there is no need to adjudicate made by the Commission must therefore be rejected.

146 Accordingly, it is not necessary to examine the applicant's request to adapt its pleas in law and form of order sought following the adoption of the final decision of 2011, made in the event that the Court should hold that the action against the contested decision had become devoid of purpose.

2. *Substance*

Preliminary observations

147 In support of its application, the applicant submits eight pleas in law. Those pleas allege infringement, first, of the principle of collegiality, secondly, of Article 87(1) EC, since the distortion of competition caused by the guarantee at issue was not examined, thirdly, of Article 87(3)(b) EC, fourthly, of the principle of proportionality, fifthly, of the principle of equal treatment, sixthly, of Article 295 EC, seventhly, of Article 7(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1), and, eighthly, of the obligation to state reasons.

148 The Commission disputes the merits of all those pleas.

149 As noted in paragraph 122 above, the pleas put forward by the applicant are admissible only in so far as they are intended to show that the inclusion of the obligation to sell in the annex to the contested decision is unlawful.

150 The applicant claims that that inclusion is unlawful in the fourth, fifth, sixth, seventh and eighth pleas. However, in those same pleas, it also presents arguments concerning the lawfulness of other conditions contained in the annex to the contested decision. Since those arguments are inadmissible, they must be rejected from the outset.

151 Next, it should be noted that the obligation to sell could not have been lawfully included in the annex to the contested decision if that decision was adopted in breach of the principle of collegiality or of Article 87(3)(b) EC or Article 87(1) EC and of the obligation to state reasons as regards the adverse effects on competition caused by the guarantee at issue, as the applicant claims, respectively, in the first three pleas. It is therefore necessary to consider that those pleas are also admissible and must be examined.

152 Accordingly, it is appropriate to examine:

— first, the first plea, alleging infringement of the principle of collegiality;

— secondly, the third plea, alleging infringement of Article 87(3)(b) EC;

— thirdly, the second plea, alleging infringement of Article 87(1) EC;

— fourthly, the eighth plea, alleging infringement of the obligation to state reasons;

— fifthly, the fourth, fifth, sixth and seventh pleas, alleging infringement, respectively, of the principle of proportionality, the principle of equal treatment, Article 295 EC and Article 7(4) of Regulation No 659/1999.

153 Finally, it is necessary to examine in the context of the second plea a number of arguments put forward in the eighth plea relating to the inadequacy of the statement of reasons for the contested decision as regards the possible effects on competition of the guarantee at issue.

The first plea, alleging infringement of the principle of collegiality

154 In the application, the applicant submits that the contested decision was adopted not by the College of Commissioners but solely by the Commissioner responsible at the material time for competition matters, namely N. Kroes, which constitutes an infringement of the principle of collegiality stemming from Article 219 EC and Article 1 of the Rules of Procedure of the Commission [C(2000) 3614] (OJ 2000 L 308, p. 26).

155 However, as the Commission correctly points out, it is clear from a note from the Director of the Registry of the Secretariat of the Commission of 12 May 2009 giving formal notice of the adoption, on that day, of certain decisions of the Commission (SEC 2009 663/2002) that the contested decision was taken by the College of Commissioners, by written procedure, and not by N. Kroes.

156 In its reply, the applicant acknowledges that the note from the Director of the Registry of the Secretariat of the Commission referred to in the preceding paragraph is evidence of the adoption of the contested decision by written procedure. However, it maintains the present plea and puts forward two new claims ('the new claims').

157 In the first place, the applicant submits that the written procedure 'usually takes five days'. However, the Commission sent the German version of the contested decision to WestLB on 6 May 2009. According to the applicant, it is clear from two e-mails from the Commission of 6 and 7 May 2009 that the wording of that decision was reworked on 7 May 2009. The applicant argues that it therefore cannot understand 'which text was adopted [by written procedure] and when it occurred'. It requests that the Commission 'provide the necessary clarifications' in that regard.

158 In the second place, the applicant argues that 'proof that the written procedure was used does not explain ... why a decision which was supposed to be submitted ... at the Commission meeting of 13 May 2009 was quickly brought forward by one day'. It states that it is clear from an e-mail from the German Ministry of the Economy of 11 May 2009 that that change was decided upon by the Commission 'to free up the Wednesday, a day on which many decisions had to be taken'. The applicant infers from this that it was planned to adopt the contested decision at the meeting of 13 May 2009 and not by written procedure. Furthermore, the applicant submits that that procedure is not intended to be used for the adoption of day-to-day management decisions. It therefore cannot be used to adopt a decision involving an obligation to sell.

159 The Commission argues that the new claims are inadmissible, since they constitute new pleas in law raised in the reply. In any event, those claims are manifestly unfounded.

160 It is clear from the provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure of the General Court, taken together, that the application initiating proceedings must indicate the subject-matter of the dispute and set out in summary form the pleas raised and that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure (Case T-340/04 *France Télécom* v *Commission* [2007] ECR II-573, paragraph 164).

161 However, a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39, and Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1677, paragraph 34).

162 The applicant no longer challenges the contested decision on the ground that it was not adopted by the College of Commissioners, as it had argued in the application. However, by the new claims, it continues to maintain that the contested decision was not genuinely, or validly, adopted by the College of Commissioners. Accordingly, it must be held that there is a sufficient connection between the original plea and the new claims, with the result that they are admissible.

163 It is therefore necessary to examine the new claims on their merits.

164 By the first of the new claims, the applicant claims, in essence, first, that the final version of the contested decision was not circulated to the Members of the Commission in good time and, secondly, that the Commission should state whether the final version of the contested decision was actually adopted by written procedure.

165 As regards the first question, it should be noted that the applicant merely states that the written procedure 'usually takes five days' and that the Commission reworked the wording of the contested decision until 7 May 2009. However, Article 12 of the Rules of Procedure of the Commission, which allows it to adopt a proposal by one or more of its Members by means of a written procedure, does not stipulate a period for which the Members of the Commission must have the text of the relevant proposal before it can be adopted. The second paragraph of that provision merely provides that 'the text of the proposal shall be circulated in writing to all Members of the Commission …, with a time limit within which Members must make known any reservations or amendments they wish to make'.

166 Moreover, it must be taken into account that the Commission stated, in the rejoinder, without being contradicted by the applicant, that the amendments made to the text concerned only minor corrections in the German version as against the version drafted in the working language used, namely English.

167 Therefore, the claim that the contested decision was adopted without giving the Members of the Commission sufficient time to examine it must be rejected.

168 As to the second issue, it is sufficient to note that the Commission has already stated that the contested decision was adopted, in its final form, by written procedure, on 12 May 2009. This is supported by the note from the Director of the Registry of the Secretariat of the Commission referred to in paragraph 155 above and is not disputed by the applicant.

169 The first of the new claims must therefore be rejected as unfounded.

170 By the second of the new claims, the applicant submits, in essence, that the written procedure should not have been used to adopt the contested decision, in so far as that procedure is reserved for the adoption of decisions relating to day-to-day management.

171 In that regard, it is sufficient to compare the wording of Articles 13 and 14 of the Rules of Procedure of the Commission, under which, respectively, the empowerment and delegation procedures are reserved for the adoption of management or administration measures, with the wording of Article 12 of that regulation, which does not contain such a limitation concerning the written procedure.

172 Contrary to what is stated by the applicant, that conclusion cannot be refuted by the explanatory note to the Rules of Procedure of the Commission on its website, which the applicant attached to the reply. As the Commission correctly argues, that note has no binding legal force, as stated in its actual wording. Furthermore, it is stated in that explanatory note that '[the written procedure, empowerment and delegation] are largely intended to relieve the Commission of decisions concerning day-to-day management which do not require discussion', which in no way precludes the written procedure for the adoption of decisions which are not concerned with day-to-day management.

173 It follows from the foregoing that the second of the new claims is also unfounded.

174 Accordingly, the present plea must be rejected.

The third plea, alleging infringement of Article 87(3)(b) EC

175 The applicant points out that the Commission approved the granting of the guarantee at issue for the benefit of WestLB under Article 87(3)(b) EC and argues that it committed an error when applying that provision.

176 The applicant puts forward, in that regard, several arguments which may be divided into two parts, the first part being raised as its principal argument and the second part being raised in the alternative. Those parts are based, first, on the fact that the Commission wrongly considered that the purpose of Article 87(3)(b) EC was comparable to that of Article 87(3)(c) EC and that of the rescue and restructuring guidelines and, secondly, on the fact that, in the contested decision, the Commission wrongly imposed conditions stricter than those imposed under the combined application of those guidelines with Article 87(3)(c) EC.

The first part, put forward as the principal argument, alleging that the Commission wrongly considered that the purpose of Article 87(3)(b) EC was comparable to that of Article 87(3)(c) EC and that of the rescue and restructuring guidelines

177 The applicant argues that the Commission, in examining the compatibility of the guarantee at issue with the common market under to Article 87(3)(b) EC, considered that the purpose of that provision was comparable, first, to that of Article 87(3)(c) EC and, secondly, to that of the rescue and restructuring guidelines. That constituted a serious error of assessment.

178 In support of that part of the plea, the applicant puts forward, in essence, two grounds of complaint, which the Commission challenges. The first ground of complaint is that the objective of remedying a disturbance in the economy of a Member State is always in the common interest. The second ground of complaint is that the Commission made two errors in the contested decision, respectively, by disregarding the purpose of Article 87(3)(b) EC, in so far as it examined the compatibility of the guarantee at issue with the common market in the light of the rescue and restructuring guidelines, and by not making authorisation of the guarantee at issue, in any event, subject to conditions less strict than those which may be imposed on the basis of Article 87(3)(c) EC.

– The first ground of complaint, alleging that the objective of remedying a disturbance in the economy of a Member State is always in the common interest

179 The applicant claims that the purpose of Article 87(3)(c) EC, in cases covered by the rescue and restructuring guidelines, is to help a firm which is in difficulty in a healthy economic environment. The existence of that environment is why, on the one hand, aid which may adversely affect trading conditions to an extent contrary to the common interest cannot be allowed under that provision and, on the other hand, the Commission must ensure that the effects on competition of the authorised aid are minimised. In contrast, the purpose of Article 87(3)(b) EC is to remedy a disturbance in the economy as a whole. This still takes place in the common interest and is a prerequisite for the existence of viable competition. The applicant concludes from this that authorisation of aid covered by the latter provision cannot be made subject to conditions seeking to protect competition.

180 In that respect, it should be noted, from the outset, that the Commission considered, in the contested decision, that the purpose of the guarantee at issue was to allow the restructuring of WestLB, which, due to its systemic importance, was necessary to remedy a serious disturbance in the German economy caused by a major financial crisis, which the applicant does not dispute.

181 Then, in so far as the present ground of complaint may be construed as meaning that the Commission, after having found that the guarantee at issue was intended to remedy a serious disturbance in the German economy, was obliged to consider that guarantee to be compatible with the common market and could not make its authorisation subject to the fulfilment of conditions, it must be noted, first of all, that it is clear from the actual wording of Article 87(3)(b) EC that the Commission, when it finds, as in the present case, that State aid is intended to remedy a serious disturbance in the economy of a Member State, is not, by that fact alone, obliged to consider that aid to be compatible with the common market.

182 Indeed, unlike aid covered by the exceptions to the general prohibition of State aid under Article 87(2) EC, which, under that provision, 'shall be' considered to be compatible with the common market, certain categories of aid provided for by Article 87(3) EC, including those intended to remedy a disturbance in the economy of a Member State, 'may' be considered to be compatible with that market.

183 Moreover, according to settled case-law, Article 87(3) EC confers on the Commission a discretion the exercise of which involves economic and social assessments which must be made in a Community context (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 24; Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18; and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 18).

184 Accordingly, that difference in wording noted by the applicant between Article 87(3)(c) EC, which allows the authorisation of some aid provided that it 'does not adversely affect trading conditions to an extent contrary to the common interest', and Article 87(3)(b) EC, which lays down no such condition, cannot lead to the conclusion that the Commission cannot assess the impact of aid authorised under the latter provision on the relevant market or markets in the European Union as a whole (see, to that effect, Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraphs 138 to 143; see also, by analogy, *Spain* v *Commission*, paragraph 183 above, paragraph 17).

185 Finally, the power of the Commission, under the first paragraph of Article 88(2) EC, to decide that aid which is incompatible with Article 87 EC must be 'altered' necessarily implies that a decision authorising aid under Article 87(3)(c) EC may be made subject to conditions for ensuring that aid does not alter trading conditions in a way contrary to the general interest (Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265, paragraphs 53 to 55).

186 It must therefore be held that Article 87(3)(b) EC does not prevent the Commission from making authorisation of the guarantee at issue subject to the fulfilment of conditions.

187 As regards the question whether those conditions can be designed to correct the effects of the authorised aid on competition, it is sufficient to point out that it is clear from paragraphs 68 and 69 of the contested decision — which are concerned with the obligation to sell — and from their central place in the section of the contested decision dealing with the examination of the measures provided for by the final restructuring plan for the purpose of ensuring the long-term viability of WestLB that authorisation of the guarantee at issue was made subject to fulfilment of the obligation to sell not in order to minimise its effects on competition, but in order to ensure the viability of WestLB.

188 The first ground of complaint must therefore be rejected.

– The second ground of complaint, alleging that the Commission made two errors in the contested decision, respectively, by disregarding the purpose of Article 87(3)(b) EC, in so far as it examined the compatibility of the guarantee at issue with the common market in the light of the rescue and restructuring guidelines, and by not making authorisation of the guarantee at issue, in any event, subject to conditions less strict than those which may be imposed on the basis of Article 87(3)(c) EC

189 First, the applicant submits that the Commission disregarded the purpose of Article 87(3)(b) EC, by examining the compatibility of the guarantee at issue with the common market in the light of the rescue and restructuring guidelines, although it had considered that that guarantee could remedy a serious disturbance in the German economy. Secondly, the applicant argues that the authorisation of aid on the basis of Article 87(3)(b) EC must, in any event, be subject to less strict conditions than the authorisation of aid on the basis of Article 87(3)(c) EC.

190 In that regard, it must be recalled that, as stated in paragraph 183 above, according to settled case-law, the Commission has wide discretion in its assessments concerning Article 87(3) EC. Judicial review by the EU Courts must, therefore, be limited to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers. It is not for the EU judicature to substitute its economic assessment for that of the Commission (see Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 48 and the case-law cited).

191 In the context of that wide discretion, the Commission is justified in relying on the criteria it considers to be most appropriate in order to determine whether an aid can be considered compatible with the common market, provided that they are relevant having regard to Articles 3(g) and 87 EC, and in specifying those criteria in guidelines which are consistent with the Treaty. The adoption of such guidelines by the Commission is an instance of the exercise of its discretion and requires only a self-imposed limitation of that power, in accordance with the principle of equal treatment. By assessing specific aid in the light of guidelines, previously adopted by it, the Commission cannot be considered to exceed the limits of its discretion or to waive that discretion. On the one hand, it retains the power to repeal or amend any guidelines if the circumstances so require. On the other, those guidelines concern a defined sector and are based on the desire to follow a policy established by it (see, to that effect, *Vlaams Gewest* v *Commission*, paragraph 83 above, paragraph 89).

192 In that regard, in the first place, it should be noted that the Commission had, prior to the adoption of the contested decision, informed the Member States of the guidelines which, under the powers conferred on it by Article 87 EC et seq., it intended to apply to the aid granted to financial institutions on account of the financial crisis. This was, inter alia, the purpose of the Communication on the measures taken on account of the financial crisis, to which the Commission refers in recital 63 of the contested decision.

193 It is clear from paragraph 10 of that communication that the assessment of the compatibility with the common market, under Article 87(3)(b) EC, of the measures taken by the Member States on account of the financial crisis should follow the general principles laid down in the rescue and restructuring guidelines, even though 'current circumstances' might justify the approval of certain exceptional measures. In applying the rescue and restructuring guidelines in the contested decision, the Commission therefore complied with the self-imposed limitation of its discretion which it had previously adopted.

194 In the second place, it should be noted that the applicant has not provided any reason capable of establishing that the criteria laid down in the rescue and restructuring guidelines — which, at the time of the adoption of the contested decision, the Commission had considered the most appropriate for assessing whether the aid granted on account of the financial crisis could be considered compatible with the common market — are not relevant, under Article 3(g) EC and Article 87 EC, in relation to aid considered necessary to remedy a serious disturbance in the economy of a Member State.

195 Moreover, those guidelines may be considered as being, in principle, suitable for assessing the compatibility of that aid with the common market, in particular if the beneficiaries are, as in the present case, banks of systemic importance whose economic viability was compromised to the point of jeopardising their existence.

196 Thus, on the one hand, the fact that such aid is necessary to remedy a serious disturbance in an economy does not mean that it cannot be regarded as aid to a firm in difficulty, as provided for in paragraph 9 of the rescue and restructuring guidelines, according to which such a firm is one which is unable, whether through its own resources or with the funds it is able to obtain from its owner-shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term. As a matter of principle, a bank whose economic viability is compromised to the point of jeopardising its existence may be regarded as a firm in difficulty.

197 Moreover, the rescue and restructuring guidelines require, in order for restructuring aid to be considered compatible with the common market, that the beneficiary be subject to a restructuring plan enabling it to be restored to long-term viability within a reasonable timescale, that the aid be accompanied by measures to avoid undue distortions of competition and that it be limited to the strict minimum of the restructuring costs (respectively, paragraphs 35 to 37, 38 to 42 and 43 to 45 of those guidelines). However, the Commission is entitled to require that the authorisation of aid granted to banks of systemic importance, on account of the financial crisis, must be subject to the fulfilment of those conditions, even if the aid is intended to remedy a serious disturbance in the economy of a Member State.

198 As regards, first of all, the requirement of a restructuring plan enabling those banks to be restored to long-term viability within a reasonable timescale, the Commission is, in principle, justified in finding that the restructuring of a bank of systemic importance whose viability is not assured cannot help to remedy on an enduring basis the disturbances caused in the economy of a Member State by the financial difficulties faced by that bank or by the financial sector as a whole. It would be difficult for that bank to conduct business activities in a normal way, since its relationships with its customers, creditors and partners would be adversely affected by the uncertainty of the continuity of its business activities and by the fragility of its financial position. Given the systemic importance of that bank, the inability to conduct those business activities in a normal way could have a negative effect on the entire national financial system which could spread to the entire economy.

199 As regards, next, the requirement that the aid be accompanied by measures to avoid undue distortions of competition, it should be noted that, in the assessment of the effect of aid on the relevant market or markets and, in particular, of its impact on trading conditions, which the Commission must make

when applying Article 87(3)(b) EC, the latter may take into account the foreseeable effects of the aid on competition and intra-Community trade (see, to that effect, *AITEC and Others* v *Commission*, paragraph 184 above, paragraphs 138 to 143). Accordingly, it must be held that the Commission may make restructuring aid subject to the fulfilment of conditions seeking to minimise the effect of that aid on competition.

200 As regards, finally, the requirement that the aid must be limited to the strict minimum of the restructuring costs, it should be noted that, as a derogation, Article 87(3)(b) EC must be interpreted narrowly (Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraph 98). Accordingly, it is not possible to hold that the Commission infringes that provision where it decides to authorise only aid, which is limited to the strict minimum, necessary to ensure the restructuring of the beneficiary so that it can sufficiently develop its business with a view to remedying a serious disturbance in the economy.

201 In the third place, it should be noted that the rescue and restructuring guidelines lay down a number of specific criteria applicable to the banking sector [see paragraph 6 of the Communication on the measures taken on account of the financial crisis and the footnote referred to in paragraph 25(a) of the rescue and restructuring guidelines].

202 In the light of all the foregoing observations, it is necessary to hold that the Commission was entitled, at the time of adopting the contested decision, to apply Article 87(3)(b) EC while examining the compatibility of the restructuring aid granted to systemically important banks in difficulty in the light of the rescue and restructuring guidelines.

203 Therefore, in order to determine whether the Commission could, in the present case, apply the rescue and restructuring guidelines, it is necessary to examine whether it could consider, first, that WestLB was a systemically important bank in difficulty and, secondly, that it had received restructuring aid.

204 In that regard, it should be noted, first of all, that it is common ground between the parties that the immediate purpose of the guarantee at issue was to avoid the negative impact of the deterioration in the market value of the EUR 23 billion portfolio on WestLB's balance sheet. The parties state in essence that, if that measure, or any other support measure having equivalent effect, had not been adopted, WestLB would have experienced serious financial difficulties capable of jeopardising the continuity of its banking activities in the short-term and even of leading to its disappearance. Accordingly, the Commission could consider without committing an error that WestLB was a firm in difficulty as provided for in paragraph 9 of the rescue and restructuring guidelines, which it had already stated in paragraphs 44 and 45 of the provisional decision and which, furthermore, was challenged neither by the Federal Republic of Germany nor by the applicant.

205 Contrary to what the applicant argued at the hearing, the fact that the guarantee at issue was granted by an owner of WestLB does not mean that that bank cannot be regarded as a firm in difficulty, as provided for in paragraph 9 of the rescue and restructuring guidelines.

206 If the applicant's argument were accepted it would automatically prevent a large number of public undertakings from being classified as firms in difficulty. However, it is apparent that the purpose of paragraph 9 of the rescue and restructuring guidelines is not to exclude public undertakings from its scope, but to distinguish between undertakings incapable of ensuring their continuity in the absence of the grant of State aid, which are classified as firms in difficulty, and undertakings for which such aid is not necessary.

207 Therefore, the fact that the guarantee at issue was granted by an owner of WestLB has no bearing on the question whether the latter could be regarded as a firm in difficulty. The only relevant question in that regard is whether that bank could overcome its economic difficulties in the absence of public support which can be classified as State aid, a question that is not raised by the applicant.

208 Next, it should be recalled that the applicant itself argued that WestLB was of systemic importance to the German economy.

209 Finally, it should be noted that the applicant did not dispute that the creation of the bad bank may be regarded as a restructuring of WestLB or that the guarantee at issue may be regarded as restructuring aid.

210 In those circumstances, it must be held that the examination of the compatibility of the guarantee at issue with the common market could be carried out in the light of the rescue and restructuring guidelines.

211 Therefore, in so far as the applicant's arguments may be interpreted as arguing that the Commission erred in law in that it examined the compatibility of the guarantee at issue with the common market in the light of those guidelines, those arguments must be rejected.

212 In any event, as the Commission correctly argues, it should be noted that the Commission, in the contested decision, does not confine itself to examining the compatibility of the guarantee at issue with the common market in the light of the conditions contained in the rescue and restructuring guidelines. It is clear from paragraphs 63 and 76 to 79 of that decision that the Commission waived the requirement that WestLB provide an own contribution of at least 50% of the restructuring costs, even though that minimum contribution was, in principle, provided for in paragraph 44 of those guidelines for the restructuring of large firms. The Commission considered that, in view of WestLB's external debts, it would be practically impossible to achieve that target for the own contribution. In addition, the Commission noted that it may not be appropriate in the context of a systemic crisis in the financial markets to require a precise quantification of WestLB's contribution.

213 Therefore, the Commission's decision to authorise the granting of the guarantee at issue for WestLB under the derogation from the prohibition of State aid provided for by Article 87(3)(b) EC had the effect that the authorisation is subject in some respects to conditions less strict than those normally provided for by the rescue and restructuring guidelines, contrary to what the applicant claims, in essence.

214 Accordingly, the second ground of complaint must also be rejected.

215 In the light of all the foregoing considerations, this part of the plea must be rejected.

The second part, put forward in the alternative, alleging that the Commission wrongly imposed in the contested decision conditions stricter than those which may be imposed as a result of the application of the rescue and restructuring guidelines in combination with Article 87(3)(c) EC

216 The applicant submits that the contested decision should be annulled even if it is held that the derogations provided for in Article 87(3)(b) and (c) EC have the same purpose, since in that decision the Commission imposed conditions stricter than those which may be imposed under the rescue and restructuring guidelines. In that regard, it produces a comparative table setting out a number of decisions taken by the Commission before and during the financial crisis relating to aid to several banks. According to the applicant, it is clear from that table that the authorisation of aid designed to avoid a disturbance in the economy has been made subject to stricter conditions than the authorisation of aid designed to avoid insolvencies in a healthy economic environment. The applicant points out that, in none of the cases set out in that table, except for that of WestLB, has the Commission required a change in the ownership of the beneficiary.

217 The Commission disputes the applicant's arguments.

218 In that regard, first, it should be noted that the comparative table provided by the applicant shows, for each decision listed, the reduction in the balance sheet of the beneficiary of the aid concerned to which the Commission made authorisation of that aid subject. According to the applicant, on the one hand, some decisions were taken under Article 87(3)(b) EC and some under Article 87(3)(c) EC and, on the other hand, the Commission applied in all cases the rescue and restructuring guidelines, which the latter does not dispute.

219 However, as the Commission correctly argues, it is not possible from that table to assess the factual and legal context in which the aid was granted or the Commission's reasoning in each case. Nor does it make it possible to determine the more or less strict nature of the other conditions to which the Commission made each authorisation subject or the derogations from the principles set out in the rescue and restructuring guidelines which the Commission authorised. Thus, the information in that table does not show that the Commission waived the requirement that WestLB provide an own contribution of at least 50% of the restructuring costs, although that waiver must be taken into account in order to determine the more or less strict nature of the conditions to which the Commission made authorisation of the guarantee at issue subject. It is therefore necessary in the present case to place in context the significance of the conclusions drawn by the applicant from that table.

220 Secondly, as regards the obligation to sell, the applicant in no way explains how that condition is stricter than those imposed as a result of the application of the rescue and restructuring guidelines in combination with the Article 87(3)(c) EC.

221 In any event, the nature and significance of the conditions to which a decision may be made subject, in order to ensure that the beneficiary will be viable in the long term, necessarily depend on the economic situation of the market or markets concerned and the economic difficulties facing the beneficiary.

222 However, as the Commission correctly argues, there is nothing to prevent those conditions from being stricter in some respects, where the aid was granted to a bank in the context of a serious financial crisis. Indeed, in the context of a market which has been weakened to a large extent, it may prove necessary further to reduce the risk structure and profile of a firm in difficulty to ensure its survival and it cannot be ruled out that this may mean that it is necessary to request a change in its ownership structure.

223 In view of the foregoing, this part of the plea must be rejected.

224 Therefore, the third plea must be rejected in its entirety.

The second plea, alleging infringement of Article 87(1) EC and the obligation to state reasons, in that the Commission neither adduced evidence of the effects of the guarantee at issue on competition nor provided an adequate statement of the reasons why that guarantee would lead to a distortion of competition

225 The applicant maintains that, in the contested decision, the Commission has neither adduced evidence of the effects of the guarantee at issue on competition nor provided an adequate statement of the reasons why that guarantee would lead to a distortion of competition. According to the applicant, the Commission has therefore infringed Article 87(1) EC and its obligation to state reasons.

226 In that context, it is now also necessary to consider, at this stage, the argument put forward by the applicant in the eighth plea, according to which 'the contested decision contains an inadequate statement of reasons, since it does not state whether there are, and what is the nature of[,] any distortions of competition resulting from the [guarantee at issue] in a financial sector characterised by market failure and State aid granted by Member States in the amount of EUR 3 000 billion'.

227 The Commission disputes the applicant's arguments.

228 Article 87(1) EC prohibits aid which affects trade between Member States and which distorts or threatens to distort competition. However, as the Commission correctly argues, in assessing those two conditions, the Commission is required, not to establish that such aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 111).

229 Therefore, the fact that the Commission has not adduced, in the contested decision, evidence of distortions of competition resulting from the guarantee at issue cannot constitute either an infringement of Article 87(1) EC or an infringement of its obligation to state reasons. The only relevant questions are, on the one hand, whether the Commission stated, in that decision, the reasons why that guarantee was liable to result in such distortion and, on the other hand, if so, whether the applicant has succeeded in showing that those reasons were incorrect.

230 It is appropriate to consider, first of all, the first of those questions, concerning the statement of reasons and, then, the second, concerning the substance of the matter.

The statement of reasons for the contested decision concerning the effects of the guarantee at issue on competition

231 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87; and Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraph 66).

232 Applied to the classification of a measure as aid, the principle referred to in the preceding paragraph requires a statement of the reasons for which the Commission considers that the measure concerned falls within the scope of Article 87(1) EC. In that regard, even in cases where it is apparent from the circumstances in which it was granted that the aid is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 15; Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 52; and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 98).

233 However, where a State aid decision was adopted in a context that was well known to the Government concerned and forms part of a consistent line of decision-making practice, particularly in relation to the latter, such a decision may be supported by a summary statement of reasons (see order of the Court of Justice of 21 January 2010 in Case C-150/09 P *Iride and Iride Energia* v *Commission*, not published in the ECR, paragraph 23 and the case-law cited).

234 The contested decision contains no specific statement of reasons concerning whether the guarantee at issue was liable to distort competition. The Commission stated, in recital 52 of that decision, as follows:

'The Commission observes that the [guarantee at issue] is the continuation of the rescue aid measure granted by the owners. The Commission has already established in [the provisional decision] that the [guarantee at issue] constitutes State aid. [The Federal Republic of Germany] does not dispute this.'

235 Accordingly, the statement of reasons in the contested decision concerning the classification of the guarantee at issue as aid within the meaning of Article 87(1) EC and, therefore, necessarily concerning the question whether that guarantee was liable to distort competition refers in its entirety to the statement of reasons contained in the provisional decision, as the applicant itself states.

236 It is appropriate to consider, first of all, whether the Commission could restrict itself to making a reference to the statement of reasons given in the provisional decision.

237 In that regard, it must be pointed out that, in the order in *Iride and Iride Energia* v *Commission*, paragraph 233 above, the Court of Justice examined the adequacy of the statement of reasons for a decision ('the Iride decision') in which the Commission restricted itself, as regards the classification of a measure as State aid, to stating that 'the measure under assessment should be considered State aid' (see order in *Iride and Iride Energia* v *Commission*, paragraph 233 above, read in the light of the judgment in Case T-25/07 *Iride and Iride Energia* v *Commission* [2009] ECR II-245, paragraph 67, which, on appeal, gave rise to that order).

238 The Court of Justice held that statement of reasons to be adequate on the basis of two factors. First, the Government concerned had itself, in its notification, described the measure at issue as State aid. Secondly, the legal and factual context of the Iride decision encompassed a decision on State aid to another beneficiary ('the ENEL decision'), which itself contained an adequate statement of reasons and was adopted in a related and sufficiently similar factual and legal context (order in *Iride and Iride Energia* v *Commission*, paragraph 233 above, paragraphs 24 and 26).

239 It should be pointed out that the two factors on which the Court of Justice relied, in the order in *Iride and Iride Energia* v *Commission*, paragraph 233 above, in order to hold that the Iride decision contained an adequate statement of reasons are, in essence, present in this case.

240 First, when, on 11 April 2008, the Federal Republic of Germany sent the Commission a supplementary notification relating to the bad bank and requested provisional authorisation to establish that bad bank, it accepted that it involved State aid to WestLB (recitals 4 and 25 of the provisional decision). However, it does not appear from the case-file that the Federal Republic of Germany subsequently challenged the provisional decision in that the guarantee at issue was classified therein as State aid.

241 Secondly, the contested decision and the provisional decision are both concerned with the same State measure (the guarantee at issue), the same beneficiary (WestLB), and the same objective (preventing WestLB from being forced to cease its activities due to the deterioration in the market value of the EUR 23 billion portfolio in the context of the financial crisis). Under those circumstances, it must be held that those two decisions were adopted in a related and sufficiently similar factual and legal context.

242 It should be noted, finally, that while 23 months had elapsed between the adoption of the ENEL decision (1 December 2004) and the adoption of the Iride decision (8 November 2006), the time which elapsed between the adoption of the provisional decision (30 April 2008) and the contested decision (12 May 2009) is 12 months and 12 days.

243 In the light of the foregoing, it must be held that, in the contested decision, the Commission could confine itself to referring to its State aid classification in the provisional decision.

244 It is appropriate, next, to consider whether the provisional decision contains an adequate statement of reasons in that regard.

245 That statement of reasons is contained in paragraph 30 of the provisional decision, which is worded as follows:

'[T]he Commission notes WestLB's cross border and international activities, so that any advantage from state resources would affect competition in the banking sector and have an impact on intra-community trade (Commission Decision in Case C50/2006 of 27.06.2007 *BAWAG*, not yet published, point 127).'

246 The statement of reasons for the provisional decision must be supplemented by that contained in the Commission Decision of 27 June 2007 concerning State aid C 50/2006 (ex NN 68/2006, CP 102/2006) implemented by the Republic of Austria for BAWAG-PSK (OJ 2008 L 83, p. 7, 'the BAWAG-PSK decision'), to which the Commission refers. However, as the Commission itself stated in response to a written question from the Court, it had made a clerical error in recital 30 of the provisional decision by referring to recital 127 of the BAWAG-PSK decision, which does not concern the question whether the aid covered by the latter decision was liable to distort competition. The examination of that question is actually set out in recitals 121 to 125 of the BAWAG-PSK decision, which are worded as follows:

'(121) Article 87(1) prohibits aid which affects trade between Member States and which distorts or threatens to distort competition.

(122) In its assessment of those two conditions, the Commission is required not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition. When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid.

(123) The Commission recalls that the banking sector has been open to competition for many years. Progressive liberalisation has enhanced the competition that may already have resulted from the free movement of capital provided for in the EC Treaty.

(124) Moreover, BAWAG-PSK has branches or subsidiaries in several Member States … Conversely, banks from different Member States operate in Austria …

(125) To conclude, there is trade between Member States in the banking sector. The guarantee strengthens the position of BAWAG-PSK in relation to banks undertakings competing in intra-Community trade. Therefore, the guarantee is liable to affect such trade and distort competition.'

247 It follows from all of the foregoing observations that the Commission considered in the provisional decision that the guarantee at issue was liable to affect competition in the banking sector on the ground that, first, that sector had been opened to competition, secondly, the guarantee at issue strengthened the position of WestLB in the markets in which it was carrying out its activities compared with that of banks which did not receive aid and, thirdly, WestLB had cross-border and international activities.

248 It is necessary to examine whether that statement of reasons fulfils the requirements set out in the case-law, having regard to the context of the provisional decision and to all the legal rules governing the matter in question.

249 In the first place, the EU judicature has ruled that, concerning State aid, the conditions under which trade between Member States is effected and competition is distorted are as a general rule inextricably linked and held that, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (see Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 81 and the case-law cited).

250 However, it is common ground and also clear that WestLB is present on the market in several Member States and that, on the German market, it faces real or potential competition from several banks established in other Member States.

251 In the second place, as the Commission stated in recital 123 of the BAWAG-PSK decision, the banking sector has been involved in an important liberalisation process at Community level. It is clear from the case-law that that fact enhances the competition that may already have resulted from the free movement of capital provided for in the Treaty, which may serve to determine that the aid has a real or potential effect on competition and affects trade between Member States (Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 142 and 145).

252 Finally, and in the third place, as the Commission stated in paragraph 4 of the rescue and restructuring guidelines, the exit of inefficient firms is a normal part of the operation of the market and restructuring aid is among the most distortive types of State aid and, therefore, the general principle of the prohibition of such aid as laid down in the EC Treaty should remain the rule concerning that aid and derogation from that rule should be limited.

253 In that regard, it must be held that, in principle, where aid is essential to the survival of an undertaking which would otherwise cease to exist, the granting of aid necessarily distorts competition, since it prevents a reallocation of that undertaking's market share among its competitors.

254 In the light of those observations, it must be held that the statement of reasons for a decision classifying as State aid the restructuring aid for an undertaking, such as WestLB, with significant cross-border activities, which operates in a sector that has been liberalised within the Union, such as the banking sector, and which could have disappeared from the market if the aid had not been granted may be particularly succinct.

255 In the light of the above, the statement of reasons provided in the provisional decision concerning the question whether the guarantee at issue could affect competition must be regarded as adequate.

The validity of the grounds of the contested decision concerning the effects of the guarantee at issue on competition

256 The applicant puts forward two arguments to challenge the validity of the grounds of the contested decision concerning the question whether the guarantee at issue could affect competition. By its first argument, the applicant maintains that the Commission should have examined the actual market situation on the date that the contested decision was adopted in order to ascertain whether the guarantee at issue, classified as State aid in the provisional decision, could continue to be so classified. By its second argument, the applicant maintains that the aid granted to the financial sector since 2008 cannot distort competition.

– The first argument, to the effect that the Commission should have examined the actual market situation on the date that the contested decision was adopted

257 The applicant submits that the Commission could not simply make a reference to the provisional decision concerning whether the guarantee at issue was liable to distort competition. According to the applicant, when adopting a decision finding that a measure falls within the scope of Article 87(1) EC, the Commission is still required to examine the actual market situation on the date that that decision is adopted. The applicant notes that the Commission had a particular obligation to carry out such an examination in the present case. On the one hand, between the adoption of the provisional decision and the adoption of the contested decision, the financial crisis had become one of the most serious for a century, which led the Commission to authorise the granting of a total amount of approximately EUR 3 000 billion in aid to the financial sector. The applicant therefore considers that it is doubtful that, when the contested decision was adopted, there still existed any competition liable to be distorted in that sector. Moreover, the applicant notes that it would be difficult for aid of EUR 5 billion, that is to say 0.167% of the total aid authorised by the Commission on account of the financial crisis up until the adoption of the contested decision, to cause a significant distortion of any remaining competition. On the other hand, the provisional decision involved a temporary rescue measure, whereas the contested decision involves a permanent restructuring measure.

258 It must be held that, in principle, the question whether a measure is State aid must be determined on the basis of objective elements, which must be appraised on the date on which the Commission takes its decision and that, accordingly, it is the appraisal of the situation carried out by the Commission on that date which is to be reviewed by the EU Courts (see, to that effect, Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraph 50 and the case-law cited).

259 Nevertheless, it should be held that, where the Commission has already classified a measure as State aid in an uncontested decision, as it has in the present case with regard to the guarantee at issue in the provisional decision, it is not necessarily required to carry out a further examination of the competitive situation existing on the date that it adopts a new decision which continues to classify the same measure as State aid, provided that those two decisions were adopted in a related and sufficiently similar factual and legal context.

260 However, the applicant's arguments are incapable of showing that between the adoption of the provisional decision and the adoption of the contested decision there was a change in circumstances which required that the Commission carry out a further examination of the potential effect of the guarantee at issue on competition.

261 First, any worsening of the financial crisis which occurred between the adoption of the provisional decision (30 April 2008) and the adoption of the contested decision (12 May 2009) and the authorisation by the Commission in that period of a series of State aid measures of a considerable overall amount for the financial sector do not prevent the continued classification of a measure adopted to assist a bank in difficulty as State aid, without the need for a further analysis of the existing competition in that sector.

262 On the one hand, that sector has been involved in an important liberalisation process at Community level, enhancing the competition that may already have resulted from the free movement of capital provided for in the Treaty (*Cassa di Risparmio di Firenze and Others*, paragraph 251 above, paragraph 145). The applicant cannot claim that any worsening of the financial crisis and the authorisation of the aid referred to in the preceding paragraph eliminated that enhanced competition to the point that the guarantee at issue could no longer affect it.

263 In any event, it must be held that the granting of State aid amounting to EUR 5 billion which enables a large bank in difficulty to continue its activities and, therefore, not to lose its significant market share to its competitors is in principle liable to affect the existing competition, even if that competition was particularly weak.

264 On the other hand, the applicant does not contradict the Commission's argument that many banks established in the Member States, including German Landesbanken similar to WestLB, had received no State aid on the date when the contested decision was adopted. As the Commission correctly argues, the competitive relationships between those banks and WestLB were necessarily affected by the granting of the guarantee at issue even though, at that time, other banks had received significant public support.

265 Furthermore, it is clear from the case-law that the fact that competitors of the beneficiary of a measure have received State aid is irrelevant in classifying that measure as State aid (*Vlaams Gewest* v *Commission*, paragraph 83 above, paragraph 54).

266 Secondly, the fact that the guarantee at issue, conceived when the provisional decision was adopted as a transitional and reversible measure, became a permanent measure when the contested decision was adopted does not constitute a change in circumstances capable of preventing the Commission, in that decision, from referring to the classification made in the provisional decision. On the contrary, the Commission could reasonably consider, as it correctly argues, that a measure classified as State aid and therefore capable of distorting competition, the application of which was subject to a temporal limitation, must be so classified *a fortiori* in the absence of that limitation.

267 It follows from the foregoing that the fact that the Commission did not examine in the contested decision whether the guarantee at issue was liable to distort competition, but referred to the examination it had carried out in that regard in the provisional decision, does not constitute an infringement of Article 87(1) EC. The present argument must therefore be rejected.

– The second argument, to the effect that the aid granted to the financial sector since 2008 cannot distort competition

268 The applicant submits that the aid granted to the financial sector since 2008 is intended to avoid a collapse of that sector and therefore cannot distort competition.

269 In that respect, it suffices to note that the aid examined by the Commission in the contested decision is individual aid granted to a single bank, WestLB, and not aid granted to the German or European financial sector as a whole. It is true that it cannot be ruled out that the survival of WestLB might also have positive economic consequences for institutions which have not benefited from State support measures. However, the fact remains that WestLB is necessarily in a stronger competitive position relative to those institutions than if it had had to cease its activities.

270 Accordingly, the argument put forward by the applicant cannot be upheld.

271 Having regard to all of the foregoing, it must be held, first, that the statement of reasons for the contested decision concerning whether the guarantee at issue could distort competition is adequate and, secondly, that the applicant has failed to show that the reasons given by the Commission were vitiated by error.

272 The second plea must therefore be rejected.

The eighth plea, alleging infringement of the obligation to state reasons

Preliminary observations

273 It is necessary, first of all, to recall that the argument put forward by the applicant that the contested decision does not contain an adequate statement of reasons — since it neither states that the guarantee at issue could distort competition nor indicates the nature of those distortions — has already been examined in the context of the second plea.

274 Next, the applicant submits that the contested decision does not contain an adequate statement of reasons concerning the assessment of whether the guarantee at issue is compatible with Article 87(3)(b) EC. According to the applicant, the reasons for that decision do not explain why the conditions set out in its annex are necessary and proportionate to attain the objective pursued by that provision. The statement of reasons should have been particularly detailed with regard, first, to the context of the financial crisis, secondly, to the scope of the conditions imposed in the contested decision and, thirdly, to the fact that it '[went] appreciably further than the previous decisions'.

275 In that regard, it should be noted that, since the action is admissible only as regards the inclusion in the annex to the contested decision of the conditions relating to the obligation to sell, the applicant's arguments can be examined on the merits only with regard to the reasoning relating to those conditions.

276 In that respect, the applicant maintains that the contested decision should have included a more detailed statement of reasons concerning the necessity of the obligation to sell, in particular since an equivalent obligation had not been imposed in other 'parallel proceedings'. The reasoning provided in that regard in recital 69 of the contested decision, according to which the interests of the savings banks and the Land of North Rhine Westphalia are sometimes opposed, is not adequate. It is not unusual for the owners of a limited company to have sometimes contradictory interests. Finally, the applicant argues that the statement of reasons for the contested decision cannot be supplemented by explanations given by the Commission solely before the Court.

277 The Commission disputes the applicant's arguments.

278 It should be recalled that the Commission found in the contested decision that the guarantee at issue was restructuring aid to a firm in difficulty. As stated in paragraph 210 above, it could therefore examine the compatibility of that measure with the common market in the light of the rescue and restructuring guidelines.

279 According to paragraph 17 of the rescue and restructuring guidelines, restructuring will be based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability. Pursuant to paragraph 34 of those guidelines, the grant of individual restructuring aid must be conditional on implementation of a restructuring plan which must be endorsed by the Commission.

280 Paragraph 47 of the rescue and restructuring guidelines provides that the beneficiary of the aid must fully implement the plan referred to in the preceding paragraph and discharge any other obligations laid down in the authorising decision. Any failure to implement the plan or to fulfil the other obligations will be regarded as misuse of the aid.

281 Paragraphs 35 to 37 of the rescue and restructuring guidelines set out the rules according to which the restructuring plan must be submitted to the Commission and the elements which it must contain. First, that plan must contain all relevant details, including a market survey and a description of the circumstances that led to the company's difficulties, which will provide a basis for assessing the proposed measures. Secondly, the Member State concerned must commit itself to that plan. Thirdly,

the plan must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions, so that it will enable the company, after completing its restructuring, to cover all its costs on its own merits. Fourthly, where the firm's difficulties stem from flaws in its corporate governance system, appropriate adaptations will have to be introduced.

282 Paragraphs 38 to 40 of the rescue and restructuring guidelines relate to the 'avoidance of undue distortions of competition' linked to the grant of restructuring aid. Pursuant to those provisions, first, compensatory measures must be adopted in order to limit the negative effects of the aid on competition and trade ('the compensatory measures'). Secondly, those measures must be 'appropriate' in that they must not lead to a deterioration in the structure of the market. Thirdly, they must be 'in proportion' to the distortive effects of the aid. In that connection, first, they must take place in particular in the market(s) where the firm will have a significant market position after restructuring. Second, while those measures may take place before or after the grant of the aid, they must in any event be an integral part of the restructuring plan. Finally, they must not consist simply of write-offs and the closure of loss-making activities where they would not lead to a reduction of capacity or market presence of the relevant firm (Joined Cases T-115/09 and T-116/09 *Electrolux* v *Commission* [2012] ECR, paragraph 44).

283 First, it is clear from the foregoing that the existence of a restructuring plan is an essential condition for restructuring aid to be considered compatible with the common market. That plan becomes a central element of the analysis which the Commission must carry out in that regard ('the examination of compatibility'). Finally, the rescue and restructuring guidelines provide that any authorisation of aid is automatically subject to compliance with the plan examined and endorsed by the Commission.

284 Secondly, the restructuring plan on the basis of which the Commission carries out the examination of compatibility must contain two types of measures, distinguished according to their purpose. The purpose of the first type of measures is to restore the undertaking's long-term economic viability. As for the second type of measures, its purpose is to avoid undue distortions of competition. In principle, there is nothing to prevent the content of all the measures provided for by the restructuring plan from being the subject-matter of negotiations between the Commission and the Member State concerned, in which the beneficiary of the aid may, where appropriate, participate. However, it is clear from the rescue and restructuring guidelines that it is the Member State which must ultimately commit itself to a final plan.

285 Finally, as regards the compatibility of aid for restructuring with the common market, it is clear from case-law that the obligation to state reasons is complied with when the Commission's decision states the reasons why it considers the aid to be justified having regard to the conditions laid down in the rescue and restructuring guidelines, those conditions being, in particular, the existence of a restructuring plan, satisfactory evidence as to the long-term viability of the beneficiary of the aid and the proportionality of the aid taking into account the contribution of that beneficiary (see, by analogy, Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 66 and the case-law cited).

286 It is in the light of the foregoing that it is necessary, first, to determine the scope of the Commission's obligation to state the reasons for deciding to make authorisation of the guarantee at issue subject to compliance with the obligation to sell and, secondly, to examine whether the statement of reasons for the contested decision is, in that respect, adequate.

The scope of the Commission's obligation to state the reasons for deciding to make authorisation of the guarantee at issue subject to compliance with the obligation to sell

287 In order to determine the scope of the Commission's obligation to state the reasons for deciding to make authorisation of the guarantee at issue subject to compliance with the obligation to sell, first, it is necessary to identify the objective in relation to which the Commission had to justify that decision. Secondly, it is necessary to determine the scope of the Commission's general obligation to give reasons for its decisions making the authorisation of restructuring aid subject to compliance with the measures provided for in the restructuring plans to which the Member States concerned have committed themselves. Thirdly, it is important to consider whether the scope of that obligation is different where the Commission decides to ensure compliance with the plans at issue by attaching conditions to its decisions, under Article 7(4) of Regulation No 659/1999. Fourthly and finally, it must be ascertained whether the obligation to sell formed part of the first comprehensive restructuring plan for WestLB, to which the Federal Republic of Germany had committed itself.

– The objective in the light of which the Commission had to justify its decision to make authorisation of the guarantee at issue subject to compliance with the obligation to sell

288 The applicant argues, in essence, that the objective pursued by the Commission, when it decides to make the authorisation of restructuring aid subject to compliance with certain conditions, is to ensure attainment of the objective covered by the exception to the general prohibition of State aid on which that authorisation is based. Where authorisation is based on Article 87(3)(b) EC, in accordance with its second hypothesis, that objective must be, according to the applicant, to remedy a serious disturbance in the economy of a Member State.

289 That claim must be rejected.

290 Indeed, as noted in paragraph 284 above, the objective pursued by the Commission in making the authorisation of restructuring aid subject to compliance with the measures provided for by the restructuring plan to which the Member State concerned has committed itself is, first, to ensure that the beneficiary is restored to long-term viability and, secondly, to ensure that there will not be undue distortions of competition.

291 In the present case, as stated in paragraph 187 above, the obligation to sell was included in the annex to the contested decision as a measure to ensure the restoration of WestLB to long-term viability. Therefore, it is with regard to that single objective that the Commission had to justify its decision to make authorisation of the guarantee at issue subject to compliance with that obligation.

– The scope of the Commission's general obligation to give reasons for its decisions making the authorisation of restructuring aid subject to compliance with the measures provided for in the restructuring plans to which the Member States concerned commit themselves

292 It must be pointed out that, although it is, in principle, for the Commission to provide proof of the grant of aid, within the meaning of Article 87(1) EC, the burden of proof of its compatibility with the common market, by way of derogation from that provision, is borne principally by the Member State concerned, which must show that the conditions for that derogation are satisfied (see, to that effect, Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* [2007] ECR II-2911, paragraph 34 and the case-law cited).

293 Accordingly, where, in the exercise of the wide discretion available to it to assess the compatibility of State aid with the common market pursuant to Article 87(3) EC (see paragraph 183 above), the Commission requires, as it does here, in its guidelines, in its guidance and in its communications that, in order to authorise aid, the Member State concerned must commit itself to a plan for achieving a

number of specific legitimate objectives, it is for the latter to show that the plan is likely to achieve them and not for the Commission to establish that each measure provided for by the plan is essential in that regard.

294 Accordingly, and in the light of what is set out in paragraphs 279 to 284 above, a restructuring plan must be regarded as made up of a series of commitments proposed by a Member State seeking to establish that the conditions for a derogation from the general prohibition of State aid have been complied with. Those commitments are intended to obtain from the Commission a decision which the Member State concerned does not have a subjective right to obtain, namely the authorisation of aid enabling it to avoid the outcome of competition, and are proposed in order to ensure that the objectives set out in paragraphs 284 and 290 above will be achieved.

295 For the beneficiary of the aid, the restructuring plan becomes all the conditions to which the grant of the aid is made subject by the Member State concerned, in so far as the latter makes a commitment to the Commission to grant the aid only if the beneficiary complies with that plan.

296 In those circumstances, it must be held that, in the context of its authorisation decision, it is, in particular, for the Commission, first, to establish that the authorised measure must actually be classified as State aid within the meaning of Article 87(1) EC, secondly, to ensure that the Member State concerned has established that the aid could benefit from one of the derogations referred to in Article 87(3) EC and, thirdly, to find that, in the light of all of the measures provided for by the restructuring plan to which that Member State has committed itself, it is possible to consider that the beneficiary of the aid will be viable in the long term and that the aid will not cause undue distortions of competition.

297 However, contrary to what the applicant claims, in essence, the Commission is not required to explain the need for each measure provided for by the restructuring plan or to seek to impose only the least restrictive measures possible among those likely to ensure the attainment of the objectives referred to in the preceding paragraph, unless either the Member State concerned has previously committed itself to a less restrictive restructuring plan, fulfilling those objectives in an equally appropriate manner, or that Member State has shown its opposition to the inclusion of certain measures in the restructuring plan and committed itself to that plan because the Commission had definitively informed it that the aid would not be authorised in the absence of those measures, since in those situations the decision to make the granting of the aid subject to compliance with those measures cannot be attributed to the Member State.

298 First, that finding is reinforced by the fact that the measures provided for by a restructuring plan can be many and varied, so it is necessary to have a thorough knowledge of the functioning and internal structure of the beneficiary of the aid, its commercial position and the strategic options open to it, in order to be able to contemplate alternative measures. Since the Commission does not necessarily have that knowledge, it is not in a position to identify measures capable of replacing those provided for by the restructuring plan to which the Member State has committed itself.

299 Secondly, imposing on the Commission the requirement to justify the necessity of each measure provided for by a restructuring plan could prevent it from establishing, in some situations, that the beneficiary of the aid will be viable in the long term. This would seem to be the case with a restructuring plan including certain measures which taken together would ensure the viability of that beneficiary but which when considered in isolation would not appear to be essential in that regard. In such a case, the Commission would be unable to show that any of the proposed measures is strictly necessary and could not, in practice, make authorisation of the aid subject to compliance with them. Accordingly, it would be unable to ensure the restoration of the beneficiary to viability.

300 Thirdly and finally, it should be recalled that, when the Commission authorises restructuring aid for a bank whose economic situation has deteriorated to the point that it could cease its activities and cause a crisis in the national financial market, it is only State intervention, by avoiding the outcome of competition, which allows its continuity, and does so in order to remedy a serious disturbance in the economy of a Member State.

301 In that context, although it is justifiable to require that the Commission ensures that the aid granted, on the one hand, is likely to produce the desired beneficial effect on that economy, which may require, in particular, that the viability of the bank is ensured, and, on the other hand, has the smallest possible effect on competition, it would, none the less, be unreasonable to require that the Commission must also determine that the conditions of authorisation of the aid are the least onerous possible for the beneficiary.

302 The finding set out in paragraphs 296 and 297 above is, moreover, consistent with the case-law to the effect that the Commission's obligation to state reasons, concerning the compatibility of restructuring aid with the common market, is complied with when the relevant decision states the reasons why the aid is justified having regard to the conditions laid down in the rescue and restructuring guidelines, those conditions being, in particular, the existence of a restructuring plan, satisfactory evidence as to the long-term viability of the beneficiary of the aid and the proportionality of the aid taking into account the contribution of its beneficiary (see paragraph 285 above).

– The question whether the scope of the Commission's general obligation to give reasons for its decisions making the authorisation of restructuring aid subject to compliance with the restructuring plans to which the Member States concerned have committed themselves is different when the Commission decides to ensure compliance with a restructuring plan by attaching conditions to its decision, under Article 7(4) of Regulation No 659/1999.

303 At the hearing, the applicant stated that the Commission's obligation to state reasons must be considered as being different from that described in paragraphs 296 and 297 above when the Commission decides, under Article 7(4) of Regulation No 659/1999, to attach a condition to a decision authorising restructuring aid.

304 However, in so far as such a condition reflects, as in the present case, a measure provided for by the restructuring plan to which the Member State concerned has committed itself, that claim must be rejected.

305 Indeed, having regard, first, to the particular responsibility conferred by the rescue and restructuring guidelines on any Member State wishing to grant restructuring aid to an undertaking, regarding the submission of a restructuring plan, and, secondly, to the fact that those guidelines automatically make authorisation of the aid subject to compliance with the measures set out in that plan, those measures must be considered as being amongst the conditions for the grant of the aid laid down by the Member State concerned (see paragraph 295 above). Furthermore, those conditions form part of the factual and legal context on the basis of which the Member State concerned requested that the Commission carry out the examination of compatibility of the aid.

306 Therefore, when the Commission attaches such a condition to the authorisation of restructuring aid, it imposes on neither the beneficiary of the aid nor the Member State concerned any obligation which they had not previously assumed.

307 Moreover, the consequences, for the Member State concerned, of the infringement of such a condition are, in essence, equivalent to those resulting from non-compliance with a measure provided for by the restructuring plan to which it is committed, namely that the aid could be regarded by the Commission as having being misused and the Commission could bring an action before the Court of Justice for a declaration that the Member State at issue has failed to fulfil its obligations.

308 Finally, and in any event, since the Commission considered that the guarantee at issue could be authorised only in the light of the existence of a restructuring plan providing for the implementation of certain measures, it does not seem logical to require it to state the reasons why its decision to authorise the aid must be subject to the condition that those measures should be implemented.

309 It must therefore be held that, in the contested decision, the Commission was required only to state the reasons why the adoption of the measures provided for by the final restructuring plan in their entirety, which, it is common ground, included the obligation to sell, would be sufficient to ensure the long-term viability of WestLB and to ensure that the guarantee at issue would not cause undue distortions of competition, provided that it is possible to consider, first, that the Federal Republic of Germany had not previously committed itself to a less restrictive comprehensive restructuring plan fulfilling those objectives in an equally appropriate manner and, secondly, that that Member State had not shown its opposition to the inclusion of the obligation to sell in the final restructuring plan and proposed its inclusion on the sole ground that the Commission had definitively informed it that the aid would not otherwise be authorised (see paragraph 297 below above).

– The questions whether the final restructuring plan was the first comprehensive restructuring plan for WestLB to which the Federal Republic of Germany had committed itself and whether the latter had shown its opposition to the inclusion of the obligation to sell in that plan

310 It is appropriate to consider, first of all, whether the original restructuring plan, which was submitted to the Commission on 8 August 2008 and did not provide for the sale of WestLB in the same terms as the final restructuring plan, may be regarded as a comprehensive restructuring plan.

311 On the one hand, it should be recalled that the original restructuring plan included a commitment to submit by 31 December 2008 ‘concrete steps’ for a change in the ownership structure of WestLB (see recital 25 of the opening decision, recitals 2 and 29 of the contested decision and paragraph 26 above). Those measures, which were not identified, were to result in the owners’ loss of their majority control before 30 September 2009.

312 On the other hand, when the original restructuring plan was notified to the Commission, the latter was informed by the Federal Republic of Germany that the owners had agreed, in the Eckpunktevereinbarung, to submit to the Commission a revised restructuring plan, including reduction measures going beyond the original restructuring plan and taking into consideration the modification of the ownership structure, by 31 December 2008 (recital 26 of the opening decision and paragraph 27 above).

313 Therefore, when the original restructuring plan was notified to it, the Commission must necessarily have considered that further significant restructuring measures, which could have a clear impact on the examination of compatibility of the guarantee at issue, would later be submitted to it. In those circumstances, it was not in a position to conduct that examination on the basis of the original restructuring plan. The latter could therefore not be regarded as a comprehensive plan for the purposes of paragraphs 35 to 45 of the rescue and restructuring guidelines.

314 Next, it should be noted that it does not appear from the case-file that the Federal Republic of Germany asked the Commission to carry out an examination of compatibility of the guarantee at issue in the light of the measures provided for by the original restructuring plan or measures other

than those provided for by the final plan or that it opposed making the grant of the guarantee at issue subject to compliance with the obligation to sell. However, given the particular responsibility for submitting a restructuring plan conferred by the rescue and restructuring guidelines on any Member State wishing to grant restructuring aid, it cannot be accepted, where that Member State has not communicated its disagreement with the measures contained in that plan, that those measures are not attributable to it. The Federal Republic of Germany did not even argue, in its observations on the opening decision, that the obligation to sell was not necessary to ensure the viability of WestLB or that less restrictive alternative solutions were conceivable (see paragraphs 44 to 50 of the contested decision), whereas the Commission, as it correctly argues, had already stated, in essence, in recital 49 of the opening decision, that a change in the ownership structure of WestLB could be necessary in that context. Moreover, to the extent that neither WestLB nor any of the interested parties submitted observations on the opening decision (see paragraph 32 above), it must be held that they too were not opposed to it. Under those circumstances, it is not possible to consider, in the present case, that the decision to include the obligation to sell in the final restructuring plan cannot be attributed, ultimately, to the Federal Republic of Germany.

315 Finally, and in any event, even though the applicant claims that the inclusion of the obligation to sell in the final restructuring plan was suggested, or even required, by the Commission, it does not claim that the Commission adopted a decision, express or implied, rejecting the original restructuring plan or another earlier restructuring plan not including the obligation to sell or definitively notifying the Federal Republic of Germany that the guarantee at issue would not be authorised if that obligation were not included in the restructuring plan for WestLB.

316 It must therefore be concluded, first, that the final restructuring plan was the only plan, for the purpose of paragraphs 35 to 40 of the rescue and restructuring guidelines, to which the Federal Republic of Germany had committed itself prior to the adoption of the contested decision and, secondly, that it has not been established, so as to make it possible in the final analysis not to attribute that inclusion to it, that that Member State opposed the inclusion of the obligation to sell in that plan.

– Conclusion

317 It follows from all the foregoing considerations that the Commission's obligation to state reasons, concerning the necessity of making authorisation of the guarantee at issue subject to the conditions provided for by the final restructuring plan to ensure the long-term viability of WestLB, consists in stating the reasons why it considers that compliance with that plan is sufficient to achieve the realisation of that objective.

318 Therefore, contrary to what the applicant claims, in essence, there is no need to examine in isolation the reasoning in the contested decision relating to the obligation to sell. In that decision, the Commission was required only to state why the obligation to sell, combined with the other measures provided for by the final restructuring plan, was likely to achieve the realisation of the objective of ensuring the long-term viability of WestLB.

319 It is therefore necessary to examine whether, in the contested decision, the Commission fulfilled that obligation.

Examination of the adequacy of the statement of reasons in the contested decision concerning the necessity of the obligation to sell

320 First, it should be pointed out that the Commission observed, in recital 64 of the contested decision, that the depth of the restructuring measures required to ensure the long-term viability of WestLB was likely to be in direct proportion to the scope and volume of the aid and to the solidity of that bank's

business model, as stated in paragraph 52 of the Communication on the treatment of impaired assets and in paragraph 44 of the communication entitled 'The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition'.

321 Secondly, the Commission pointed out, in recital 68 of the contested decision, that the change in the ownership structure of WestLB was an important step towards solving its difficulties and facilitating its positive economic development. In that regard, the Commission referred to the observations, made in the opening decision, concerning the fact that those difficulties were caused by that ownership structure and conflicts of interest between shareholders.

322 As stated in paragraph 31 above, the Commission had already observed, in recital 49 of the opening decision, that the difficult situation of WestLB was probably due to its ownership structure and to the 'different interests' among the owners. In recital 50 of that decision, it had stated that the change in the ownership structures proposed in the original restructuring plan could bring about changes in that bank's business model. In recital 48 of the same decision, the Commission had pointed out that that business model, characterised by large structured investment portfolios, off-balance-sheet commitments and limited access to customer-driven business, had proved to be unsustainable in the long term.

323 Thirdly, in recital 69 of the contested decision, the Commission recalled that WestLB and the owners had accepted the point of view that WestLB's difficulties were due in part to its ownership structure and had undertaken to put its change of ownership into definite terms by 31 December 2008, for example by producing a letter of intent. The Commission noted that the preferred strategy was a merger between WestLB and Helaba. The integration into that group of DeKaBank Deutsche Girozentrale was proposed as a complementary measure. The Commission stated that neither of those options had proved successful, for many reasons, including the conflict of interests among the owners. The Commission pointed out that the savings banks indirectly forming part of the ownership structure of WestLB and the Land of North Rhine Westphalia sometimes pursued directly opposed interests and considered that this confirmed that 'the view of the matter [which it had] expressed in the opening decision was correct', and that 'a change of ownership [was] of the greatest importance if the long-term viability of WestLB [was] to be restored'.

324 Fourthly, the Commission noted, in recital 73 of the contested decision, that the sale of WestLB would be facilitated by the prior unbundling of its various business activities and their grouping into three core business areas, which would be offered for sale in a tender procedure, both separately and as a whole.

325 Fifthly, the Commission stated, in recital 74 of the contested decision, that WestLB had redirected its business activities, abandoning loss-making business such as investment management and proprietary trading, which gave rise to the crisis, and laying the emphasis on customer-driven business. The Commission noted that the final restructuring plan allowed WestLB again to concentrate its activities on North Rhine-Westphalia and, more generally, Germany and on certain core business areas. The Commission pointed out that the refocus from risky activities to less volatile business like transaction banking and cooperation with savings banks, private-banking customers, and mid-size corporates would increase the sustainable part of WestLB's activities and therefore contribute to the restoration of its viability and thus to the abandonment of a business approach that had proved unsustainable in the long term.

326 Finally and sixthly, the Commission stated, in recital 75 of the contested decision, that the final restructuring plan included cost-cutting measures and measures to improve risk management and, thus, WestLB's risk exposure. As stated in paragraph 50 above, the Commission concluded that that plan clearly demonstrated the capacity of WestLB to restore its long-term viability.

327 It follows from the foregoing that, in the contested decision, the Commission identified in a sufficiently precise manner several measures in the final restructuring plan allowing the range of WestLB's activities and its ownership structure to be changed. In the Commission's view, that change resulted in the abandonment of the commercial policy underlying the bank's financial difficulties, which was characterised by the exercise of high-risk activities. In addition, there will no longer exist the conflicts of interest between the owners which, according to the Commission, played an important role in creating those difficulties. Finally, the Commission stated that WestLB's transition towards a lower-risk business model and towards an ownership structure less characterised by conflict would be strengthened or facilitated by cost-reduction measures and by its division into different business sectors which could be sold separately.

328 That statement of reasons makes it possible to understand the reasons why the Commission considered that the measures provided for by the final restructuring plan, and set out in the annex to the contested decision, including those relating to the obligation to sell, were likely to ensure the restoration of WestLB to long-term viability.

329 It must therefore be held that the contested decision is adequately reasoned as regards making the guarantee at issue subject to compliance with the obligation to sell.

330 For the sake of completeness, it should be noted that that statement of reasons should also be considered to be adequate if, as the applicant argues, in essence, the Commission was required to establish that the obligation to sell was strictly necessary for restoring WestLB's long-term viability.

331 Indeed, it is clear from paragraphs 31, 32 and 321 above that the Commission indicated during the administrative procedure leading to the adoption of the contested decision, and in that decision, that WestLB's financial difficulties were due to an unsustainable business model.

332 The Commission also stated that that model was, in part, the consequence of the existence of a particular ownership structure and a conflict of interest between the owners.

333 Admittedly, it was only in its written pleadings that the Commission described the characteristics of WestLB's ownership structure which, in its view, were responsible for that model and the conflicting interests of the owners likely to make the bank's commercial viability more difficult. It argues, in essence, that since WestLB's ownership structure was controlled by the savings banks in the Westphalia-Lippe and Rhineland regions, it was not reasonable to consider that WestLB would be able to develop significant business activities in a sector essential for ensuring its return to commercial viability and in which those savings banks were active, that is to say private banking on behalf of customers.

334 However, WestLB's ownership structure and the, potentially conflicting, interests of the owners are necessarily elements which are well known to the applicant, so it would be unreasonable to require the Commission to set out, in the contested decision, the characteristics of that structure which, in the Commission's view, lead to WestLB's financial difficulties (see, to that effect and by analogy, judgment of 13 April 2011 in Case T-167/07 *Far Eastern New Century* v *Council*, not published in the ECR, paragraph 127).

335 Moreover, the Commission had already stated in essence, in the opening decision, that WestLB's financial difficulties were due to an unsustainable business model because of its ownership structure and the conflicts of interest between the owners, and neither the Federal Republic of Germany nor the applicant, as an interested party, challenged that preliminary view or requested further information concerning the reasons underlying it, which is a relevant factor for limiting in the present case the scope of the Commission's obligation in the contested decision to state reasons in that respect (see, to that effect and by analogy, *Far Eastern New Century* v *Council*, paragraph 334 above, paragraph 128).

336 Finally, as the applicant itself states, the owners had signed the Eckpunktevereinbarung which was sent to the Commission on 8 August 2008 (see paragraph 25 above). That document, which was agreed upon following exchanges between the Commission, the Federal Republic of Germany, WestLB and the owners, contains a commitment concerning the change in the bank's ownership structure (see paragraphs 26 and 27 above). The requirement imposed on the Commission to explain why that change was necessary is therefore moderated in the present case.

337 It is therefore necessary to reject the present plea.

The fourth plea, alleging infringement of the principle of proportionality

338 The present plea is divided, in essence, into three parts, alleging, respectively, first, that the Commission assessed the proportionality of the conditions attaching to the contested decision on the basis of a false premiss, secondly, an infringement of property rights and, thirdly, that the harm to the owners is disproportionate to the objective pursued by the contested decision.

The first part, alleging that the Commission assessed the proportionality of the conditions attaching to the contested decision on the basis of a false premiss

339 The applicant submits that, as it stated in the third plea, the Commission considered that the purpose of Article 87(3)(b) EC, the provision on the basis of which the guarantee at issue was authorised, was comparable to that of Article 87(3)(c) EC. The applicant considers that the Commission therefore assessed the proportionality of the conditions attaching to the contested decision on the basis of a false premiss. According to the applicant, the resolution of a serious disturbance in the economy is a more important objective of general interest than the promotion of a sector or region. It notes that the principle of proportionality has been infringed for that reason alone.

340 The Commission disputes the applicant's arguments.

341 It should be pointed out that the applicant only formally relies on an infringement of the principle of proportionality. In reality, it calls into question the application of Article 87(3)(b) EC by the Commission in the contested decision and refers to the arguments put forward in that regard in the third plea. The first part must therefore be rejected on the same grounds as those arguments, as the Commission correctly argues.

The second part, alleging an infringement of property rights

342 The applicant claims that the owners were deprived of their property rights by the contested decision, in breach of the principles governing the protection of that right in the European Union, which the Commission disputes.

343 It is clear that this part of the plea, like the preceding part, is only formally alleging infringement of the principle of proportionality. By this part of the plea, the applicant is actually putting forward the arguments presented in the sixth plea, in support of which it relies on the Commission's lack of powers to compel the owners to transfer their property rights in WestLB. The arguments put forward by the applicant will therefore be considered in the context of the sixth plea. However, in so far as those arguments are incapable of establishing the existence of an infringement of the principle of proportionality, they must be rejected in the context of the present plea.

The third part, alleging that the harm to the owners is disproportionate to the objective pursued by the contested decision

344 The applicant submits that the deprivation of the owners' property rights resulting from the contested decision causes them harm which is disproportionate to the Commission's objective of avoiding distortions of competition in the financial sector. That harm is particularly disproportionate because, on the one hand, numerous aid measures had already led to disturbances in that sector and, on the other hand, the guarantee at issue was regarded as necessary to 'save' a major bank and to restore the functioning of that sector.

345 The Commission disputes the applicant's arguments.

346 The principle of proportionality requires that the measures adopted by EU institutions must not exceed what is appropriate and necessary to attain the objective pursued. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used (Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, paragraph 21).

347 The principle of proportionality, as a general principle of EU law, is none the less a criterion for the lawfulness of any act of the institutions of the Union. That being so, in the examination of acts of the Commission, the questions always arise, first, of the precise extent and limits of the obligations which flow from the observance of that principle and, second, of the limits of judicial review (Case C-441/07 P *Commission* v *Alrosa* [2010] ECR I-5949, paragraphs 36 and 37).

348 In assessing the scope of the principle of proportionality in the present case, it is appropriate, in particular, to take into consideration the respective obligations of the Commission and of the Member State concerned in a procedure for the authorisation of restructuring aid for an undertaking whose continuity is in jeopardy, as set out, in essence, in paragraphs 287 to 302 above.

349 In view of what has been stated in paragraphs 287 to 302 above, it must be held that observance of the principle of proportionality does not require that the Commission must make authorisation of restructuring aid subject to the measures strictly necessary to restore the viability of the beneficiary of the aid and avoid undue distortions of competition if those measures form part of a restructuring plan to which the Member State concerned has committed itself.

350 Application of the principle of proportionality by the Commission in that context is confined to determining, first, that the restructuring plan to which the Member State concerned has committed itself suggests that the beneficiary of the aid will be viable in the long term and that undue distortions of competition will be avoided and, secondly, that the Member State concerned has not committed itself to a plan containing less onerous measures adequately ensuring that economic viability and avoiding those distortions (see, by analogy, *Commission* v *Alrosa*, paragraph 347 above, paragraph 41).

351 The proportionality of the Commission's decision to make authorisation of the guarantee at issue subject to compliance with the obligation to sell must be examined in the light of those observations.

352 In that regard, the final restructuring plan is the only comprehensive restructuring plan to which the Federal Republic of Germany committed itself before the adoption of the contested decision (see paragraph 316 above). Since the obligation to sell was provided for in that plan, it must be concluded that the Commission was not required to make authorisation of the guarantee at issue subject to conditions concerning the change in WestLB's ownership structure which are less strict than those provided for by the final restructuring plan.

353 It follows from the foregoing that, in making authorisation of the guarantee at issue subject to compliance with the obligation to sell, the Commission did not infringe the principle of proportionality.

354 Finally, and for the sake of completeness, it should be noted that, even if the Commission were required to make authorisation of the restructuring aid subject only to the least restrictive measures possible to ensure the restoration of the beneficiary to long-term economic viability, it must be held that the applicant has failed to demonstrate that the obligation to sell is disproportionate to the objective pursued by the Commission.

355 In that regard, it is important to remember that, contrary to what the applicant essentially states, the objective pursued by the Commission in making authorisation of the guarantee at issue subject to compliance with the obligation to sell was not to prevent that guarantee from causing undue distortions of competition in the financial markets.

356 As the Commission correctly argues, and as stated in paragraphs 187 and 291 above, the obligation to sell seeks to ensure the restoration of WestLB to long-term viability.

357 Accordingly, first, the applicant's argument that that condition is disproportionate to the objective of avoiding undue distortions of competition must be rejected as irrelevant.

358 Secondly, it should be noted that the applicant has not put forward any argument to show that the decision by the Commission making authorisation of the guarantee at issue subject to compliance with the obligation to sell is disproportionate to the objective of ensuring the restoration of WestLB to long-term viability.

359 In the light of all the foregoing considerations, the present plea must be rejected in its entirety.

The fifth plea, alleging infringement of the principle of equal treatment and misuse of power

360 The applicant claims that the Commission, in adopting the contested decision, infringed the principle of equal treatment and misused its powers.

361 According to the applicant, making the authorisation of aid to a bank subject to the obligation to sell the bank is unprecedented in the Commission's decision-making practice. A comparison of the contested decision with Commission Decision C(2009) 3708 final of 7 May 2009 on State aid N 244/2009 — Commerzbank, Germany ('the Commerzbank decision') clearly shows that there has been unequal treatment. In that decision, adopted a week before the contested decision, the Commission did not require a change in the ownership structure of the bank which received the aid. Furthermore, the applicant produces a table which, in its view, shows that the decision concerning WestLB is the only decision, among those relating to aid granted in the context of the financial crisis, in which authorisation of the aid at issue was made subject to a change in the beneficiary's ownership structure.

362 The applicant adds that the Commission has provided no objective justification for the unequal treatment suffered by WestLB. It notes that, in reality, the Commission arbitrarily used the powers conferred on it by Article 87(3)(b) EC for a purpose other than that pursued by that provision, namely reorganising WestLB and its ownership structure. According to the applicant, that constitutes a misuse of power within the meaning of the second paragraph of Article 230 EC. It presents three facts to support that claim. First, the Commission determined beforehand, on 15 July 2008, the conditions for authorisation of the restructuring. Secondly, it did not change those conditions in the contested decision, in spite of the worsening financial crisis and the fact that it ultimately decided to apply Article 87(3)(b) EC. Thirdly, on several occasions N. Kroes publicly emphasised the conditions

imposed, in particular in the context of four press articles, and regularly gave warnings concerning the consolidation of Landesbanken, while asserting that the German financial sector 'based on three pillars,' was outdated and needed to be reformed.

363 The Commission disputes the applicant's arguments.

364 First, it must be pointed out that compliance with 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 (Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, paragraph 72 and the case-law cited, and judgment of 18 January 2012 in Case T-422/07 *Djebel — SGPS* v *Commission*, not published in the ECR, paragraph 202).

365 However, the applicant has not demonstrated that WestLB was in a situation comparable to that of the banks which received State aid cited in its application and in respect of which, in the applicant's view, the Commission authorised restructuring aid without requiring a change in the ownership structure.

366 In that regard, it must be held the effect of restructuring aid granted to a bank in difficulty in a situation of financial crisis fundamentally depends on a set of individual circumstances, which include the bank's economic situation and its prospects of being restored to economic viability. However, the applicant does not examine whether the Commission, in the decisions relating to the banks which it cites, had considered that the ownership structures were as problematic as that of WestLB, as the Commission correctly argues.

367 With regard to the aid authorisation forming the subject-matter of the Commerzbank decision, the Commission states that it was not made subject to a change in the beneficiary's ownership structure on the grounds, first, that, contrary to WestLB, Commerzbank was an 'open' undertaking whose shares were held by a dispersed body of shareholders and, secondly, that the difficulties which it encountered were not due to its ownership structure or to divergences of interests between its owners, which the applicant disputed neither in the rejoinder nor at the hearing.

368 Secondly, it should be noted that, as the Commission argues in essence, it is only in the context of Article 87(3)(b) EC that it is necessary to assess the legality of a Commission decision declaring that new aid does not fulfil the requirements for application of that derogation, and not in the light of its previous decision-making practice, assuming that the latter is established (see, by analogy, judgment of 8 July 2010 in Case T-396/08 *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, not published in the ECR, paragraph 54, *and Djebel — SGPS* v *Commission*, paragraph 364 above, paragraph 198). The concept of State aid and the conditions necessary for ensuring the restoration of the beneficiary's viability reflect an objective situation which must be appraised on the date on which the Commission takes its decision. Thus, the Commission's reasons for having made a different appraisal of the situation in an earlier decision must remain immaterial to the appraisal of the lawfulness of the contested decision (see, by analogy, *Djebel — SGPS* v *Commission*, paragraph 364 above, paragraph 199 and the case-law cited).

369 Thirdly, as the Commission correctly maintains, it cannot be deprived of the opportunity to set compatibility conditions stricter than those in previous decisions if so required by the development of the common market and the objective of undistorted competition within that market, and there is no legitimate reason for traders to entertain a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretionary power will be maintained (see, to that effect, *Djebel — SGPS* v *Commission*, paragraph 364 above, paragraph 200 and the case-law cited).

370 Next, it must be held that, in principle, the fact that authorisation of restructuring aid is made subject to compliance with the measures provided for by the restructuring plan to which the Member State concerned has committed itself cannot result in an infringement of the principle of equal treatment.

371 Indeed, in the event that the authorisation of two comparable restructuring aid measures is made subject to different conditions, which are provided for in restructuring plans to which the Member States concerned had respectively committed themselves, the different situations in which the beneficiaries of the aid would find themselves would be a result not of a choice by the Commission but of the nature of the respective commitments made by those Member States, since the Commission was required to consider whether they were adequate to ensure the restoration of the beneficiaries to viability and to avoid undue distortions of competition.

372 Finally, as to the question whether the Commission has misused its powers in adopting the contested decision, it should be recalled that, according to the case-law, a measure is only vitiated by misuse of powers if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Case C-342/03 *Spain* v *Council* [2005] ECR I-1975, paragraph 64).

373 However, it should be noted, first of all, that the press articles cited by the applicant containing certain statements by N. Kroes do not show, as the Commission correctly argues, that the Commission used its powers to monitor State aid for purposes other than those provided for by Article 87 EC.

374 It is appropriate to consider that, by those statements, N. Kroes made public her view that any authorisation of the guarantee at issue should be made subject to resolving the issues which led WestLB into difficulties before the financial crisis, which would require major changes concerning its business model and the structural problems related to its ownership structure. Those statements do not constitute the Commission's definitive position on that issue, still less on the structure of the German financial sector.

375 In any event, the applicant does not explain why the statements by N. Kroes should be regarded as a body of objective, relevant and consistent evidence that the decision was taken with the exclusive or main purpose of achieving an end other than that stated or of evading a procedure.

376 Next, it must be pointed out that the fact that the Commission could set out, on 15 July 2008, the conditions which, in its view, should be fulfilled for the guarantee at issue to be authorised and that it did not amend those conditions in the contested decision, despite the worsening financial crisis and the fact that it decided to apply Article 87(3)(b) EC, also does not constitute objective evidence that the contested decision was taken with the purpose of achieving an end other than that stated or of evading a procedure.

377 After all, this only shows that, at a relatively early stage of the procedure, the Commission stated that it would be difficult to authorise the guarantee at issue if the restructuring plan for WestLB did not include certain conditions which were incorporated in the final restructuring plan, but did not adopt a definitive position in that regard. However, the foregoing does not show that the Commission sought to change the ownership structure of WestLB or to reduce the size of that bank to achieve objectives other than those of ensuring the viability of the bank and of avoiding undue distortions of competition.

378 Furthermore, it should be noted, first, that the applicant has not submitted a plea for annulment of the contested decision alleging that the Commission used coercion or placed undue pressure on the Federal Republic Germany so that it would commit itself to the final restructuring plan.

379 Secondly, the informal assessment by the Commission concerning the possibility of authorising the guarantee at issue in the absence of certain measures, carried out on 15 July 2008, was preceded by a significant study of that guarantee from the perspective of State aid law. The Commission had already adopted, on 30 April 2008, the provisional decision, which was concerned with the compatibility of that guarantee with the common market and, as stated in paragraph 320 above, neither the Federal

Republic of Germany nor WestLB or any of the interested parties, when they had the opportunity to submit observations on the opening decision, formally challenged the Commission's preliminary view, expressed in that decision, that a change in the ownership structure could be required to restore the viability of WestLB in the long term.

380 Having regard to the foregoing, it must be held that the applicant has failed to demonstrate that the Commission discriminated against the applicant or misused its powers under Article 87 EC.

381 The present plea must therefore be rejected.

The sixth plea, alleging infringement of Article 295 EC

382 According to Article 295 EC, '[the EC] Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'.

383 The applicant claims that the Commission infringed that provision by making authorisation of the guarantee at issue subject to the obligation to sell. It submits that the Commission deprived the owners of their property rights and determined who may own a particular asset, which falls within the exclusive competence of the Member States. Even in the exercise of its powers under Articles 87 EC and 88 EC, the Commission cannot compel an owner to give up his property rights without infringing the absolute limits established by Article 295 EC on the powers of the European Union.

384 The applicant considers that the scope of protection of Article 295 EC is in any event affected when the Member States are left with no latitude in the management of public undertakings, in the retention of shareholdings which they have in those undertakings or in recourse to considerations other than purely profit-making criteria. According to the applicant, that latitude has been taken from the owners by the contested decision. Contrary to what the Commission asserts, knowing whether that objective of the contested decision was primary or secondary is irrelevant.

385 The applicant submits that 'an examination of the numerous investigation procedures concerning State aid and ad hoc measures in the financial sector shows that ... the Commission is no longer adopting decisions in isolated cases but, through structural modifications to the economic models and business sectors of several banks, is carrying out a major reorganisation of the financial sector'. The applicant states that the Commission has, in fact, piloted the entire sector from the perspective of economic rather than competition policy, which is beyond its powers and contrary to Article 295 EC.

386 The Commission disputes the applicant's arguments.

387 It should be pointed out, first of all, that, as the Commission claims, it is settled case-law that although systems of property ownership continue to be a matter for Member States by virtue of Article 295 EC, that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7; Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 48; and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 192).

388 Thus, and in accordance with Article 86(1) EC, the competition rules, which are fundamental rules, apply without distinction to public and private undertakings (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 387 above, paragraph 193).

389 Article 295 EC cannot therefore be held to restrict the scope of the concept of State aid within the meaning of Article 87(1) EC (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 387 above, paragraph 194).

390 Accordingly, Article 295 EC cannot limit the discretion conferred on the Commission to decide whether or not a measure covered by the general prohibition of State aid referred to in Article 87(1) EC may be authorised under one of the derogations from that provision provided for by Article 87(3) EC.

391 Therefore, it must be held that Article 295 EC does not prevent the Commission from making the authorisation of State aid to an undertaking to be restructured subject to that undertaking's sale, where this is intended to ensure its long-term viability.

392 As the Commission points out, such a condition does not call into question the 'system of property ownership' in the Member State concerned.

393 In that respect, it is sufficient to point out, first of all, that it is clear from the case-law that the application of the competition rules to undertakings irrespective of the property systems to which they are subject does not have the effect of restricting the protection under Article 295 EC and of leaving the Member States hardly any latitude in the management of public undertakings, in the retention of shareholdings which they have in those undertakings or in recourse to considerations other than purely profit-making criteria (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 387 above, paragraph 195).

394 Where the interests to which the preceding paragraph relates might conflict with the application of the competition rules, they are taken into account by Article 86(2) EC since it provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly may escape the application of the competition rules if those rules obstruct the performance, in law or in fact, of the particular tasks assigned to those undertakings (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 387 above, paragraph 196).

395 However, the applicant has not asserted that the conditions laid down in Article 86(2) EC for the exemption of WestLB from the application of the competition rules were fulfilled (see, to that effect, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 387 above, paragraphs 197).

396 Consequently, the applicant is incorrect to claim that the objective pursued by the Commission when it made authorisation of the guarantee at issue subject to the obligation to sell was to call into question the structure of the German financial sector and the existence of public shareholders in WestLB or other banks, as the Commission points out.

397 In that regard, it should be added that the contested decision does not make authorisation of the guarantee at issue subject to the sale of WestLB to private persons. On the contrary, the Commission stated, in recital 72 of the contested decision, that alternative solutions were acceptable, for example a consolidation of German Landesbanken, which are of a public nature, as the parties noted in their answers to the written questions of the Court dated 31 October 2013.

398 Finally, as the Commission submits, the authorisation of the guarantee at issue was not made subject to the loss by the owners of capital interests in WestLB without consideration. Under the conditions to which the authorisation was made subject, the owners could sell their shareholdings to any private or public entity fulfilling certain criteria and approved by the Commission.

399 It cannot be excluded that the conditions to which that sale was made subject — including the period within which it was to be carried out and the absence of a guarantee that, before the end of that period, the financial crisis and the effects of that crisis on the value of the bank assets would no longer exist — were likely to have a material effect on the price which could be obtained by the owners. Nevertheless, that fact should be considered in the light of the fact that the parties agree that, in the

absence of the granting of the guarantee at issue or support measures having equivalent effect, WestLB could have ceased to exist, with the result that the market value of that undertaking would, in principle, have been much smaller if that guarantee had not been exempted from the general prohibition of State aid resulting from Article 87(1) EC.

400 In view of the foregoing, the present plea must be rejected.

The seventh plea, alleging infringement of Article 7(4) of Regulation No 659/1999

401 Pursuant to Article 7(4) of Regulation No 659/1999, '[t]he Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored'.

402 As the applicant points out, the possibility for the Commission to impose conditions or obligations was recognised by the Courts of the European Union even before the adoption of Regulation No 659/1999 (see paragraph 185 above).

403 The applicant puts forward, in essence, three arguments in support of the present plea, which the Commission disputes.

404 In the first place, the applicant submits that the infringement of Article 295 EC committed by the Commission in adopting the contested decision also involves an infringement of Article 7(4) of Regulation No 659/1999.

405 However, it is sufficient to note that that argument is no different from those which the applicant relied on in the previous plea, alleging infringement of Article 295 EC. Therefore, it must be rejected for the same reasons as those arguments.

406 In the second place, the applicant submits that Article 7(4) of Regulation No 659/1999 does not allow the Commission to impose conditions which adversely affect property rights. The principle of legal certainty, according to which rules must be clear and precise to ensure the predictability of legal situations and relationships, requires that an infringement of such a fundamental right must be based on a specific provision establishing the existence of a power of the European Union and of the institution concerned in that regard. Article 7(4) of Regulation No 659/1999 cannot be regarded as such a provision, in so far as it does not specify the conditions and obligations which may be imposed by the Commission.

407 The applicant claims that that argument is supported by 'a comparison with other regulated matters'. It points out that Article 7(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) allows the Commission to require undertakings and associations of undertakings to bring infringements of Articles 81 EC and 82 EC to an end. According to the applicant, Article 7(1) of that regulation provides that behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end may be imposed and provides that structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. There are no such rules in Article 7(4) of Regulation No 659/1999.

408 Similarly, the applicant notes that Article 6(2) and Article 8(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) provide for 'a minimum content in terms of the substantive requirements for the adoption of conditions'. The Commission notice on remedies acceptable under Council Regulation (EC)

No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ 2008 C 267, p. 1) states, moreover, that the Commission cannot make the authorisation of a merger subject to the commitments made by the parties.

409 In that regard, it should be noted that, as the Commission correctly maintains, Article 7(4) of Regulation No 659/1999 simply clarifies the procedural prerequisites which must be fulfilled so that it can declare aid compatible with the common market by attaching certain conditions to that aid. As the Commission states, it follows in particular from that provision that this is possible only in decisions adopted, as in the present case, after the initiation of a formal investigation procedure. However, the substantive conditions to which the Commission may make the authorisation of State aid subject under Article 87(3) EC stem not from Article 7(4) of Regulation No 659/1999 but from the legal basis on which the declaration of the compatibility of the aid is founded, in the present case Article 87(3)(b) EC.

410 As has been repeatedly stated, the Commission may, when considering whether to authorise restructuring aid under Article 87(3)(b) EC, apply in the examination of compatibility of that aid the criteria contained in the rescue and restructuring guidelines, including those relating to the restoration of the beneficiary of the aid to long-term viability. Therefore, it must be held that the Commission may make the authorisation of restructuring aid under that provision subject to compliance with any measures contained in the restructuring plan to which the Member State has committed itself with a view to ensuring that restoration of viability.

411 Those measures include, in particular, the obligation to sell, to which the applicant refers in essence.

412 Therefore, the second argument put forward by the applicant as part of the present plea must be rejected.

413 In the third place, the applicant claims that 'the Commission considered that it was necessary to impose unilateral conditions relating in particular to the renunciation of property rights'. According to the original version of the contested decision, the reason was that the owners 'did not comply with the timetable and delayed the procedure'. However, the applicant points out that a timetable had not been drawn up. The applicant accepts that the contested decision no longer refers to that reason but, in its view, this is not a 'minimal error', 'having no bearing on its operative part and [the] grounds'. The Commission then considered the conditions as necessary on the ground that 'the course of the decision-making process delayed the procedure'. However, a decision by the competent bodies of the owners could have been adopted before the end of May 2009. The applicant concludes that the Commission chose not to wait for that decision. Finally, for the application of Article 7(4) of Regulation No 659/1999, it is neither necessary nor sufficient that a time-limit, a non-existent one to boot, is not respected by the parties.

414 In that regard, it should be noted that, contrary to what the applicant claims, in essence, the Commission was not required to wait for the owners themselves to decide the conditions for the restructuring of WestLB. As noted in paragraph 284 above, those conditions had to be provided for in a restructuring plan to which the Member State concerned, and not the owners, had committed itself.

415 As regards the references to the correction made to recital 41 of the uncorrected version of the contested decision, which is contained in recital 42 of the corrected version of that decision, the applicant does not clearly state what conclusions, in its view, the Court should draw from those references.

416 In any event, a comparison of the uncorrected and corrected versions of the contested decision shows that the amendment was minor.

417 Indeed, as is clear from paragraphs 41 and 43 above, in its uncorrected version, the contested decision stated, first, that, '[a]lthough it [had] been accepted by [the Federal Republic of] Germany and by the owners, … the restructuring plan [could not] be considered binding' and, secondly, that, '[i]n the course of the proceedings the Commission [had] observed that the owners did not meet the deadlines and delayed the procedure'. The corrected version of the contested decision no longer contains those observations but it does state that, '[i]n the course of the proceedings the Commission [had] observed that the owners [had] been unable to comply with the original timetable for an authorised restructuring plan, and that decision-making has fallen behind schedule'.

418 Therefore, the content of the two versions of the contested decision is, in that respect, similar. There is no reason to consider that the differences in wording between the two versions reveal any change in the Commission's reasoning.

419 Finally, as the Commission claims, that correction has no connection with its power to make authorisation of the guarantee at issue subject to compliance with certain conditions. The Commission did not have to justify its decision to exercise the power conferred upon it by Article 7(4) of Regulation No 659/1999 to make the authorisation of aid subject to compliance with the conditions referred to by the contested decision.

420 The third argument put forward by the applicant as part of the present plea must therefore be rejected.

421 In the light of all the foregoing considerations, the present plea must be rejected in its entirety.

422 Since all the admissible pleas in the present action have been rejected as unfounded, the action must be dismissed in its entirety.

Costs

423 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

424 Since the applicant has been unsuccessful, it must bear its own costs and those of the Commission, in both the main proceedings and the interim proceedings, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT (First Chamber, Extended Composition)

hereby:

1. **Rejects the European Commission's request for a declaration that there is no need to adjudicate;**

2. **Dismisses the action;**

3. **Orders Westfälisch-Lippischer Sparkassen- und Giroverband to bear its own costs and to pay those incurred by the Commission, including the costs relating to the interim proceedings.**

Kanninen Pelikánová Buttigieg

Collins Gervasoni

Delivered in open court in Luxembourg on 17 July 2014.

[Signatures]

Table of contents

Facts ... 1

1. Beneficiary ... 2

2. WestLB's financial difficulties and notification of the bad bank ... 2

3. Description of the bad bank ... 3

4. Supplementary notification ... 3

5. Authorisation of the guarantee at issue for a period of six months ... 3

6. Notification and examination of the extension for the bad bank ... 4

7. Contested decision ... 6

8. Developments in WestLB's situation after the adoption of the contested decision ... 9

Procedure ... 10

Forms of order sought by the parties ... 11

Law ... 12

1. Admissibility ... 12

The applicant's standing to bring proceedings ... 12

The first argument, concerning the fact that the applicant took part in the adoption of the measure classified as State aid by the contested decision ... 12

The second argument, concerning individual harm to the applicant as an owner ... 16

Conclusion concerning the applicant's standing to bring proceedings ... 17

The applicant's interest in bringing proceedings ... 17

2. Substance ... 20

Preliminary observations ... 20

The first plea, alleging infringement of the principle of collegiality ... 21

The third plea, alleging infringement of Article 87(3)(b) EC ... 23

The first part, put forward as the principal argument, alleging that the Commission wrongly considered that the purpose of Article 87(3)(b) EC was comparable to that of Article 87(3)(c) EC and that of the rescue and restructuring guidelines ... 23

– The first ground of complaint, alleging that the objective of remedying a disturbance in the economy of a Member State is always in the common interest ... 24

– The second ground of complaint, alleging that the Commission made two errors in the contested decision, respectively, by disregarding the purpose of Article 87(3)(b) EC, in so far as it examined the compatibility of the guarantee at issue with the common market in the light of the rescue and restructuring guidelines, and by not making authorisation of the guarantee at issue, in any event, subject to conditions less strict than those which may be imposed on the basis of Article 87(3)(c) EC 25

The second part, put forward in the alternative, alleging that the Commission wrongly imposed in the contested decision conditions stricter than those which may be imposed as a result of the application of the rescue and restructuring guidelines in combination with Article 87(3)(c) EC 28

The second plea, alleging infringement of Article 87(1) EC and the obligation to state reasons, in that the Commission neither adduced evidence of the effects of the guarantee at issue on competition nor provided an adequate statement of the reasons why that guarantee would lead to a distortion of competition 29

The statement of reasons for the contested decision concerning the effects of the guarantee at issue on competition 30

The validity of the grounds of the contested decision concerning the effects of the guarantee at issue on competition 33

– The first argument, to the effect that the Commission should have examined the actual market situation on the date that the contested decision was adopted 34

– The second argument, to the effect that the aid granted to the financial sector since 2008 cannot distort competition 35

The eighth plea, alleging infringement of the obligation to state reasons 36

Preliminary observations 36

The scope of the Commission's obligation to state the reasons for deciding to make authorisation of the guarantee at issue subject to compliance with the obligation to sell 38

– The objective in the light of which the Commission had to justify its decision to make authorisation of the guarantee at issue subject to compliance with the obligation to sell 38

– The scope of the Commission's general obligation to give reasons for its decisions making the authorisation of restructuring aid subject to compliance with the measures provided for in the restructuring plans to which the Member States concerned commit themselves 38

– The question whether the scope of the Commission's general obligation to give reasons for its decisions making the authorisation of restructuring aid subject to compliance with the restructuring plans to which the Member States concerned have committed themselves is different when the Commission decides to ensure compliance with a restructuring plan by attaching conditions to its decision, under Article 7(4) of Regulation No 659/1999. 40

– The questions whether the final restructuring plan was the first comprehensive restructuring plan for WestLB to which the Federal Republic of Germany had committed itself and whether the latter had shown its opposition to the inclusion of the obligation to sell in that plan 41

– Conclusion 42

Examination of the adequacy of the statement of reasons in the contested decision concerning the necessity of the obligation to sell 42

The fourth plea, alleging infringement of the principle of proportionality 45

The first part, alleging that the Commission assessed the proportionality of the conditions attaching to the contested decision on the basis of a false premiss 45

The second part, alleging an infringement of property rights 45

The third part, alleging that the harm to the owners is disproportionate to the objective pursued by the contested decision 46

The fifth plea, alleging infringement of the principle of equal treatment and misuse of power 47

The sixth plea, alleging infringement of Article 295 EC 50

The seventh plea, alleging infringement of Article 7(4) of Regulation No 659/1999 52

Costs 54