JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

3 March 2010 *

In Case T-36/06,

Bundesverband deutscher Banken eV, established in Berlin (Germany), represented by H.-J. Niemeyer and K.-S. Scholz, lawyers,

applicant,

v

European Commission, represented by N. Khan and T. Scharf, acting as Agents,

defendant,

* Language of the case: German.

supported by

Land Hessen (Germany), represented initially by H.-J. Freund and M. Holzhäuser, and subsequently by H.-J. Freund and S. Lehr, lawyers,

and by

Landesbank Hessen-Thüringen Girozentrale, established in Frankfurt am Main (Germany), represented by H.-J. Freund, lawyer,

interveners,

APPLICATION for annulment of Commission Decision C(2005) 3232 final of 6 September 2005 relating to the transfer of the Hessischer Investitionsfonds (Hessian Investment Fund) as a silent partnership contribution to Landesbank Hessen-Thüringen Girozentrale,

THE GENERAL COURT (Fourth Chamber),

composed of O. Czúcz (Rapporteur), President, V. Vadapalas and I. Labucka, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2008,

gives the following

Judgment

Background to the dispute

A — *The contribution at issue*

1 The Landesbank Hessen-Thüringen Girozentrale ('Helaba') is one of Germany's largest banks. Its legal status is that of a body governed by public law. Since 1 January 2001, Helaba has been owned by the Sparkassen- und Giroverband Hessen-Thüringen with an 85% stake, *Land* Hessen ('the *Land*') with a 10% stake, and the *Land* of Thuringia with a 5% stake. Helaba operates as the principal banker to the *Länder* of Hessen and Thuringia and as the central institution of the Hessen and Thuringia savings banks. It also operates as a commercial bank both on the national and on the international markets.

2 The Hessischer Investitionsfonds (Hessian Investment Fund; 'the special fund') was established as a special asset of the *Land* in 1970. It offers interest-free loans or loans at a reduced rate of interest for local investment projects. By a legislative amendment adopted on 13 December 2002, the Hessisches Ministerium der Finanzen (Ministry of Finance of the *Land*) was empowered to transfer all or part of the special fund to a credit institution, by way of a financial contribution and in the form of a silent partnership contribution in accordance with Paragraph 10 of the Law on Credit

Institutions (Kreditwesengesetz; 'the KWG'), or in any other form recognised under supervisory legislation, in return for a market remuneration.

3 To that end, the *Land* and Helaba reached agreement on the terms of the transfer of the special fund to Helaba. According to the draft contract, the special asset was to be transferred to Helaba in the form of a silent partnership contribution of unlimited duration ('the contribution at issue') valued at EUR 594 million, in return for a remuneration of 1.65% of its nominal value less the share of the contribution required to cover the loan activities associated with the special fund's local investment projects. The draft contract does not include a step-up provision under which the remuneration would increase after a certain period of time.

4 According to Paragraph 2 of the draft contract, the right to receive remuneration is lost if Helaba suffers an annual loss, that is to say if its profit and loss accounts show a loss in respect of the preceding financial year, or in so far as payment of the remuneration would give rise to an annual book loss. Unpaid remuneration is paid in subsequent years provided there is no annual loss and in so far as payment of the remuneration would not give rise to such a loss. The contribution at issue participates fully in the losses, but any diminution of its value has to be made good by Helaba in the following year up to its nominal value. Payment of the remuneration for the contribution at issue takes priority over the payment of dividends on the share capital and over the allocation of funds to capital reserves.

5 Under Paragraph 4 of the draft contract, the *Land* is not entitled to withdraw the contribution at issue. According to Paragraph 4(8), '[i]n the event of insolvency proceedings relating to the assets of [Helaba] or in the event of its liquidation, the [contribution at issue] shall be repaid only after all creditors of [Helaba] have been satisfied, including holders of participation rights and creditors of other guarantee capital

as referred to in Paragraph 10(5a) of the KWG, but before shareholders have been satisfied'.

B — *Administrative procedure and the contested decision*

6 By letter of 4 June 2004, the Federal Republic of Germany notified its intention to make the contribution at issue and requested the Commission of the European Communities to declare that the contribution at issue did not constitute State aid within the meaning of Article 87(1) EC.

7 On 4 August 2004, the Commission requested additional information, which the Federal Republic of Germany provided by letters of 31 August and 7 September 2004.

8 By letter of 29 September 2004, the Commission asked the Federal Republic of Germany, in accordance with Article 4(5) 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), to consent to an extension of the two-month period within which the Commission is required to carry out the preliminary examination of a notified measure. By letter of 7 October 2004, the Federal Republic of Germany agreed to the extension of that period until 31 December 2004.

9 By letters of 15 and 22 November 2004, the Commission requested further information from the Federal Republic of Germany.

10 By letter of 21 December 2004, the Commission imposed on the Federal Republic of Germany a time-limit of 30 days within which the latter was required to communicate the information requested, and stated that it would deem the notification to be withdrawn, as provided for in Article 5(3) of Regulation No 659/1999, if the information was not provided in due time.

11 By letter of 30 March 2005, the Federal Republic of Germany provided the additional information concerning the market rate. The Commission requested further information by letter of 20 May 2005, to which the Federal Republic of Germany replied by letter of 3 June 2005.

12 By Commission Decision C(2005) 3232 final of 6 September 2005 relating to the transfer of the Hessischer Investitionsfonds as a silent partnership contribution to Landesbank Hessen-Thüringen Girozentrale ('the contested decision'), the Commission decided, following the preliminary examination stage, that the contribution at issue did not constitute State aid.

13 In the contested decision, the Commission states that, for the purposes of examining whether the contribution at issue confers an advantage on Helaba that may be classified as State aid within the meaning of Article 87(1) EC, it is appropriate to apply the test of the 'private investor operating in a market economy' ('the private investor'), according to which capital contributions made on terms on which a private investor would be prepared to dispose of funds to a comparable private undertaking do not constitute State aid. The Commission refers, in that regard, to the judgment of the Court of First Instance in Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435 ('*WestLB*').

14 As regards, first of all, the issue of legal and economic classification, the Commission takes the view that the contribution at issue is comparable to other silent partnership contributions on the market and that, in consequence, whether the remuneration

agreed between the parties is in line with market conditions may be assessed as against the remuneration for those silent partnership contributions. In that regard, the Commission finds, in the first place, that the contribution at issue was expressly described as a silent partnership contribution in the draft contract. In the second place, it states that the terms of the contribution at issue are comparable to those of other silent partnership contributions, inasmuch as the contribution at issue must be repaid before the share capital and the *Land* receives the whole of the agreed remuneration and not a dividend in proportion to profits. It adds that unlimited silent partnership contributions without step-up provisions, such as the contribution at issue, do exist on the market, and that the size of that contribution is not unusual. Finally, as regards the classification of the contribution, it refers – in a footnote – to its Decision 2006/742/EC of 20 October 2004 on aid granted by Germany to Helaba (OJ 2006 L 307, p. 159), which is the decision at issue in the case giving rise to the judgment of the General Court of today's date in Case T-163/05 *Bundesverband deutscher Banken* v *Commission* [2010] ECR II-387.

15 The Commission goes on to calculate the appropriate remuneration for the capital which can be used by Helaba to guarantee the expansion of its credit business. It explains in that regard that, on the market, the remuneration for silent partnership contributions corresponds to a reference rate together with a remuneration premium ('the liability remuneration'). However, it takes the view that, in the present case, the reference rate element must be deducted from the market-rate remuneration to take account of the fact that the contribution at issue does not provide Helaba with liquid assets. By contrast, it considers that the tax on industrial and commercial operations ('the trade tax') – which industrial and commercial investors conducting business in Germany must pay, and which, in the present case, must be paid by Helaba because the *Land* is not liable for it – must be added to the rate of remuneration agreed by the parties, because it is part of the expense borne by Helaba as a result of the contribution at issue.

16 As regards the calculation of market-rate liability remuneration, the Commission's findings are based on two expert opinions of investment banks and the report of a firm of auditors in relation to those opinions. In the light of those three reports, the Commission considers it reasonable to take as a starting point a liability remuneration of 65 to 90 basis points corresponding to the premium identified on the market in respect of silent partnership contributions from issuers in the European banking

sector which are expressed in euros, are of unlimited duration and which include a step-up provision.

17 The Commission considers whether it is appropriate to apply premiums or discounts to that liability remuneration in order to take account of the specific nature of the contribution at issue as against the silent partnership contributions used as a reference for the calculation of that remuneration. It takes the view that it is appropriate to apply a premium of 30 to 40 basis points in order to take account of the fact that, unlike the unlimited silent partnership contributions which were used as a reference, the contribution at issue does not include a step-up provision. However, it considers that it is not necessary to apply a premium on account of the fact that, once the contribution at issue has been made, the proportion of silent partnership contributions in Helaba's core capital would be 57% and thus considerably higher than the proportion of that type of instrument in the own funds of private banks, or on account of the fact that the contribution at issue will take the proportion of silent partnership contributions which the *Land* holds in Helaba's core capital to 44%. The Commission ultimately considers a premium of 10 basis points to be possibly justified in order to take account of the fact that the remuneration is paid only if Helaba generates an annual profit, but it does not give a definitive view on the issue since taking account of that premium does not alter the final assessment.

18 Finally, in the light of all these considerations, the Commission concludes that the market-rate remuneration for a contribution such as the contribution at issue is between 1% and 1.4%. It considers, therefore, that the remuneration rate of 1.65% agreed by Helaba and the *Land*, to which the expense of the trade tax must be added, does not procure an advantage for Helaba and cannot, therefore, be classified as State aid.

19 The Commission adds that, in May 2005, Helaba placed a EUR 250 million unlimited silent partnership contribution with private institutional investors without a step-up provision, and that interest is paid on that contribution at the rate of 5.5% per annum. It explains that the 5.5% rate corresponds to the reference rate (Euribor or Mid-Swap; the contested decision states that the latter was 3.84% when the decision was adopted) together with a liability remuneration. It considers that the conditions attached to

that silent partnership contribution confirm its assessment that the agreed remuneration for the contribution at issue is in line with market remuneration, and that Helaba would be in a position to place a silent partnership contribution on the market if it did not receive the contribution at issue.

Procedure and forms of order sought by the parties

20 By application lodged at the Registry of the Court on 26 January 2006, the applicant, the Bundesverband deutscher Banken eV (German Federation of Private Banks), brought the present action.

21 By documents lodged at the Registry of the Court on 6 and 13 June 2006 respectively, Helaba and the *Land* applied for leave to intervene in the present proceedings in support of the Commission. By order of 14 September 2006, the President of the Third Chamber of the Court of First Instance granted them leave to intervene. The interveners lodged their statements in intervention within the prescribed period. The applicant and the Commission also lodged their observations on those statements within the prescribed period.

22 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber to which, in consequence, the present case was assigned.

23 In view of the end of the term of office of one of the members of the Chamber, the President of the Court of First Instance designated another Judge to complete the Chamber, in accordance with Article 32(3) of the Rules of Procedure of the Court of First Instance.

24 By letter of 20 May 2008, the Court ordered the Commission to produce certain documents, including the confidential version of the contested decision. The Commission complied with the order within the prescribed period.

25 Upon hearing the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

26 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 9 September 2008.

27 It was decided on that occasion that, before closure of the oral procedure, the Commission would be allowed to reply in writing to one of the questions put by the Court. The Commission lodged its reply and the applicant its observations within the prescribed period. The oral procedure was closed on 8 October 2008.

28 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

29 The Commission, supported by Helaba, contends that the Court should:

— declare the action inadmissible and, in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

30 The *Land* contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

1. *Admissibility*

31 The Commission, supported by Helaba, argues that the action is inadmissible in so far as the applicant is not individually concerned by the contested decision.

32 It must be noted that the Court is entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of the action on the merits without first ruling on the objection of inadmissibility raised by the defendant (Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraphs 51 and 52, and judgment of the Court of First Instance of 13 September 2006 in Joined Cases T-217/99, T-321/00 and T-222/01 *Sinaga* v *Commission*, not published in the ECR, paragraph 68).

33 In the circumstances of the present case, the Court considers it necessary to begin by examining the pleas put forward by the applicant, without first ruling on the plea of inadmissibility raised by the Commission, since the action for annulment is in any event unfounded on the grounds set out below.

2. *Substance*

34 The applicant puts forward three pleas in law alleging, respectively, a failure to state reasons, infringement of Article 87 EC and infringement of the applicant's procedural rights owing to the Commission's failure to initiate the formal investigation procedure provided for under Article 88(2) EC.

The plea alleging a failure to state reasons

35 The applicant submits that the contested decision does not contain adequate reasons in respect of the classification of the contribution at issue as a silent partnership contribution for the purpose of market comparisons; of the taking into account of the trade tax; of the deduction of refinancing costs; and of the proposition that the remuneration is in line with market conditions.

The classification of the contribution at issue

— Arguments of the parties

36 The applicant submits that the statement of reasons for the Commission's assessment in recital 25 to the contested decision that the contribution at issue 'is comparable to other market-rate silent partnership contributions' is inadequate.

37 First of all, the applicant is critical of the fact that the Commission bases its assessment in respect of the classification of the contribution at issue on the draft contract without summarising its content. The applicant states that the Commission merely refers to the fact that the parties to the contribution at issue described it in the draft contract as a silent partnership contribution, and that the Commission did not, therefore, give reasons for the comparability of the contribution at issue with other market-rate silent partnership contributions.

38 Second, it submits that the Commission does not give reasons for its assertion, in recital 26 to the contested decision, that the contribution at issue has to be repaid before the share capital in the event of liquidation or insolvency, whereas, in particular, the contract relating to the contribution concerned in the case giving rise to the judgment of today's date in Case T-163/05 *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above, provides that the repayment of that contribution did not take priority over the repayment of share capital.

39 Third, it maintains that the statement in recital 26 to the contested decision that the *Land* receives 'the whole of the agreed remuneration whereas an investor in the share capital is entitled only to payment of a dividend in proportion to profits' is unclear

and does not indicate what the Commission intends to establish by adopting that comparison.

40 Fourth, the Commission does not give reasons for its statements in recital 27 to the contested decision that 'unlimited silent partnership contributions without step-up provisions can be found on the market' and that 'the size of the silent partnership contribution in question is not unusual'. The applicant takes the view that if the Commission wanted to substantiate its statements by relying on the issues in 1998 and 1999 to which it had referred in Decision 2006/742, it should have included the corresponding part of Decision 2006/742 in the contested decision. The applicant takes the view, moreover, that the Commission failed to state why the situation on the capital markets in 1998 and 1999 was comparable to the situation at the time of the adoption of the contested decision in the summer of 2005. It also submits that, in Decision 2006/742, the Commission merely reproduced the arguments on which the Federal Republic of Germany relied in relation to the 1998 and 1999 issues. In its observations on the statements in intervention, it further submits that the contested decision does not satisfy the obligation to state reasons because the silent partnership contributions referred to cannot be identified in the non-confidential version of that decision, owing to the anonymity of the banks.

41 Fifth, according to the applicant, the Commission provided inadequate reasons for its assertion in recital 29 to the contested decision that the contribution at issue represents 'various advantages' for the *Land* as against an investment in share capital. The applicant submits in that regard that the Commission's statements are 'superficial', 'one-sided' and 'without substance'.

42 The Commission, supported by Helaba, denies that the contested decision contains inadequate reasoning with regard to the classification of the contribution at issue as a silent partnership contribution. The *Land* did not put forward any arguments in that regard.

— Findings of the Court

43 The Court observes that the statement of reasons must be appropriate to the measure concerned and the context in which the measure was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the Court to carry out its review and to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded (*WestLB*, cited in paragraph 13 above, paragraph 278).

44 It is not necessary for the statement of reasons to specify all the relevant matters of fact or of law, since the question whether the statement of reasons for a measure satisfies 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 (*WestLB*, cited in paragraph 13 above, paragraph 279).

45 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (*WestLB*, cited in paragraph 13 above, paragraph 280).

46 With regard, specifically, to a Commission decision that the notified measure does not constitute aid, the obligation to state reasons requires that the reasons which led the Commission to consider that the measure concerned does not fall within the scope of Article 87(1) EC should be stated.

47 Furthermore, it has consistently been held that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons

given are correct, which goes to the substantive legality of the contested measure (see Joined Cases T-239/04 and T-323/04 *Italy* v *Commission* [2007] ECR II-3265, paragraph 117 and the case-law cited).

48 With regard, first of all, to the applicant's complaint concerning the Commission's reliance on the draft contract, when the content of that contract is neither reproduced in the contested decision or known to the applicant or to the Court, suffice it to note that, although the Commission does not reproduce the text of the draft contract's provisions, it mentions the various matters arising from that draft on which its legal assessment is based, with the result that both the applicant and the Court are in a position to ascertain the Commission's reasoning.

49 As regards the argument that the Commission merely made reference to the fact that the parties to the contribution at issue described it as a silent partnership contribution in the draft contract, it must be noted that the Commission did not rely exclusively on the description given by the parties to the contribution at issue. Moreover, even if it had done so, that would not mean that the contested decision was vitiated by a failure to state reasons, since the question whether the Commission can classify the contribution solely on the basis of the description given by the parties is one that goes to the substance of the reasons put forward by the Commission, and not their adequacy.

50 Second, as regards the alleged failure to give reasons for the Commission's statement that the contribution at issue must be repaid before the share capital in the event of liquidation or insolvency, that is a straightforward statement of information derived from the draft contract (see paragraph 5 above) and, consequently, requires no further reasons to be given. The doubts expressed by the applicant as to whether or not that statement is erroneous do not relate to the adequacy of the reasons for the contested decision but its substance and, in particular, the material accuracy of the facts established by the Commission.

51 Third, as regards the reasons for the Commission's statement that the *Land* receives 'the whole of the agreed remuneration whereas an investor in the share capital is entitled only to payment of a dividend in proportion to profits', suffice it to note that it is clear from the whole of recital 26 to the contested decision – which states that, 'just like an investor of a silent partnership contribution on the capital market', the *Land* receives the whole of that remuneration – that the Commission considered the form of the agreed remuneration for the contribution at issue to be characteristic of silent partnership contributions rather than of share capital, and that that fact, among others, supports the proposition that the contribution at issue should be classified as a silent partnership contribution. The doubts expressed by the applicant as to whether the form of the agreed remuneration for the contribution at issue is in fact characteristic of silent partnership contributions do not relate to the reasons for the contested decision, but to its substance.

52 Fourth, as regards the reasons for the Commission's assertions that 'silent partnership contributions without step-up provisions can be found on the market', and that 'the size of the silent partnership contribution in question is not unusual', suffice it to point out that the Commission merely noted two points which are clear from the information supplied in the expert reports and, in particular, from transactions carried out on the market to which it refers in recitals 49 and 56 to the contested decision. The reference to Decision 2006/742 in the footnote does not concern those two findings of fact but the whole of the Commission's reasoning in respect of the classification of the contribution at issue as a silent partnership contribution for the purposes of the market comparison of the agreed remuneration. Since the Commission did not base those statements on market data in relation to 1998 and 1999, it did not have to state why the situation on the market in 1998 and in 1999 is comparable to the situation at the time of the adoption of the contested decision.

53 With regard to the argument that the Commission should not have referred back to Decision 2006/742 but should have reproduced the relevant parts of that decision in the contested decision, it must be held that that argument is invalidated by the case-law according to which a statement of reasons for a decision is sufficient if it refers to a document which is already in the addressee's possession and which contains the

matters on which the institution based its decision (see, to that effect and by analogy, Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 144), as indeed is the case here, since the applicant received a copy of Decision 2006/742 when it was adopted, several months before the adoption of the contested decision.

54 With regard to the argument that the statement of reasons for the contested decision is inadequate because the silent partnership contributions used for the purposes of comparison cannot be identified owing to the anonymity of the banks which issued them, it must be pointed out that what the applicant is actually criticising is the incomplete nature of the non-confidential version available to it when it brought its action, and not the statement of reasons for the contested decision as such. Furthermore, it must be noted that, in the present case, the deletion of certain information from that version was not such as to prevent the applicant from defending its rights or ascertaining whether the contested decision was well founded. Notwithstanding the fact that the names of the banks which issued the contributions in question were deleted, the non-confidential version of the contested decision contains, in a form that is sufficiently comprehensible, the assessment criteria on which the Commission was able to base its view. Moreover, the confidential version of the contested decision, as notified to the Federal Republic of Germany, was in any event communicated to the applicant in the course of the proceedings (see paragraph 24 above), and the applicant did not make any new observations on the basis of the passages concerned.

55 Fifth, as regards the Commission's assessment that the contribution at issue represented advantages for the *Land* as against an investment in the share capital, it must be noted that, in stating that the Commission's assertions are 'superficial', 'one-sided' and 'without substance', the applicant is not in fact criticising the inadequacy of the reasoning, but the substance of the assessment made.

56 In those circumstances, it must be held that the statement of reasons for the contested decision is not inadequate with regard to the classification of the contribution at issue.

Taking into account the trade tax

— Arguments of the parties

57 The applicant submits that the contested decision does not include any statement of reasons for the assessment in recital 36 that '[a]n institutional investor operating in a market economy would … have required a higher remuneration than the *Land* in order to offset his trade tax burden' and '[f]or its part, Helaba would have been fully prepared to pay that remuneration premium to such an investor'.

58 The Commission, supported by Helaba, denies that the contested decision contains an inadequate statement of reasons with regard to the account taken of the trade tax as a charge to be borne by Helaba as a result of the contribution at issue. The *Land* did not put forward any arguments in that regard.

— Findings of the Court

59 It must be held that the Commission did no more in the present case than apply the conclusion which it had reached in Decision 2006/742 in respect of the contribution at issue in that case. That decision, as has already been shown above (see paragraph 53 above), was already in the applicant's possession.

60 However, the examination of Decision 2006/742 and of the applicant's arguments in respect of the manifest error of assessment allegedly made by the Commission in that regard, which is set out at paragraphs 188 to 192 of the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above, did not

reveal any failure to state reasons that would prevent the applicant from challenging that decision or the Court from assessing its substance.

61 It follows from this that, on any view, the contested decision fits into a well-established line of decisions, known to the applicant, and may, therefore, be reasoned in a summary manner (see, to that effect, Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31).

The deduction of the refinancing costs

— Arguments of the parties

62 The applicant submits that recitals 37 to 41 to the contested decision do not disclose the criteria on which the Commission relied in reaching the conclusion that Helaba is effectively bearing additional refinancing costs in the amount of the gross refinancing rate over and above those which it would have borne if it had received a silent cash contribution, nor do they explain why the tax deductibility of the remuneration justifies the deduction of the refinancing costs.

63 The Commission, supported by Helaba, denies that the contested decision contains an inadequate statement of reasons in respect of the account taken of the fact that Helaba is bearing additional refinancing costs in the present case. The *Land* did not put forward any arguments in that regard.

— Findings of the Court

64 It must be noted that, as the applicant indicates in its application, the Commission did no more in the present case than apply the conclusion which it had reached in Decision 2006/742 with regard to the contribution at issue in that decision.

65 In those circumstances, and given that the Court has held in its judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above, that the Commission's reasoning for its conclusion was adequate (see paragraphs 265 to 267 of that judgment), the applicant's arguments concerning the alleged failure to state reasons for the contested decision must be rejected in so far as the contested decision could, in any event, be understood in the light of the statement of reasons contained in Decision 2006/742 (see paragraph 61 above).

Whether the remuneration agreed between the *Land* and Helaba is in line with market conditions

— Arguments of the parties

66 The applicant maintains that the reasons put forward by the Commission to support its conclusion that the remuneration agreed between the *Land* and Helaba is in line with market conditions are inadequate. It submits in that regard that the statement in recital 69 to the contested decision – that the fact that silent partnership contributions represent a significant part of the core capital means that there is an increased likelihood of recourse to such contributions 'instead of to the share capital' – is inadequate and contradictory as against its statement that, in the event of insolvency, silent partnership contributions must be repaid before the share capital. It also takes the view that no reasons are given for the Commission's assertion in recital 73 to the contested decision that the *Land* has considerable influence on the determination of Helaba's risk profile, and that the Commission does not explain whether the terms of the EUR 500 million issue which it mentions in recital 74 to the decision and to which

a single investor subscribed can be compared with those of the contribution at issue, with the result that neither the applicant nor the Court is in a position to ascertain whether the two contributions are comparable.

67 The Commission, supported by Helaba, denies that the statement of reasons for the contested decision is inadequate with regard to the question whether the agreed remuneration for the contribution at issue is in line with market conditions. The *Land* did not put forward any arguments in that regard.

— Findings of the Court

68 With regard to the Commission's statement that the fact that silent partnership contributions represent a significant part of the core capital means that there is an increased likelihood of recourse to such contributions 'instead of to the share capital', it must be held that, while the way in which it is phrased may not be perfect, it is clear from the contested decision as a whole that the Commission intended that statement not to define the order of priority as between share capital and silent partnership contributions in the event of insolvency, but to indicate that the risk that the share capital might not be sufficient in the event of economic difficulties is greater where silent partnership contributions represent a significant part of the core capital. That assertion is not, therefore, one that prevents the applicant from challenging the contested decision or the Court from assessing its lawfulness.

69 With regard to the Commission's statement that the *Land* has considerable influence on the determination of Helaba's risk profile, it must be observed that the Commission explained the basis of that assertion in recital 73 to the contested decision. While it is indeed the case that that explanation was deleted in the non-confidential version of the contested decision that was available to the applicant when it brought this action, the confidential version of that decision was produced by the Commission at the Court's request and communicated to the applicant before the hearing (see

paragraph 24 above). In those circumstances, it must be held that the applicant was in a position to defend its rights.

70 As regards the fact that the Commission does not explain whether the terms of the EUR 500 million issue to which a single investor subscribed are comparable to those of the contribution at issue, it is apparent from the contested decision that the Commission refers to that example in order to show that it cannot be ruled out that an investor might concentrate all his risks in a single undertaking. However, whether the fact that that concentration of risk in a given undertaking cannot be ruled out is sufficient to deem the remuneration agreed between the *Land* and Helaba to be in line with market conditions is a question that relates not to the reasons for the contested decision, but to its substance.

71 In those circumstances, it must be held that the contested decision is not vitiated by a failure to state reasons with regard to whether the agreed remuneration for the contribution at issue is in line with market conditions.

72 The plea alleging a failure to state reasons for the contested decision is therefore dismissed.

The plea alleging an infringement of Article 87 EC

Arguments of the parties

73 The applicant submits that the Commission infringed Article 87 EC in finding that the agreed remuneration for the contribution at issue satisfies the private investor test and does not, therefore, constitute State aid.

74 It submits in that regard that the Commission made a manifest error of assessment in taking the view, first of all, that the trade tax owed by Helaba must be added to the rate of remuneration agreed between the *Land* and Helaba for market comparison purposes since it is part of the expense borne by Helaba as a result of that contribution; second, that the fact that Helaba bears the costs of obtaining on the market the liquidity which it does not derive from the contribution at issue must be taken into account; and third, that the market-rate liability remuneration is below the rate of 1.65% agreed between the parties and increased owing to the impact of the trade tax.

75 As regards the account taken of the trade tax and of the refinancing costs borne by Helaba owing to the lack of liquidity of the contribution at issue, the applicant essentially reiterates the arguments which it put forward in the case giving rise to the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above, and which are set out at paragraphs 185 to 186 and 263 of that judgment.

76 With regard to the appropriate level of remuneration, it maintains, in essence, that the contribution at issue presents a higher risk profile than silent partnership contributions issued on the market and that a private investor would, therefore, have required a higher remuneration for that contribution than that required on the market for silent partnership contributions. Its argument is based on the size of the contribution at issue, the impossibility of the *Land* withdrawing its investment and the risk of loss in the event of insolvency. It takes the view, moreover, that the fact that the agreed remuneration for the contribution at issue is fixed is not relevant to the determination of the market rate, and that the Commission was not entitled to rely on the silent partnership contribution issued by Helaba in 2005 since it is not comparable to the contribution at issue.

77 The Commission, supported by the *Land* and Helaba, opposes those arguments.

Findings of the Court

78 With regard to the arguments concerning the account taken of the trade tax and the deduction of the refinancing costs, these must be rejected for the same reasons as those set out at paragraphs 188 to 192 and 269 to 291 of the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above.

79 With regard to the arguments aimed at demonstrating that the contribution at issue presents a higher risk profile than that of the silent partnership contributions used by the Commission for comparison purposes, it is appropriate to examine in turn the arguments as to the significance for the calculation of the market-rate remuneration – and thus for the assessment of the existence of aid – of the size of the investment, of the impossibility of the *Land* withdrawing its investment, of the risk of loss in the event of insolvency, of the fact that the agreed remuneration for the contribution at issue is fixed, and the relevance of the comparison made by the Commission with Helaba's May 2005 issue.

— The size of the investment

80 The applicant submits that the Commission failed properly to take into account the significance of the size of the investment for the purposes of the classification of the contribution at issue and the comparison of the remuneration agreed between the *Land* and Helaba with the liability remuneration for the silent partnership contributions issued on the market.

81 As regards, in the first place, the significance of the size of the investment for the classification of the contribution at issue as a silent partnership contribution for the purposes of a market comparison, the applicant submits that the fact that it was subscribed to by a single investor, that the *Land* holds 44% of Helaba's core capital and that 83% of the *Land*'s investments are concentrated in a single bank means that the

contribution at issue is akin to share capital, since the risk for the *Land* is higher than that assumed by investors subscribing to silent partnership contributions issued on the market.

82 As regards, first, the fact that a single investor subscribed to the whole of the contribution at issue, the applicant submits, referring to *WestLB*, cited in paragraph 13 above (paragraph 255), that an investor who alone subscribes to the whole of an investment cannot take the conduct of other operators on the market into account and, consequently, runs a higher risk.

83 It must be pointed out that, at paragraph 255 of *WestLB*, cited in paragraph 13 above, the Court merely took the view, on examining the appropriate remuneration for the investment, as opposed to the classification of the investment, that an informed private investor – that is to say an investor who wishes to maximise his profits without running excessive risks in comparison with other operators on the market – would, in principle, require a minimum return equivalent to the average return for the sector concerned.

84 It must be held that that reference by the Court to the conduct of other investors does not confirm the applicant's argument, since it bears no relation to the question whether the fact that a single investor subscribes to the whole of an issue increases the risk profile of the investment.

85 Next, as regards the fact that the silent partnership contributions to which the *Land* subscribed represent 44% of Helaba's core capital and 83% of the *Land*'s investments, it must be held that it is not manifestly erroneous to decide, as the Commission implicitly did, that those two factors are irrelevant to determining whether the contribution at issue presents a risk profile more akin to that of share capital or to that of silent partnership contributions on the market and, in consequence, to determining whether the question of the remuneration being in line with market conditions must be examined by reference to the remuneration for silent partnership contributions or to that for share capital. Reference must be made in that regard to paragraphs 140 and 141 of the judgment of today's date in *Bundesverband deutscher Banken* v

Commission, cited in paragraph 14 above, in which the Court rejected similar arguments put forward by the applicant.

86 Furthermore, the Court must reject the applicant's argument that, by failing to take account of the share of Helaba's core capital held by the *Land* for the purposes of the classification of the contribution at issue, the Commission contradicts its own Decision 2006/737/EC of 20 October 2004 on aid from Germany for Westdeutsche Landesbank – Girozentrale, now WestLB AG (OJ 2006 L 307, p. 22), in which it found that the significance of the size of the investment is indicative of a similarity to share capital.

87 It must be observed that, in Decision 2006/737, it was not the size of the original own funds acquired by the *Land* of North Rhine-Westphalia as sole subscriber that was viewed as an indication that the transfer was akin to an injection of share capital, but the overall volume of the transaction because, unlike in the present case, such a sizeable volume of original own funds could, at that time, be obtained by a bank only in the form of share capital, irrespective of whether the investment was made by one or more investors (see recitals 204 et seq. to Decision 2006/737).

88 As regards, in the second place, the significance of the size of the investment for determining the market-rate remuneration, the applicant takes issue with the four arguments on which the Commission based its view that it was not necessary to apply a premium in order to take account of the *Land*'s substantial commitment to Helaba.

89 Thus, first, the applicant denies that the risk resulting from the concentration of the *Land*'s investments in Helaba is compensated for by the fact that the *Land*'s remuneration was not reduced in spite of the fact that, on the market, the award of an entire issue to a single investor would lead to the remuneration being reduced. It submits

in that regard that the reference to any discount in the market remuneration is of no relevance in the present case because the contribution at issue was not offered to a large number of investors who would consequently be in competition with each other.

90 It must be observed that the fact that the contribution was not negotiated on the market does not mean that it is manifestly erroneous to take the view that a remuneration discount, such as to compensate for any remuneration premium on account of the significant exposure of the *Land* to Helaba, may be taken into account. Indeed, the applicant does not claim that Helaba would have been unable to obtain on the market, possibly as one of a number of investors, a contribution which, in its view, has the same characteristics as the contribution at issue (size, unlimited duration, liability remuneration). In those circumstances, Helaba was able to encourage the *Land* to forgo any remuneration premium to take account of its significant exposure to Helaba, since Helaba could have rejected the *Land*'s offer and obtained the funds on the market at a lower cost.

91 Second, the applicant maintains, with regard to the Commission's assertion that the *Land* has considerable influence on the determination of Helaba's strategic risk profile, that the non-confidential version of the contested decision does not disclose why the Commission came to that conclusion and, in any event, does not explain why, as a result, the *Land* should be required to forgo the appropriate remuneration for the contribution at issue.

92 It must be observed that, although the applicant appears to dispute the adequacy of the statement of reasons for the contested decision, these arguments appear in a section of the application entitled 'Erroneous arguments of the Commission' in connection with the plea alleging an infringement of Article 87 EC, and not in the section relating to the plea alleging the inadequacy of the statement of reasons.

93 In any event, as regards the fact that the reason for the Commission's finding that the *Land* has considerable influence on the determination of Helaba's strategic risk

profile does not appear in the non-confidential version of the contested decision, it is necessary to refer back to paragraph 69 above, where that argument has already been rejected by the Court.

94 With regard to the relationship between the considerable influence of the *Land* on the determination of Helaba's strategic risk profile and the amount of the remuneration, it follows from recitals 71 to 74 to the contested decision that the Commission took the view that, taken in conjunction with the three other matters it examined, that influence reduces the risk to which the *Land* is exposed as a result of the fact that it holds a significant part of Helaba's core capital and that 83% of its investments are concentrated in Helaba, and that, in consequence, the *Land* did not forgo greater remuneration for the contribution at issue, but accepted a remuneration that was adequate having regard to all the circumstances of the transaction. It must be noted, however, that the applicant did not put forward any argument intended specifically to show that it was manifestly erroneous to take the view that the *Land*'s considerable influence on Helaba's strategic risk profile could compensate for the risk to which the *Land* is exposed on account of the fact that it holds a significant part of Helaba's core capital and that 83% of its investments are concentrated in Helaba.

95 Third, the applicant disputes the relevance of the Commission's reference to a EUR 500 million issue subscribed to by a single investor. It complains that the Commission did not identify that transaction or specify the details, and submits that, in those circumstances, it is not possible to conclude that there is nothing unusual about the fact that the *Land* subscribed to the whole of the contribution at issue.

96 It must be held, as the applicant states, that the mere fact that an investor subscribed to a EUR 500 million issue is not sufficient to prove that the risk profile of the contribution at issue does not entail a greater remuneration than the liability remuneration for silent partnership contributions on the market. Given that the Commission does not examine the liability remuneration agreed in respect of that contribution, this example cannot be used as a basis on which to conclude that the concentration of the *Land* in Helaba should not give rise to a remuneration premium.

97 Fourth, the applicant denies that the fact that the *Land* has holdings of a total value of EUR 361.5 million in undertakings other than Helaba reduces the strong risk of concentration run by the *Land* in respect of Helaba.

98 It must be held that the fact that the *Land* does not concentrate all its investments in Helaba, only 87%, is not of itself sufficient to substantiate the Commission's conclusion that the *Land*'s considerable commitment to Helaba does not justify a premium on the remuneration agreed for the contribution at issue.

99 However, in the light of paragraphs 88 to 94 above, the fact that the latter aspects, which are mentioned by the Commission in the contested decision, do not support the conclusion that a remuneration premium on account of the concentration of the *Land*'s risk in Helaba was not necessary cannot lead to the annulment of the contested decision (see, to that effect, Case T-155/04 *SELEX Sistemi Integrati* v *Commission* [2006] ECR II-4797, paragraph 47).

100 Furthermore, it must be noted that the size of the amounts which the *Land* invested in Helaba derives in part from its decision not to split the special fund at issue in the case giving rise to the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above, and that that concentration of risk on the part of the *Land* does not represent a specific interest for Helaba such as to compel it to remunerate the *Land* for the increased risk assumed (see paragraphs 229 and 230 of the judgment concerned).

101 In view of the foregoing, it must be held that the applicant's arguments concerning the size of the *Land*'s investment in Helaba do not demonstrate that the Commission made a manifest error of assessment in concluding that the remuneration for the contribution at issue was not required to be greater than the liability remuneration for silent partnership contributions on the market.

— The impossibility of withdrawing the investment

102 The applicant submits that the impossibility of the *Land* withdrawing its investment represents a crucial difference as against other silent partnership contributions on the market, and complains that the Commission failed to take it into account in determining the normal market remuneration. The applicant repeats the arguments which it put forward in connection with the case giving rise to the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above, and which are set out at paragraphs 151 and 233 thereof. Those arguments must therefore be rejected for the reasons set out at paragraphs 152 to 154 and 234 to 237 of that judgment.

— The risk of loss in the event of insolvency

103 The applicant submits that the risk of loss in the event of insolvency constitutes a crucial difference as against other silent partnership contributions on the market, and complains that the Commission failed to take it into account in determining the normal market remuneration. It repeats the arguments which it put forward concerning Decision 2006/742 which are set out at paragraph 108 of the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above. Moreover since, owing to its confidential nature, the draft contract was not communicated to the applicant before its application was lodged, the applicant states that the parties probably envisaged the contribution at issue ranking below the share capital, as it believes was the case in respect of the contribution at issue in the case giving rise to that judgment.

104 With regard to the content of the draft contract, suffice it to note that Article 4 provides that '[i]n the event of insolvency proceedings relating to the assets of [Helaba] or in the event of its liquidation, the [contribution at issue] shall be repaid only after all creditors of [Helaba] have been satisfied, including holders of participation rights and creditors of other guarantee capital as referred to in Paragraph 10(5a) of the KWG, but before shareholders have been satisfied'.

105 It is thus apparent from the draft contract that the contribution at issue ranks above the share capital and that, as the Commission found in recital 26 to the contested decision, it is comparable in that regard to other silent partnership contributions on the market, which would suggest that the remuneration agreed between the *Land* and Helaba may be compared with the remuneration fixed for silent partnership contributions issued on the market and not with the remuneration arising from investments in share capital. It must be noted that, having received a copy of the draft contract following the Court's request to the Commission, the applicant made no observations in that regard.

106 As far as the other arguments put forward by the applicant are concerned, these must be rejected for the reasons set out at paragraph 109 of the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above.

— The relevance of the fixed nature of the remuneration

107 The applicant submits, first, that it follows from recitals 26 and 29 to the contested decision that the Commission considers the fact that the remuneration for the contribution at issue is fixed and does not, in principle, depend on the annual results, whereas the amount of dividends depends on Helaba's accounting profits, to constitute an advantage in comparison with an investment in share capital. It maintains that, from an economic perspective, the structure of the remuneration for the contribution at issue presents both advantages and disadvantages in comparison with that of remuneration for share capital.

108 It must be noted in that regard that, while the Commission does indeed state in recital 29 to the contested decision that a silent partnership contribution presents certain advantages for the *Land* in comparison with a transfer of special assets as share capital, it does not base its assessment in respect of the classification of the contribution at issue on that statement. That classification is based, as far as the remuneration is concerned, on the statement made in recital 26 to the contested decision that, just like an investor of a silent partnership contribution on the capital market, the *Land* receives the whole of that remuneration, whereas an investor in the share capital is entitled to the payment of a dividend in proportion to profits. The Commission does

not thereby indicate that remuneration that is fixed is more favourable than entitlement to a dividend. It merely takes the view that fixed remuneration, such as that provided for in respect of the contribution at issue, is appropriate to silent partnership contributions rather than to share capital and that, as a result, the type of remuneration agreed between the parties to the contribution at issue renders it similar to silent partnership contributions on the market.

109 In those circumstances, there is no need to examine the applicant's arguments as to the substance of the Commission's assertion, in recital 29 to the contested decision, that a silent partnership contribution presents certain advantages for the *Land* as against a transfer of special assets as share capital.

110 Second, the applicant submits that, contrary to the Commission's assertion, fixed remuneration is not appropriate to silent partnership contributions, nor is variable remuneration appropriate to share capital. It refers in that regard to the arguments which it put forward in the case giving rise to the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above. However, those arguments were rejected at paragraphs 113 to 122 of that judgment.

111 Third, the applicant submits that the fact that the *Land*'s right of remuneration depends on the existence of an annual surplus on the part of Helaba represents a divergence, to the detriment of the *Land*, as compared with the structure of silent partnership contributions on the market, since the right of remuneration for these depends, as a rule, on the issuer's accounting profit and only in certain circumstances on an annual surplus, with the result that the issuer is less likely to suspend payment of the remuneration.

112 It must be observed that the expert reports to which the Commission refers in recitals 59 and 60 to the contested decision indicate that, contrary to what is claimed by the applicant, it is not clear that the conditions governing payment of the remuneration for the contribution at issue are less favourable to the *Land* than normal market

conditions. Thus, whilst investment bank A took the view that they were indeed less favourable, investment bank B and the firm of auditors concluded that the conditions governing payment of the remuneration for the contribution at issue were more favourable to the *Land* than would normally be the case.

113 In any event, it must be noted that the Commission stated in recital [65] to the contested decision that, as the applicant claims, a remuneration premium for more restrictive payment conditions might be justified. However, it also took the view, without the applicant having put forward any arguments to the contrary, that the failure to take account of a premium owing to more restrictive payment conditions did not affect its assessment, since the liability remuneration resulting from the rate agreed by the *Land* and Helaba for the contribution at issue, together with the charge representing the trade tax, namely 1.925%, was still higher than the market liability remuneration resulting from the addition of the premium proposed by investment bank A to the range determined by the expert reports.

114 In those circumstances, it must be concluded that the applicant's arguments do not establish that the Commission made a manifest error of assessment in taking the view that the remuneration provisions of the draft contract mean that the contribution at issue is more akin to other silent partnership contributions on the market and that the differences that exist do not preclude the view that the rate of remuneration agreed between the parties is in line with a market rate of liability remuneration.

— The relevance of the May 2005 contribution

115 The applicant submits that the Commission should not have relied on the silent partnership contribution issued by Helaba in May 2005 (see paragraph 19 above) since this cannot be compared with the contribution at issue. It maintains that the two contributions are distinguished, in particular, by the fact that numerous investors subscribed to the May 2005 contribution, it was listed on the stock exchange and was

required to be repaid at its nominal value together with interest, there being no provision for a reduction for losses by Helaba. Furthermore, it asks the Court to order the Commission to state whether agreements exist as to the ranking of the contribution at issue, particularly in relation to the silent partnership contribution of May 2005.

116 It must be held that the Commission mentioned the May 2005 issue in the contested decision only for the sake of completeness once it had concluded that the remuneration for the contribution at issue that was agreed by the *Land* and Helaba was at the market rate. In those circumstances, given that the applicant's arguments relating to the assessments on which the Commission based that conclusion have been rejected, any possible irrelevance of the comparison with the contribution issued by Helaba in May 2005 cannot bring about the annulment of the contested decision.

117 In any event, even on the assumption that the differences invoked by the applicant are relevant and genuine – which is denied by Helaba so far as concerns the level of repayment in the event of cancellation, as to which the applicant did not respond – the May 2005 contribution shows, as the Commission states in the contested decision, that Helaba could issue silent partnership contributions on the market, and that, as regards matters of interest to Helaba, such as the classification as core capital and the rate of liability remuneration, and for which it was prepared to remunerate investors, those silent partnership contributions have the same characteristics as the contribution at issue. It follows from this that Helaba was not obliged by virtue of its economic situation to accept the contribution at issue and, accordingly, was in a position to refuse to remunerate the *Land* for those characteristics of the contribution which, while representing an increase in the risk run by the *Land*, did not confer on Helaba any additional advantage over a contribution issued on the market.

118 It must be noted that the degree of risk assumed by the *Land* in relation to its investments is irrelevant for the purposes of their classification as State aid within the meaning of Article 87 EC unless Helaba obtained an advantage which it would not have been able to obtain on the market.

119 In view of the foregoing, the applicant's second plea must be dismissed.

The plea relating to an infringement of the applicant's procedural rights

Arguments of the parties

120 The applicant submits that the Commission should have initiated the formal investigation procedure provided for under Article 88(2) EC, since, on the basis of the information available to the Commission, it was not in a position to reach the firm view that the contribution at issue was compatible with the EC Treaty, and that it reached the contrary conclusion only because it misapplied the private investor test in concluding that the remuneration for the contribution at issue was appropriate and that the gross refinancing costs resulting from the lack of liquidity of the contribution at issue had to be deducted from the remuneration.

121 It takes the view, in particular, that the Commission should have analysed in greater depth whether it was appropriate to deduct from the remuneration which a private investor would have required the refinancing costs borne by Helaba on account of the lack of liquidity, and the fundamental differences between the contribution at issue and 'market-rate' silent partnership contributions. Of those differences, the applicant mentions the fact that it is altogether impossible for the *Land* to withdraw or disinvest, and the higher risk accepted by the *Land* on account of the significant size of the contribution at issue as well as the 'accumulation of risks' arising from that contribution and from the contribution at issue in the case giving rise to the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above. It takes the view that the Commission should also have ascertained whether a private investor whose contributions represent more than 40% of a company's core capital, as in the present case, would have required greater remuneration.

122 The applicant challenges the Commission's assertion that these difficulties were all resolved in Decision 2006/742. It submits in that regard that, in its action against that decision, it set out in detail the many particular features of the contribution at issue in the light of other 'market-rate' silent partnership contributions, and the reasons precluding the deduction of financing costs. It maintains that some of these arguments were new as far as the Commission was concerned, and that the Commission was therefore faced with new issues when considering the contribution at issue.

123 The applicant submits, furthermore, that the fact that the Commission was faced with serious difficulties is demonstrated by the length of the preliminary examination, which lasted 15 months, clearly exceeding the two-month period envisaged for preliminary examinations by Article 4(5) of Regulation No 659/1999. The existence of serious difficulties is further confirmed by the fact that the Commission sent a total of four requests for information to the Federal Republic of Germany, and that the latter requested an extension of the time-limit imposed for its reply.

124 The Commission, supported by Helaba, opposes those arguments. The *Land* did not put forward any arguments in that regard.

Findings of the Court

125 It must be borne in mind that, according to the case-law, the procedure under Article 88(2) EC, which guarantees the Member States and the sectors concerned an opportunity to make their views known and allows the Commission to be fully informed of all the facts of the case before taking its decision, is essential whenever the Commission has serious difficulties in determining whether a State measure is compatible with the common market (Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13). The Commission cannot therefore limit itself to the preliminary procedure under Article 88(3) EC and take a favourable decision on a State measure unless it is in a position to reach the firm view, following an initial examination, that

the measure cannot be classified as aid within the meaning of Article 87(1) EC or that the measure, while constituting aid, is compatible with the common market (Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 329).

126 While the Commission's powers are circumscribed as far as initiating that procedure is concerned, it may, in accordance with the objective of Article 88(3) EC and with its duty of good administration, engage in a dialogue with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered (Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 45, and order of 21 November 2005 in Case T-426/04 *Tramarin* v *Commission* [2005] ECR II-4765, paragraph 29).

127 It must also be borne in mind, however, that, according to the case-law, the notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market (*Prayon-Rupel* v *Commission*, cited in paragraph 126 above, paragraph 47; see, to that effect, Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 60). The applicant bears the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of consistent evidence, concerning, first, the circumstances and the length of the preliminary examination procedure and, second, the content of the contested decision.

128 In the present case, the applicant maintains in support of its assertion that the Commission was not in a position to overcome all the difficulties encountered in its assessment of the contribution at issue, in essence, that the Commission came to the conclusion that the contribution at issue was in line with market conditions solely because it misapplied the private investor test, and refers in that regard to its arguments in relation to the infringement of Article 87 EC.

129 However, the question whether the Commission misapplied the private investor test is not to be confused with the question whether there are serious difficulties which require the formal investigation procedure to be initiated. Consideration of whether serious difficulties exist is not aimed at establishing whether the Commission applied Article 87 EC correctly, but whether, at the time of its adoption of the contested decision, there was sufficiently comprehensive information available to it to enable it to assess the compatibility of the disputed measure with the common market.

130 The fact that the Commission's assessment of the contribution at issue is, in the applicant's opinion, incorrect, and that the Commission did not respond to certain complaints raised by the applicant in connection with Case T-163/05 does not imply that the Commission was not in a position to take a decision on the measure in question on the basis of the information available to it or that it was, therefore, required to initiate the formal investigation procedure in order to complete its enquiry. It must, in particular, be observed that any argument raised by an interested party in the context of a separate procedure relating to similar circumstances is not necessarily likely to give rise to serious difficulties requiring the initiation of the formal procedure.

131 Furthermore, as regards the applicant's argument that the Commission should have examined in greater depth the fundamental differences between the contribution at issue and silent partnership contributions on the market as well as the consequences of its non-liquidity, it must be borne in mind that the Commission had initiated the formal investigation procedure in respect of the contribution at issue in the case giving rise to the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 14 above, as well as in respect of other transactions concerning the Landesbanken (regional banks) and that, on that occasion, there had, inter alia, been some discussion about the characteristics of the contribution at issue mentioned by the applicant, such as the amount of the funds transferred, the size of the share of Helaba's core capital which they represented, the permanent nature of the contribution, the lack of opportunity to withdraw the investment and the account taken of the higher costs resulting from the transactions concerned, as against transactions carried out on the market, owing to the non-liquidity of the assets transferred. It must, in particular, be noted that, contrary to what is claimed by the applicant, the argument relating to a reduced transfer value to compensate for the lack of liquidity

had already been advanced during the examination preceding the adoption of Decision 2006/742. In those circumstances, it must be held that, not only did the Commission have the information at the date of adoption of the contested decision allowing it to assess the relevance of each of the characteristics of the contribution at issue mentioned by the applicant, but also, like any other interested person, the applicant had the opportunity to provide the Commission with all the information it deemed necessary in that respect.

132 With regard to the applicant's arguments relating to the length of the preliminary examination and the fact that the Commission sent several requests for information to the Federal Republic of Germany before taking its decision, it must be noted that the length of the examination of the contribution at issue exceeded the period laid down for the preliminary examination of a notified measure – while account is nevertheless taken of the Commission's understandable desire to await the end of the formal investigation procedures initiated in respect of the earlier transactions in favour of the Landesbanken – and that the Commission sent three requests for information to the Federal Republic of Germany, one of which had to be repeated. It is apparent from the case-law that the fact that the time spent on a preliminary examination considerably exceeds the time usually taken, and the content of the discussions between the Commission and the Member State concerned during that stage of the procedure, may be evidence of the existence of serious difficulties in the assessment (see, to that effect, *Germany* v *Commission*, cited in paragraph 125 above, paragraphs 14, 15 and 17, and Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraphs 89 and 102). However, it must be held that, having regard to the applicant's arguments and to the circumstances of the case considered at paragraphs 129 to 131 above, the period of time involved in taking the contested decision and the despatch of several requests for information is not sufficient in the present case to demonstrate that the Commission adopted the contested decision notwithstanding the existence of serious difficulties.

133 This plea must, therefore, be dismissed.

134 Since all the pleas put forward by the applicant have been dismissed as unfounded, the action must be dismissed.

The applications for measures of organisation of procedure

135 In its application, the applicant asks the Court to order the Commission to produce the following documents:

— the expert reports and the report by the firm of auditors mentioned in recital 46 to the contested decision;

— the draft contract relating to the contribution at issue, mentioned in recital 16 to the contested decision;

— the calculations to establish the value of the contribution at issue referred to in recital 15 to the contested decision, together with the auditors' certificates.

136 In addition, the applicant asks the Court to order the Commission, first, to disclose the issue to which it refers in recital 74 to the contested decision by which an investor acquired the whole of the core capital of a German bank for the sum of EUR 500 million and, second, to inform the applicant whether agreements exist as to the ranking of the contribution at issue, and in particular in relation to the May 2005 contribution.

137 In its reply, the applicant asks the Court to request the Commission to produce the confidential version of the contested decision and the statutory guarantee agreement between Helaba's owners.

138 The expert reports, the auditor's report, the draft contract and the confidential version of the contested decision were produced by the Commission at the request of Court (see paragraph 24 above). As for the remainder, it is clear, in the light of all the foregoing considerations, that the Court has been able to rule on the present application on the basis of the documents submitted by the parties.

Costs

139 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the forms of order sought by the Commission, the *Land* and Helaba.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Bundesverband deutscher Banken eV to bear its own costs and to pay those of the European Commission, the *Land* Hessen and Landesbank Hessen-Thüringen Girozentrale.

Czúcz Vadapalas Labucka

Delivered in open court in Luxembourg on 3 March 2010.

[Signatures]

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