JUDGMENT OF THE GENERAL COURT (fourth chamber)

3 March 2010 *

In Case T-163/05,

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

applicant,

v

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

defendant,

* Language of the case: German.

supported by

Federal Republic of Germany, represented by M. Lumma and C. Schulze-Bahr, acting as Agents, and by J. Witting, lawyer,

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 2006/742/EC of 20 October 2004 on aid granted by Germany [to] Landesbank Hessen-Thüringen – Girozentrale (OJ 2006 L 307, p. 159),

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 By a law of 17 December 1998, the *Land* established a special fund called 'Wohnungswesen und Zukunftsinvestition' (Housing and Future Investment; 'the special fund'). The special fund comprises the *Land*'s claims from low-interest loans granted between 1948 and 1998 for the purpose of promoting social housing construction. As at 31 December 1998, the loan portfolio amounted to DEM 7.829 billion (approximately EUR 4 billion). Its cash value was determined by two independent experts at DEM 2.473 billion (EUR 1.264 billion).

3 The special fund was transferred to Helaba, under a contract ('the contract') between Helaba and the *Land*, as a 'silent partnership contribution' in the form of an internal partnership entering into force on 31 December 1998 ('the contribution at issue'). According to clause 1(2) of the contract, the purpose of the contribution was to serve, permanently, as liable equity capital for Helaba, in the form of core capital. The Bundesaufsichtsamt für das Kreditwesen (Federal Banking Supervisory Office; 'BAKred'), in fact, recognised the entire contribution as core capital. The view was thus taken, inter alia, that the contribution was in line with the Sydney Declaration, a press release by the Basel Committee on Banking Supervision of 27 October 1998 stating that the share of hybrid equity capital instruments (instruments which have certain characteristics both of shareholdings and of debt obligations) in the core capital of credit institutions may not exceed 15%, except in the case of instruments the contractual terms of which provide that the capital is issued permanently and is not coupled with any explicit feature – other than a pure call option by the issuer – which might lead to the instrument being redeemed.

4 The parties to the contract agreed that, in consideration for that silent partnership contribution, Helaba would pay the *Land* a remuneration of 1.4% per annum of the amount of the contribution, after deducting the part required to cover the promotion

of social housing construction. That remuneration consists of a remuneration for the liability function of 1.2% per annum and a premium of 0.2% for the perpetuity of the contribution and Helaba's unilateral right of notice. It was agreed, under a phased arrangement, that this remuneration would not be payable in the first four years (1998 to 2002) on the full value of the fund, but on the tranches rising in annual increments ('the phased model'). The tranches were fixed at DEM 700 million, DEM 1.2 billion, DEM 1.6 billion and DEM 2 billion (approximately EUR 380 million, EUR 610 million, EUR 820 million and EUR 1.02 billion, respectively).

B — *Cases concerning the German Landesbanken*

5 By letters of 31 May and 21 December 1994 the applicant, the Bundesverband deutscher Banken eV (Association of German Banks), informed the Commission of the European Communities that a certain number of *Länder*, including the *Land* of North-Rhine Westphalia, had transferred loans for housing construction to the liable equity capital of certain Landesbanken (regional banks), such as Westdeutsche Landesbank Girozentrale ('WestLB') or, if not, that they intended to do so. According to the applicant, the parties had not agreed any remuneration consistent with the test of the private investor operating in a market economy ("the private investor test') in return for these contributions, and therefore the increase in the equity capital of the relevant Landesbanken resulting from those transactions distorted competition in favour of the recipient banks.

6 By two letters of 6 August 1997 and 30 July 1998 the applicant informed the Commission of two further transfers of assets, including the contribution at issue.

7 Initially, the Commission examined the transfer of assets to WestLB ('the WestLB case'), announcing that it would examine the transfers to the other banks in the light of the outcome of that case. On 8 July 1999, the Commission adopted Decision 2000/392/EC on a measure implemented by the Federal Republic of Germany for

WestLB (OJ 2000 L 150, p. 1; 'the 1999 WestLB decision'), by which it found that the transaction in question constituted State aid that was incompatible with the common market, and ordered the recovery of the aid. That decision was annulled by the judgment in Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435 ('*WestLB*' or 'the *WestLB* judgment') owing to a failure to state adequate reasons.

8 By letter of 13 November 2002, the Commission informed the Federal Republic of Germany of its decision to initiate formal investigation procedures in relation, inter alia, to the contribution at issue. The decision initiating the procedure in relation to the contribution at issue was published in the *Official Journal of the European Union* (OJ 2003 C 72, p. 3).

C — *The contested decision*

9 On 20 October 2004, the Commission adopted Decision 2006/742/EC on aid granted by Germany [to] Landesbank Hessen-Thüringen – Girozentrale (OJ 2006 L 307, p. 159; 'the contested decision').

10 In the contested decision, the Commission took the view that, since the special fund was recognised by BAKred as core capital of Helaba, it was appropriate – in order to examine whether the Land's conduct corresponded to that of a private investor – to compare the contribution at issue with equity instruments that were recognised as core capital in Germany in the year of the contribution and that were available to Helaba at the time of the transfer specifically for an investment of this order of magnitude, which made up significantly more than 15% of Helaba's core capital. It rejected the applicant's argument that the characteristics of the contribution at issue, as they appear in the contract concluded between the *Land* and Helaba, were such that the contribution was more akin to share capital than to a 'normal' – that is to say,

time-limited – silent partnership contribution (recitals 128 to 139 to the contested decision).

11 As regards the calculation of the remuneration which a private investor would have required for a contribution such as the contribution at issue, the Commission distinguished the amount which was available to underpin Helaba's competitive business from that which, for various reasons could not, in the Commission's view, be used by Helaba for that purpose (recitals 141 and 142 to the contested decision).

12 With regard to the amount which was available to underpin Helaba's competitive business, in the first place, the Commission took the view that it was necessary to take into account the fact that Helaba was required to pay tax on industrial and commercial operations ('trade tax'), which has to be paid by industrial and commercial investors conducting business in Germany, but which, in the present case, had to be paid by Helaba because the *Land* was not obliged to do so (recitals 157 to 159 to the contested decision).

13 In the second place, the Commission explains that, on the market, the rate used as a reference for the calculation of the remuneration is either fixed, corresponding generally to the yield on public bonds with a 10-year maturity, or variable, corresponding to the interbank market rates, such as the Libor or Euribor rates. The Commission states that a remuneration premium is added, irrespective of the type of reference rate used, the composition of which varies according to whether the remuneration is variable or fixed. It explains that, if the remuneration is variable, the remuneration premium corresponds to the liability remuneration for the silent partnership in question ('the liability remuneration'). However, if the remuneration is fixed, the remuneration premium comprises two elements: the refinancing premium, that is to say the premium on the yield on public bonds which the bank has to pay on the market to procure liquidity, and the liability remuneration corresponding to the risk profile of the silent partnership contribution in question (recital 162 to the contested decision).

14 Given that the contribution at issue does not entail a transfer of liquid capital or involve additional refinancing costs for Helaba, the Commission takes the view that Helaba has to pay only a liability remuneration to the *Land* (recitals 162, 184 to 187 to the contested decision).

15 Therefore, as regards the issue whether the agreed remuneration, together with the increase on account of the trade tax effect, is in line with market conditions, the Commission took the view that, since the remuneration was in the upper part of the market range for liability remuneration, it did not see any evidence of favourable treatment of Helaba and hence of State aid (recitals 172 and 183 to the contested decision).

16 As regards the amount which, according to the Commission, was not available to underpin Helaba's competitive business because it had to be used to cover the business of the special fund of promoting social housing construction or by reason of the phased model, the Commission took the view that its entry in Helaba's balance sheet from the time of the transfer represented an advantage for Helaba in so far as it operated as a guarantee which had to be paid for, contrary to what was envisaged by the parties, at a rate of 0.3% per annum before tax. The Commission therefore deemed Helaba to have received EUR 6.09 million in State aid (recitals 155 and 190 to the contested decision).

Procedure and forms of order sought by the parties

17 By application lodged at the Registry of the Court on 18 April 2005, the applicant brought the present action.

18 By documents lodged at the Registry of the Court on 29 July, 4 and 8 August 2005 respectively, Helaba, the Federal Republic of Germany and the *Land* applied for leave

to intervene in the present proceedings in support of the Commission. By order of 30 September 2005, the President of the Third Chamber of the Court granted them leave to intervene.

19 By letters of 9 and 23 August 2005 and 15 December 2005 the applicant applied for certain confidential information contained in the application and in the reply to be excluded from the copies to be sent to the interveners. It produced a non-confidential version of those pleadings. The interveners were sent only the non-confidential versions of those pleadings and raised no objection in that regard.

20 By a letter of 20 December 2005 the applicant informed the Court that it had not named the banks which had provided it with certain information included in the reply because the banks feared that their commercial relationships with Helaba would be seriously damaged if their identity were to become known to Helaba. It explained that this information would be provided to the Court alone at the Court's request.

21 The interveners lodged their statements within the prescribed period. The applicant, in turn, lodged its observations on the statements in intervention within the prescribed period. The Commission declined to submit observations on those statements.

22 By letter of 28 March 2006 the Commission requested the Court to remove from the file certain annexes to the reply. Since the applicant had no objection to that request in relation to Annex C.3 to the reply, Annex C.3 was removed from the file by decision of the President of the Third Chamber of 28 June 2006. The decision concerning the other annexes which the Commission had applied to have removed was reserved.

23 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.

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

25 Upon hearing the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, requested the Commission to lodge certain documents and put questions in writing to the parties, to which they replied within the prescribed period.

26 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 9 September 2008. At the end of that hearing, the Commission was authorised to reply in writing to one of the questions put by the Court. The Commission replied by letter of 19 September 2008 and, on 2 October 2008, the applicant lodged its observations on that reply. The oral procedure was closed on 8 October 2008.

27 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

28 The Commission, supported by the interveners, contends that the Court should:

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

— order the applicant to pay the costs.

Law

A — *Admissibility*

29 The Commission contends that the action is likely to be inadmissible in so far as the applicant is not individually concerned by the contested decision.

30 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 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).

31 It must be observed in this instance that, while the present case and the case giving rise to the judgment of the Court of today's date in Case T-36/06 *Bundesverband*

deutscher Banken v *Commission* [2010] ECR II-537 raise slightly different issues of admissibility on account of the legal basis of each of the contested decisions, they raise issues of substance that are essentially similar, since, in the case giving rise to the aforementioned judgment of today's date, the parties repeat many of the arguments that were put forward in the present proceedings. Consequently, the Court considers it necessary to begin by adjudicating on 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.

B — *Substance*

32 The applicant submits that the contested decision is contrary to Article 87(1) EC inasmuch as the remuneration agreed between the *Land* and Helaba in respect of the part of the contribution which the latter could use to underpin its competitive business is not consistent with what a private investor would have required at the time of the transaction, and the *Land*'s willingness to forgo an appropriate remuneration constitutes State aid. It submits, moreover, that the reasons stated in respect of some of the findings in the contested decision are inadequate.

33 Specifically, the applicant submits, first of all, that the Commission did not take into account the market situation at the time when the contribution at issue was made. It goes on to criticise the Commission's findings in relation to each of the steps taken to reach the conclusion that the remuneration agreed in respect of the part of the contribution at issue that could be used to underpin Helaba's competitive business does not constitute State aid. In the first place, it takes issue with the Commission's view that, for the purposes of a comparison of the remuneration agreed in respect of the contribution at issue with remuneration for other transactions that took place on the market, the contribution at issue had more in common with a time-limited silent partnership contribution than with share capital. In the second place, it objects to the Commission's acceptance of the solution involving a phased remuneration for that part of the contribution at issue which could be used to underpin Helaba's

competitive business, in accordance with the phased model. In the third place, it objects to the Commission's findings in respect of possible premiums and deductions which might be applied to the market range of liability remuneration to take account of the specific nature of the contribution at issue. In the fourth place, it objects to the Commission's deduction from the remuneration that would be required on the market of the refinancing costs associated, as far as Helaba is concerned, with the purported lack of liquidity of the contribution.

34 It must be borne in mind at the outset that the aim of Article 87(1) EC is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products.

35 In order to determine whether a State measure constitutes aid, it is therefore necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60, *WestLB*, cited in paragraph 7 above, paragraphs 207 and 243).

36 In that regard, it cannot be held that the exercise of ascertaining whether the transaction took place under normal conditions of a market economy must necessarily be made by reference to the single investor or to the single undertaking benefiting from the investment, when it is the interaction between the various economic operators which is precisely the feature of a market economy (*WestLB*, cited in paragraph 7 above, paragraph 327). Nor, furthermore, does that exercise require the constraints connected with the nature of the asset transferred to be disregarded altogether, since it is necessary to take into account, as a reference, the conduct of a private investor finding himself, as far as possible, in the same situation as a public investor (see, to that effect, Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 70;

Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 133; and *WestLB*, cited in paragraph 7 above, paragraph 270).

37 In those circumstances, the Commission is obliged, in assessing whether the undertaking enjoys an advantage which it would not have been able to obtain under market conditions, to make a complete analysis of all factors that are relevant to the transaction at issue and its context, including the situation of the beneficiary undertaking and of the relevant market (*WestLB*, cited in paragraph 7 above, paragraph 251). The Commission can, in particular, examine whether, in a case such as this one, the undertaking would have been able to procure funds entailing the same advantages from other investors and, if necessary, under what conditions, since a measure cannot constitute State aid if it does not place an undertaking in a more advantageous position than it would have been in if the public authority had not intervened.

38 Lastly it must be borne in mind that the assessment by the Commission of the question whether an investment secures an advantage which the undertaking would not have been able to obtain on the market involves a complex economic appraisal. When the Commission adopts a measure involving such an appraisal it enjoys a wide discretion, and judicial review of that measure, even though it is in principle a comprehensive review of whether a measure falls within the scope of Article 87(1) EC, is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 81; Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 105; and *WestLB*, cited in paragraph 7 above, paragraph 282).

39 Before examining the applicant's various objections to the contested decision, it is appropriate to analyse the parties' arguments in relation to the context in which the contribution at issue was negotiated.

1. *Context in which the contribution at issue was negotiated*

40 The applicant submits that it is wrong to take the view that Helaba did not need a core capital contribution and that the contribution was made essentially in the interests of the Federal Republic of Germany, in particular of the *Land*.

41 The Commission, supported by the *Land* and Helaba, rejects that presentation of the context of the case.

42 So far as Helaba's situation is concerned, it must be noted that, before the transfer of the contribution at issue, Helaba had a core capital ratio of 5.4% and an equity ratio of 9.6%, both higher than the minimum ratios set by law, namely 4% and 8% respectively (recitals 28 and 32 to the contested decision). Unlike in the WestLB case, to which the applicant refers several times, there was no amendment of the applicable rules that made an increase in the equity ratios of European banks essential in 1998. The fact that Helaba's ratios were less favourable than those of the major German private banks does not mean that the contribution at issue was essential for Helaba's survival or for Helaba to be able to maintain its volume of business, since it cannot be the case that all German banks not having the ratios of the major private banks need an injection of capital. In any event, the applicant did not provide details of the ratios of the major private banks for 1998, only for the period from 1984 to 1994.

43 In those circumstances, it must be held that Helaba needed only such new funds as were necessary in order to attain the growth targets laid down in its business plan. Aside from the fact that any failure to obtain the funds needed for that purpose would have had the effect merely of impeding its growth and would have compromised

neither its survival nor its volume of business at that time, the growth targets fixed in Helaba's business plan required – according to the observations of the Federal Republic of Germany set out in recital 54 to the contested decision – only a substantially smaller increase in core capital than the amount of the contribution at issue, indeed of the tranches provided for by the phased model.

44 That finding is not affected by the statements of the Chairman of Helaba's Board of Managing Directors which were published in the German press in 1998 and to which the applicant referred. Helaba's dependence on the contribution at issue cannot in any way be inferred from the Chairman's statement that '[i]f international developments permit it, [Helaba] would very much like [the special fund] to be made available to [it] as equity capital in return for a market remuneration'. Similarly, an urgent need for equity capital cannot be inferred from his assertion that, 'in the long term at least, consideration [had to] be given to Helaba's capital adequacy'.

45 Those statements do indeed show that Helaba was an interested party as regards the contribution at issue, and that the contribution was required to put Helaba in the position of being able to cover its capital needs over a number of years and increase its risk-bearing transactions. It is, in fact, only because Helaba was expecting to benefit that it suggested taking on the special fund in the form of a silent partnership contribution. However, that does not mean that it was dependent on the contribution at issue or that it could not have increased its core capital by calling on private investors.

46 As far as the situation of the *Land* is concerned, it is apparent from the contested decision and from the documents in the case that it wanted to generate additional income by using the social housing promotion portfolio for other purposes, that it nevertheless did not want to sell it so as to be able to continue to use it for promotion

activities, that it did not wish to divide it between several institutions – owing, on the one hand, to the fact that, as a revolving fund, it has to be refinanced by returns on loans granted and, on the other, to the ensuing costs and loss of flexibility in administering the aid – and that it wanted to organise the administration of the assets as effectively and cheaply as possible (recital 20 to the contested decision).

47 Helaba declared that it was prepared to take on and manage the whole aid portfolio of the special fund. The fact that Helaba was already managing funds and aid programmes and that, since it was a bank governed by public law, the *Land* had a supervisory role and was better equipped to monitor its solvency and its development, inter alia, persuaded the *Land* that Helaba was the appropriate partner. The cooperative banks had, admittedly, spontaneously shown their interest in the special fund, but they wanted the *Land* to sell it. Furthermore, in spite of the allegedly very modest remuneration agreed for the contribution at issue and the fact that the *Land*'s intention to transfer the funds had been made public, the applicant having become aware of it by summer 1998 at the latest, the major private banks, unlike the cooperative banks, did not make rival offers.

48 It is, therefore, against that background that the Court must consider the parties' arguments and determine whether the Commission made a manifest error of assessment in taking the view, in essence, that the financial burden on Helaba associated with the part of the special fund that it could use to underpin its competitive business was not less than Helaba would have borne under normal market conditions to obtain the same advantages, and that, in consequence, the contribution at issue did not involve State aid.

49 Given that one of the applicant's arguments concerning the allegedly erroneous classification of the contribution at issue as a silent partnership contribution and the allegedly modest level of remuneration relates to the very high volume of the

contribution, and the Commission counters that argument on the basis of the phased model, it is this issue that must be examined first of all.

2. *Taking the phased model into account*

(a) The contested decision

50 As indicated in paragraph 11 above, the Commission took the view that the remuneration for the part of the contribution at issue which was available to underpin Helaba's competitive business should be distinguished from the part which, for various reasons, was not.

51 With regard to the determination of the part of the contribution at issue which was available to underpin Helaba's competitive business, the Commission accepted that it should take into account the phased model agreed between the parties, under which, in the first four years following the transfer of the contribution at issue, the 1.4% remuneration fixed in the contract was paid not on the whole contribution – with the exception of the part required to cover the promotion of social housing construction – but on tranches agreed in advance. The Commission justified its acceptance of the phased model by stating that, although the funds were *de facto* usable by Helaba from the outset, Helaba had indicated that it only needed the assets in stages in order to underpin its competitive business and, moreover, that, within the agreed tranches, it was the actual usability or non-usability that was taken into consideration. The Commission took the view that a private investor in the situation of the *Land* who did not wish to divide up the special fund would not have been in a position to impose any faster increase in the capital base to be remunerated at the agreed rate of 1.4% (recitals 143 to 146 to the contested decision). The Commission took the view, however, that the remainder of the

contribution at issue over and above the agreed tranches was required to be remunerated at a rate of 0.3% (recitals 142, 191 and 192 to the contested decision).

(b) Arguments of the parties

52 The applicant submits that the Commission made a manifest error of assessment when it took the view that the phased model satisfies the private investor test. It maintains that, as the Commission itself recognised, the question whether the issuer actually uses the full amount to underpin its competitive business is irrelevant to the investor, since what counts for the investor is the fact that he has made his assets available to the bank, thereby forgoing their use and risking their loss.

53 The applicant takes the view that the reasons put forward by the Commission for nevertheless accepting the phased model are erroneous.

54 As regards the fact that Helaba had informed the *Land* that it would not use the entire contribution at issue straightaway, the applicant claims that, while Helaba's conduct in demanding the phased model may have been reasonable from an economic point of view, the same cannot be said for the *Land*, since a private investor in those circumstances would not have forgone part of his remuneration but would have sought other investment opportunities enabling him to maximise his profits, or at least would have transferred the special fund in stages in accordance with Helaba's requirements. At the hearing, the applicant nevertheless stated in reply to a question put by the Court that it was not a question in this instance of whether the *Land* had to transfer its special fund in stages or try to place it elsewhere, but whether it ought not to have required remuneration for the full funds transferred.

55 The applicant states that, contrary to what is claimed by the Commission, the Commission departed from the practice which it had followed in the cases concerning the other Landesbanken. Thus, it claims that the Commission maintained in the defence which it submitted in the proceedings giving rise to the *WestLB* judgment, cited in paragraph 7 above, that no private investor would make capital available to an undertaking and agree to be remunerated only in part on the ground that the amount in question actually exceeded the undertaking's real requirements.

56 As regards the fact that the remuneration had to be paid on the basis of tranches agreed between the parties, irrespective of whether or not Helaba had used the full amounts, it submits that the contract did not include a clause prohibiting Helaba from using the contribution at issue for the expansion of its business beyond the reference amounts. It takes the view, therefore, that the establishment of those reference amounts did not constitute an advantage for the *Land* since it was possible to envisage Helaba using a larger amount for liability purposes. The applicant takes the view, moreover, that a private investor would have required remuneration for the advantage in terms of Helaba's rating on account of the increase in its core capital.

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

(c) Findings of the Court

58 It must be held, first of all, that, as the applicant itself conceded at the hearing, the question as to what alternative investment opportunities might have been of interest to the *Land* is irrelevant in the present case. It is not a question of determining whether the *Land* could have obtained a better return on its special fund by investing it differently or in another undertaking, but whether, by investing that special fund

in Helaba under the agreed conditions, the *Land* conferred an advantage on Helaba which it could not have obtained in any other way.

59 Next, it must be noted that the parties agree that a private investor who makes his capital available to a bank as that bank's core capital, and thereby forgoes the use of it and exposes himself to the risk of losing it, will require remuneration for the whole of the capital transferred. The Commission thus took the view in the contested decision that the whole of the contribution at issue had to be remunerated from the very first day of its transfer to Helaba, since it was from that point on that the *Land* risked losing it and Helaba was able to enjoy its benefits (recitals 142, 155, 191 and 192 to the contested decision).

60 The Commission took the view, however, that a private investor would have agreed to two different rates of remuneration, according to the purpose served by each part of the contribution at issue (recitals 142, 143 and 191 to 193 to the contested decision). It thus decided that a private investor would, on the one hand, have accepted the remuneration agreed by the *Land* and Helaba for that part of the contribution at issue that was available for Helaba's use in expanding its competitive business and would, on the other, have required a remuneration of 0.3% for the remainder of the contribution at issue on account, inter alia, of the rating advantage to Helaba entailed in its being entered from the outset as core capital. Given that the *Land* had not required remuneration for that part of the contribution at issue which was not likely to be used for the expansion of Helaba's competitive business, the Commission found, in respect of the period from 31 December 1998 to 31 December 2003, that State aid had been granted in the amount of EUR 6.09 million and ordered its recovery by the Federal Republic of Germany.

61 The applicant objects to the Commission's assessment that, in the circumstances of the present case, a private investor would have accepted the phased model and consequently that, in the early years, a part of the funds which, for supervisory purposes,

was available for use in underpinning Helaba's competitive business – namely the part of the contribution at issue exceeding the tranches of the phased model and not needed to underpin the promotion of social housing construction – would not be remunerated at the same rate as the rest of those funds.

62 In the first place, the applicant submits that, as the Commission itself admits in the contested decision and stated in the WestLB case, a private investor would not accept that his return should depend on the amount of equity capital actually used.

63 It must be held in that regard that the basis for the remuneration agreed between the parties did not, even in the early years following the contribution at issue, depend on the amount of the contribution that was actually used. It is apparent from the contested decision that Helaba was required to remunerate the *Land* for the agreed tranches in full, irrespective of their actual use for the purposes of expanding its competitive business. At the end of the period in which the phased model applied, that is to say from 2003, the remuneration agreed between the parties was required to be paid on the whole of the contribution at issue, with the exception of the part required to underpin the promotion of social housing construction, irrespective of the amount actually used by Helaba to underpin its competitive business. The contested decision is therefore consistent with the principle relied on by the applicant, that a private investor would not accept that his return should depend on the amount of equity capital actually used.

64 In the second place, the applicant states that the Commission's differentiation – in drawing a distinction as to whether the capital is, as in the present case, not supposed to be used for business expansion purposes because the bank announced beforehand that it was not needed and would not be used, or can be used freely – is irrelevant to the investor since, in both cases, he no longer has the capital. It maintains that, in any event, the agreement reached between the *Land* and Helaba does not protect the

Land, because it does not include any undertaking by Helaba to use the funds transferred only up to the amount of the agreed tranches.

65 As regards the applicant's assertion that it is irrelevant to the investor that Helaba had announced that it did not immediately need all the capital, it should be borne in mind that, according to the case-law (see paragraph 36 above), whether a transaction is in line with market conditions cannot be assessed from the point of view of the single investor but must be assessed taking into account the interaction between the various economic operators and the context in which the transaction took place.

66 In that respect, the applicant does not put forward any arguments from which it might be concluded that the Commission made a manifest error of assessment in finding that, in a situation such as that of the present case, characterised, on the one hand, by the fact that the *Land* wanted to invest in a non-liquid asset and did not want to divide it and, on the other, by the fact that Helaba did not, either in the short or medium term, need capital on the scale of that of the special fund, a private investor would not have been able to obtain from the bank immediate remuneration for the whole of the contribution at issue at the rate of remuneration for the expansion of the bank's competitive business. On the contrary, the applicant itself states that Helaba probably behaved reasonably by requiring the phased model to be applied.

67 In any event, there does not appear to be a manifest error in taking the view that a bank will not agree to pay the rate corresponding to remuneration for the expansion of its competitive business in respect of capital which it knows in advance it will not be able to use for that purpose. While such capital may, as the Commission states, enable the bank to strengthen its solvency or avoid its deterioration and, therefore, to reduce or maintain its financing costs, it does not enable the bank to obtain additional income from new transactions.

68 Accordingly, in the circumstances of the present case, a private investor in the *Land*'s situation should have taken into account the fact that, since, for supervisory purposes, it was impossible for Helaba to use the whole of the contribution available immediately for the expansion of its competitive business, that part of the contribution which was not available for Helaba to use did not have the same economic function for Helaba as the part which was available.

69 It is true that this aspect did not justify the *Land* forgoing receipt of any remuneration at all for the capital which was not available for Helaba to use and which was nevertheless transferred to Helaba in order to avoid any division of the special fund. Since that capital served from the outset to guarantee Helaba's debts, it was subject to a certain risk of loss from that moment on, and gave Helaba an advantage in terms of rating and reputation. It is precisely in order to ensure remuneration of the risk taken on by the *Land* and of the advantage to Helaba that the Commission imposed the payment of a remuneration of 0.3% per annum for that part of the contribution at issue.

70 As to the fact that the contract does not include a clause by which Helaba undertakes not to use amounts in excess of the agreed tranches for the expansion of its competitive business, it must be held that this does not render manifestly erroneous the Commission's assessment that the part of the contribution at issue above those tranches did not have a business expansion function. It must be noted that the *Land* managed to ensure that the tranches were fixed at a much higher level than would have been necessary given Helaba's capital requirements according to its business plan, thereby ensuring that the tranches would not be exceeded. It follows from the observations of the Federal Republic of Germany, set out in recital 54 to the contested decision and confirmed by the applicant and Helaba in their written pleadings, that the tranches were fixed at approximately EUR 384 million (1999), EUR 614 million (2000), EUR 818 million (2001) and EUR 1.02 billion (2002), whereas, on the basis of planned annual growth, the bank needed approximately EUR 150 million per annum.

71 Finally, it must be observed that the applicant, which focuses on the situation of the *Land* as investor, does not explain how the solution adopted by the Commission – acceptance of the phased model and the imposition of 0.3% remuneration for the part of the contribution above the agreed tranches – entailed a competitive advantage for Helaba which it would not have been able to obtain under market conditions.

72 Therefore, the Commission did not make a manifest error of assessment in taking the view that, in the circumstances of the present case, the fact that, between 1999 and 2002, Helaba did not pay a remuneration at a level appropriate to a business expansion function for that part of the capital which, while perfectly usable – from a supervisory point of view – for the underpinning of its competitive business, would not be used for the purpose, did not give rise to an advantage which Helaba would not have been able to obtain under market conditions.

73 That conclusion is unaffected by the applicant's argument that the Commission's acceptance of the phased model in the present case represents a departure from its earlier practice, in particular from the position which it defended in the judicial proceedings concerning the 1999 WestLB decision. It must be noted that the Court annulled that decision in the *WestLB* judgment, cited in paragraph 7 above, and that the decision adopted by the Commission following that annulment – Decision 2006/737/EC of 20 October 2004 on aid from Germany for Westdeutsche Landesbank – Girozentrale (WestLB), now WestLB AG (OJ 2006 L 307, p. 22; 'the 2004 WestLB decision') – no longer imposes the remuneration rate premium which the Commission had sought to justify on the basis of the argument invoked by the applicant. In any event, it cannot be held that the Commission accepted that the *Land* would be only partly remunerated for that part of the contribution at issue which, from a supervisory point of view, could be used for the expansion of Helaba's competitive business. The Commission essentially took the view that, following the compromise resulting in the phased model, the *Land* did not let the use of the funds transferred be determined by Helaba's commercial judgment and that, given the imposition of a 0.3% remuneration for that part of the contribution at issue exceeding the agreed tranches, it was not a partial remuneration that the *Land* received but a remuneration appropriate to each part of the contribution according to its function for Helaba.

74 It follows from the foregoing that the present complaint must be rejected.

3. *The complaint that the Commission incorrectly classified the contribution at issue as a 'normal' silent partnership contribution instead of as an investment in share capital*

(a) The contested decision

75 The Commission summarises the arguments put to it, stating that, according to the applicant, 'the only legal form properly available to Helaba … was that of share capital' and that, as a result, the contribution at issue represented 'a formal abuse of a "normal" silent partnership'. The Commission also states that, according to the applicant, in economic terms, the contribution at issue had so many points in common with share capital that an investor would have insisted on the payment of interest corresponding to the remuneration of share capital. Nevertheless, according to the Federal Republic of Germany, 'another legal form available was that of a silent partnership contribution of unlimited duration' ('perpetual') (recitals 127 and 128 to the contested decision).

76 In the first place, the Commission notes that the silent partnership contribution was expressly established as such by the *Land* and Helaba and accepted as such by the competent German authorities (recital 129 to the contested decision).

77 In the second place, the Commission states that, with regard to a risk analysis, the contribution at issue is more akin to a 'normal' silent partnership, that is to say time-limited, than to share capital. It regards as essential in that respect the fact that, as the Federal Republic of Germany explained in reliance on an expert's report, in insolvency

proceedings, the contribution at issue would, like other 'normal' silent partnerships, have to be repaid before share capital. It adds that, so long as the undertaking is not making a loss, both the *Land* and the investor of a time-limited silent partnership receive the entire agreed remuneration, whereas the investor in share capital can claim only payment of a dividend that is in proportion to profits (recitals 130 to 132 to the contested decision).

78 In the third place, the Commission explains why it considers that the arguments put forward by the applicant during the administrative procedure do not suffice to invalidate that conclusion.

79 Thus, first of all, the Commission rejects the applicant's argument that the contribution at issue should be compared – just as it was in the WestLB case – to a share capital investment on account of its volume, which resulted in the long term in an increase of almost 50% in Helaba's core capital. It states in that regard that Helaba could easily have covered its estimated capital requirement in the period from 1998 to 2002 by taking up, at intervals, several smaller silent partnership contributions from a number of different institutional investors (recital 133 to the contested decision).

80 Second, the Commission rejects the applicant's argument that, as a result of the contribution at issue, the proportion of share capital in Helaba's total core capital ('the share capital buffer') did not exceed 50%, whereas that of private credit institutions was more than 80%. The Commission took the view that this did not mean that a private investor would not have made the contribution at issue, since the Federal Republic of Germany had shown that the regional banks generally made greater use of silent partnership contributions beyond the 15% limit, including from private investors (recital 134 to the contested decision).

81 Third, as regards the consequences in terms of the level of risk of the perpetuity of the contribution at issue, the Commission rejects the applicant's arguments that institutional investors are only prepared to acquire hybrid equity capital instruments of fixed duration or instruments for which repayment can be assumed, because the payout rate rises incrementally. In its view, the perpetuity of the contribution primarily entails a risk to the investor of not being able to profit from interest rate increases on the market, but has no effect on the risk of loss. The Commission concludes from this that the perpetuity of the contribution at issue does not in this instance justify that contribution being compared – for the purposes of a review of the appropriate level of the agreed remuneration – to remuneration for share capital, instead of to remuneration for silent partnership contributions (recitals 136 and 138 to the contested decision).

82 The Commission concludes from this that the *Land*'s transfer of the special fund 'was undoubtedly made in the legal form of a silent partnership that has much more in common with other silent partnerships than with share capital'. It states in that regard that"[t]here is, therefore, in [its] view, not sufficient evidence of an abuse of the legal form of a silent partnership for a contribution of capital that in actual economic terms constituted share capital'. It concludes that '[t]he basis for the remuneration of [the contribution at issue] is, therefore, "normal", i.e. time-limited silent partnership assets typical in size of those observable on the market, on whose remuneration a premium may possibly have to be charged' (recital 139 to the contested decision).

(b) Arguments of the parties

83 The applicant submits that the contribution at issue should not have been classified as a 'normal' silent partnership contribution and, therefore, that its remuneration should not have been compared to that of time-limited silent partnership contributions issued on the market.

84 It emphasises that the Commission considered whether the parties had improperly classified the contribution at issue as a silent partnership, rather than share capital, and only examined the economic characteristics of the contribution at issue as a secondary point. It states that this reasoning is erroneous and that it is not a question, in the present case, of whether that was impropriety but of considering whether, from an economic point of view, the contribution at issue had more in common with other silent partnership contributions on the market or with investments in share capital.

85 The applicant takes the view that, contrary to the Commission's conclusion, the contribution at issue differs in legal and economic respects from the company law model of a silent partnership or from time-limited silent partnerships issued on the market and recognised as core capital, and has a special structure which precludes any comparison with the silent partnerships selected by the Commission for that purpose. It takes the view, furthermore, that the Commission did not make its assessment on the basis of the situation as it was at the time the contribution at issue was made and, moreover, that its assessment of the market situation at that time was poor.

86 As regards, in the first place, the specific legal features of the contribution at issue, the applicant submits that, in terms of form, the contribution is not a 'normal' silent partnership within the meaning of German company law, inter alia, because it was devised to satisfy the conditions laid down by law and by the Sydney Declaration so as to enable it to be regarded as part of Helaba's core capital, albeit above the 15% limit.

87 As regards, in the second place, the special economic features of the contribution at issue, the applicant mentions five factors which render the risk profile of the contribution at issue more akin to that of share capital than of time-limited silent partnerships:

its size, its guarantee status, its profitability profile, the protection of capital invested and its duration and the impossibility of withdrawal.

88 As regards, in the third place, the market situation at the time when the contribution was made, the applicant submits that the Commission infringed the private investor test by selecting the wrong reference period. It thus maintains that the Commission based its conclusion that the contribution at issue had to be compared with time-limited silent partnerships on information about private bank practices during the period after the date of the contribution at issue.

89 In addition, the applicant challenges the Commission's assertions that, at the time of the contribution at issue, there was an established market in Germany in hybrid equity capital instruments and, moreover, that Helaba could equally have satisfied its capital requirements by issuing the silent contribution in several smaller tranches. It argues, in particular, that it is not a question of what Helaba could have done to obtain funds, but whether a private investor would have granted it a contribution that was similar and on the same terms as the contribution at issue.

90 The Commission and the interveners oppose those arguments.

(c) Findings of the Court

91 As a preliminary point, it is necessary to clarify the parties' position regarding the significance to the outcome of the present dispute of the legal form chosen by Helaba and the *Land* for the contribution at issue.

92 It follows from the contested decision, in particular from recitals 127, 128 and 139 thereto (see paragraphs 75 and 82 above), that the Commission interpreted the arguments put forward by the applicant during the administrative procedure as being aimed at eliciting a declaration that the legal form of the silent partnership was abused.

93 In its application, the applicant challenges that interpretation and submits that it has never claimed that the contribution at issue was, in legal terms, share capital. It maintains that it claimed during the administrative procedure that, by the particular way in which it was set up, the contribution at issue differed considerably, economically, from a silent partnership and that it had far more in common with share capital, with the result that a private investor would have required a remuneration appropriate to the risk profile of share capital in return for that contribution. In addition, it examines the legal characteristics of the contribution at issue and submits that the Commission's assertion that the contribution at issue is comparable to 'normal' silent partnership contributions does not stand up to in-depth analysis of the legal structure of the contribution, and that it has significant special features in comparison with a 'normal' silent partnership contribution corresponding to the company law model.

94 It nevertheless follows from the parties' written statements as a whole that the question whether or not the Commission correctly interpreted the arguments put forward by the applicant during the administrative procedure is not the real subject-matter of the present dispute. It is clear from the parties' arguments that they agree that the contribution at issue was described in legal terms by the *Land* and by Helaba as a silent partnership contribution and recognised as such by the German authorities. They also agree that the particular features of the contribution at issue did not prevent the *Land* or Helaba from using the legal form of a silent partnership contribution.

95 The parties' arguments in respect of the classification of the contribution at issue, for the purposes of determining the reference transactions, therefore concentrate on whether that contribution displays such similarities – in terms of risk profile – with share capital that a private investor would have required remuneration appropriate to that of share capital, or whether it is more akin to silent partnership contributions

which are time-limited and recognised as core capital, so that its remuneration could be compared to that of such silent contributions.

96 In that regard, it must be noted that the comparison of the contribution at issue with other hybrid instruments is a matter of some economic complexity, over which the Commission enjoys a wide margin of assessment (*WestLB*, cited in paragraph 7 above, paragraph 351).

97 In addition, the classification of the contribution at issue as a time-limited silent partnership contribution or as share capital is merely an analytical tool used by the Commission in applying Article 87(1) EC (see, to that effect, *WestLB*, cited in paragraph 7 above, paragraph 250).

98 The Commission's assessment in that regard does not therefore permit it to make an automatic determination as to the existence and scale of State aid, but merely allows it to use for its assessment a starting point which takes into account the conditions in which private investors have carried out transactions that are as similar as possible. The Commission's conclusion on that point does not relieve it of its obligation to make a complete analysis of all factors that are relevant to the transaction at issue and its context, including the situation of the beneficiary undertaking and of the relevant market, in order to verify whether that undertaking is receiving an economic advantage which it would not have obtained under normal market conditions (see, to that effect, *WestLB*, cited in paragraph 7 above, paragraphs 251 and 257).

99 It is necessary to consider the parties' arguments as to the different characteristics of the contribution at issue by studying, first of all, the arguments concerning the characteristics on which the Commission principally based its view that the remuneration for the contribution at issue had to be compared to remuneration for time-limited silent partnerships; next, those concerning the characteristics of the contribution at issue which the Commission deemed not to preclude such a comparison; and, lastly,

those concerning the characteristics of the contribution at issue which were not relied upon during the administrative procedure or examined in the contested decision. It will also be necessary to examine the applicant's objections regarding the reference period taken into account by the Commission for the application of the private investor test.

The characteristics on which the Commission based its view that the remuneration for the contribution at issue had to be compared to remuneration for time-limited silent partnership contributions

— Risk of loss in the event of insolvency or liquidation

100 The Commission took the view that the contribution at issue represented the same risk in the event of insolvency or liquidation as time-limited silent partnerships already on the market because, in such cases, it had to be repaid before share capital. The Commission relied in that regard on the provisions of the contract and on an expert report produced by the Federal Republic of Germany (recital 131 to the contested decision).

101 The relevant provisions of the contract are clauses 3 and 9. Clause 3, on 'Participation in losses', provides under subclause (2):

'The relationship between claims of the contributor and those of other investors within the meaning of Paragraph 10 of the [Kreditwesengesetz] shall be determined in accordance with the chronological order of capital investment in the bank, claims arising from earlier capital injections thus having priority. In the case of simultaneous capital contributions, claims shall be satisfied according to the share of liability capital

that they represent for the purposes of Paragraph 10(4) and (5) of the [Kreditwesengesetz]. For contributions pursuant to Paragraph 10(4) of the [Kreditwesengesetz] the relevant date shall be that on which the contribution was made; for participation rights the relevant date shall be the first date of their validity.'

102 Paragraph 9 on 'Deferred priority' provides:

'In the event of the bank's insolvency or liquidation, claims for the return of funds shall be dealt with – subject to Paragraph 3(2) … – only after settlement of claims of all the bank's creditors with the exception of lower-ranking private investors in accordance with Paragraph 10 of the [Kreditwesengesetz].'

103 The expert report produced by the Federal Republic of Germany states:

'Clause 3(2) of the contract does not in any way alter the priority laid down by law for repayment of the silent contribution on any credit balance in the event of the bank's insolvency or liquidation. This is demonstrated, first, by the economy of the provision which, in its second sentence, refers only to capital within the meaning of Paragraph 10(4) and (5) of the [Kreditwesengesetz] and which, in its third sentence, defines the date determining the chronological order for the purposes of that provision only in respect of silent partnership contributions and participation rights.'

104 The applicant submits, first of all, that, although a silent partnership must, as a rule, be repaid before share capital, the question whether the same applies to the contribution at issue remains open in view of the wording of the contract. It states, furthermore, that it does not know upon what information the author of the expert report cited by the Commission relied in concluding, contrary to the wording of the contract, that the contribution at issue has to be repaid before share capital. In its reply, the applicant states that, in so far as claims of creditors who have invested core capital are

settled in the chronological order of their contributions in accordance with clauses 3(2) and 9 of the contract, the *Land* was required to proceed on the basis that its claim would be settled only after all others in the event of Helaba's insolvency or liquidation, not only after those of all 'normal' creditors, but also after those of all investors in core capital and thus also after those of investors in share capital.

105 In that regard, it must be noted that the contract does not expressly provide that the contribution at issue must be repaid after share capital and, moreover, that the reference to 'other investors within the meaning of Paragraph 10 of the [Kreditwesengesetz]' in the first sentence of clause 3(2) of the contract creates a problem of interpretation in relation to whether the priority of claims on capital injected earlier also covers contributions of share capital.

106 It must be observed that, although the applicant states in certain passages in its pleadings that the contract provides for the contribution at issue to be repaid after share capital, the applicant also states in its application that the question whether the supplementary rule – under which silent partnership contributions must be repaid before share capital – is applicable to the contribution at issue remains open. Moreover, in spite of the fact that the expert report mentioned by the Commission was sent to the applicant at the Court's request, the applicant did not put forward any arguments to challenge the interpretation of the author of the expert report, according to which the reference to 'other investors within the meaning of Paragraph 10 of the [Kreditwesengesetz]' in the first sentence of clause 3(2) of the contract had to be understood in the light of the second and third sentences of that provision, which relate to silent partnership contributions and participation rights, not to share capital.

107 In those circumstances, it must be held that it cannot be concluded from the applicant's arguments that the Commission made a manifest error of assessment in taking the view, in the light of the expert report provided by the Federal Republic of Germany, that the contribution at issue had to be repaid before share capital in the event of insolvency or liquidation. The mere fact that the applicant interprets the contract differently than the expert report, the Commission and the parties to the

contribution at issue is not sufficient to prove that there has been a manifest error of assessment.

108 The applicant submits, second, that, although the contribution at issue had to be repaid before share capital, the risk of loss would be similar to that of share capital since, in practice, lower-ranking creditors and investors receive nothing in an insolvency.

109 Suffice it to note in that regard that, even on the assumption that every case of insolvency in the banking sector involves both owners and lower-ranking creditors losing all their capital, which the Commission and the interveners deny, this feature is common to all silent partnership contributions recognised as core capital, since they are all, necessarily, lower-ranking claims. As a result, while this may be a feature that the contribution at issue has in common with share capital, it does not distinguish the contribution at issue from silent partnership contributions recognised as core capital.

110 In those circumstances, it must be held that the applicant's arguments do not support a finding that the Commission made a manifest error of assessment in concluding that the contribution at issue represented the same risk as silent partnerships in the event of insolvency or liquidation.

— Profitability profile

111 The Commission took the view that the contribution at issue was a normal silent partnership in that, like an investor in a time-limited silent partnership, the *Land* receives the entire agreed remuneration so long as the undertaking is not making a

loss, whereas the investor in share capital can claim only payment of a dividend that is in proportion to profits (recital 132 to the contested decision).

112 The applicant objects to that assessment and submits that both fixed and variable remuneration can be used for share capital and for silent partnerships, and that each can prove to be as advantageous as the other, depending on the bank's results. It observes in that regard that, in the WestLB case, the Commission compared the transaction concerned with share capital, in spite of the fact that the remuneration in question was fixed. It adds that, in any event, from the investor's point of view, the main question is whether payment of the remuneration depends on profits being made. It considers that to be the case in this instance, since the *Land* receives the whole of its remuneration only if Helaba's profits are at least equal to the remuneration and if no refinancing is necessary for that purpose.

113 As regards, in the first place, the fixed or variable nature of the remuneration, it must be held as a preliminary point that it is not a question in this instance of which is the more advantageous in a specific situation, but of determining whether the Commission made a manifest error of assessment in concluding that the fact that the remuneration agreed between the parties is fixed, and must be paid, in principle, as soon as Helaba is not making a loss, means the contribution at issue has more in common with time-limited silent partnerships than with share capital because that method of remuneration is appropriate to silent partnership contributions.

114 In that regard Helaba contends, pertinently, that, even where there is provision for fixed remuneration for share capital, the actual profits which the bank's owners make from their investment are always variable. In so far as profits exceeding the fixed remuneration paid will be applied towards increasing the bank's reserves which have to be distributed in the event of liquidation or which have a positive influence on share values, the profits of an investor in share capital will exceed the remuneration he received. That being the case, the final amount cannot be stipulated in advance, which thus means that the final remuneration for the investment is variable.

115 Helaba also states, without contradiction by the applicant, that, according to the study of hybrid core capital lodged by the applicant itself, the best core capital is that which takes the form of share capital, since that alone does not give rise, inter alia, to fixed payment obligations.

116 It follows from this that, while that may not always be the case, it is common for silent partnerships to be remunerated on a fixed basis and capital by means of variable dividends. In any event, while it is mandatory for the remuneration for silent partnerships to be paid as soon as the contractual conditions laid down are satisfied, the owners can use the profits in various ways, such as adding them to the reserves or distributing profits, depending, as a rule, on the will of the majority.

117 That conclusion is not affected by the applicant's argument relating to the 1999 WestLB decision. It must be borne in mind that that decision was annulled by the Court in *WestLB*, cited in paragraph 7 above. Moreover, in so far as the applicant's argument could be understood as referring to the 2004 WestLB decision, the fact that the Commission took the view that the remuneration of capital transferred in the transaction at issue should be compared to the remuneration of share capital does not mean that the profitability profile of that transaction is appropriate to share capital, but simply that, in the context of the examination of the transaction as a whole, other factors are strongly in favour of such a comparison. The Commission had, in particular, mentioned that the capital transferred was regarded as core capital whereas the instruments which the Federal Republic of Germany suggested should be used for comparison purposes could be used in Germany only as additional own funds.

118 As regards, in the second place, the applicant's argument that, both in the case of the contribution at issue and in that of share capital, the remuneration depends on the existence of profits, it must be held that the fact that payment of the remuneration, even if fixed, is subject to the bank not recording an annual deficit and to such payment not giving rise to such a deficit is common to all silent partnerships recognised as core

capital, since this is required under Paragraph 10(4) of the German Law on credit institutions (Kreditwesengesetz). Consequently, that aspect is unlikely to demonstrate that the Commission made a manifest error of assessment in taking the view that the contribution at issue bore similarities to silent partnerships recognised as core capital which already existed on the market.

119 Moreover, it must be held that the amount of profits required in order for the remuneration of the contribution at issue, or other silent partnership contributions, to be payable is less than that required in order for the bank's owners to receive a dividend. The remuneration of silent partnership contributions constitutes, according to German legislation, an operating expense which is therefore paid before tax and before the distribution of profits. It follows from this that, for investors to receive their full remuneration, the bank only needs to achieve an annual surplus before tax equal to the remuneration for contributions. By contrast, in order for the owners to receive the same amount in the form of dividends, the bank would, as a rule, have to achieve an annual surplus before tax equal to the sum of the remuneration for silent contributions, tax and that dividend.

120 The applicant's argument, put forward in reply to a question put by the Court at the hearing, according to which that feature does not really distinguish the contribution at issue and silent partnerships negotiated on the market from share capital, since the owners can show distributable profits even in the case of annual losses – in particular by reducing reserves – contradicts its argument that the conditions of payment of the remuneration for the contribution at issue are such that it has more in common with share capital than with silent partnerships issued on the market. Whereas payment of remuneration for silent partnerships requires an annual surplus, payment of dividends can proceed even in the case of annual losses, by showing a distributable profit.

121 In addition, while payment of the remuneration for silent partnerships is mandatory once the conditions laid down in the contract are satisfied, payment of dividends at

the end of a financial year in which there have been annual losses does not follow automatically but requires the approval of the majority of shareholders. Moreover, as the applicant acknowledged at the hearing in reply to a question put by the Court, it would damage a bank's reputation and the prospects of success of future issues if the bank paid dividends after incurring annual losses and failing to pay the remuneration for silent partnership contributions.

122 In those circumstances, it must be concluded that the applicant has not demonstrated that the Commission made a manifest error of assessment in taking the view that the profitability profile of the contribution at issue was characteristic of silent partnership contributions.

The characteristics of the contribution at issue which the Commission regarded as not precluding a comparison of remuneration for the contribution at issue with the remuneration for time-limited silent partnership contributions

123 The Commission rejected the applicant's arguments in relation to the volume of the contribution at issue, the share of Helaba's core capital that it represents and its perpetuity.

— Volume

124 The Commission took the view that the large overall volume of the contribution at issue did not necessarily mean that it had to be classified as share capital. It referred in that regard to the fact that, as a result of the phased model, between 1999 and 2002 Helaba was able to use only part of the funds transferred to underpin its competitive business. Furthermore, it rejected the comparison with the WestLB case on the

ground that, in that case, the large volume of the capital injection was only one of several indicia of its equivalence to share capital. It states in that regard that it also took into account, inter alia, the fact that the funds were exposed to the full risk of loss in the event of insolvency or liquidation and the fact that there was not yet a developed market in hybrid core capital instruments in Germany (recital 133 to the contested decision).

125 The applicant submits that it is appropriate, from the investor's point of view, to distinguish two aspects – the total amount of the issue and the size of the share attributable to each investor. It criticises the Commission for having failed to make that distinction.

126 As regards, in the first place, the total amount of the issue, the applicant begins by disputing the grounds put forward by the Commission for taking the view that, even though the large volume of the issue was taken into account in the WestLB case as evidence of a similarity to share capital, the large volume of the contribution at issue did not warrant such classification in this instance. Accordingly, it observes that, in its view, the contribution at issue participates, economically, in the full risk of loss in the event of insolvency or liquidation, and submits that a capital market on which a private investor would have made an investment in Helaba such as the contribution at issue never existed in 1998 or afterwards. It submits that both the Commission in the 1999 WestLB decision, and the Court in its *WestLB* judgment, cited in paragraph 7 above, attached considerable importance to the high volume of the contribution of funds when classifying the transaction. The applicant takes the view that the fact that the volume of the contribution at issue is particularly high and, therefore, of considerable importance in the present case, is confirmed by the comparison with the transactions mentioned by the Commission in recital 164 to the contested decision, but also by the fact that the contribution at issue accounts for 25% of the total European volume of hybrid core capital instruments in 1998.

127 Second, according to the applicant, the Commission's reasons in relation to the phased model cannot be accepted since a private investor would not have accepted it, and it is

wrong to conclude that this arrangement amounts to five smaller contributions since the entire contribution at issue was immediately recognised as core capital of Helaba and, moreover, in the case of contributions paid at different times, the conditions of each contribution would be different whereas, in the present case, the entire contribution is subject to the same conditions.

128 So far as, first of all, the comparison with the WestLB case is concerned, it should be borne in mind that the 1999 WestLB decision on which the applicant relies was annulled by the Court. Furthermore, while it is true that, in its 2004 WestLB decision – adopted following that annulment and referred to in recital 133 to the contested decision – the Commission took account of the large volume of capital transferred in treating the transfer at issue in that case as share capital, it did not rely on the overall volume of the transaction but on the part of WestLB's own funds which the capital concerned represented as well as, definitively, on the fact that, when that transaction was carried out, hybrid core capital instruments constituted no more than 20% of core capital, were not regarded as core capital in Germany and were not all issued for unlimited duration (recitals 204, 206, 208 and 209 to the 2004 WestLB decision).

129 By contrast, so far as the contribution at issue is concerned, the amount of that contribution (EUR 1.264 billion), albeit higher than that of the transactions used by the Commission for comparison purposes, is still far removed from the volume of the transaction at issue in the WestLB case (EUR 3.02 billion shown on the balance sheet, of which EUR 2.05 billion was recognised as original own funds) (recitals 54 and 71 to the 2004 WestLB decision). Furthermore, as the Commission points out, the contribution at issue was granted at the end of 1998, whereas the contribution in the WestLB case dated back to 1991. There is no dispute about the fact that, at the end of 1998, hybrid core capital instruments could already be regarded, according to German legislation, as original own funds and not only as additional equity, could be issued for an indefinite period and, by satisfying the requirements of the Sydney Declaration, could represent a significant part of a bank's core capital.

130 The applicant's argument that, in its *WestLB* judgment, cited in paragraph 7 above, the Court attached considerable significance to the criterion of the volume of the investment must also be rejected. The Court held in that judgment that the Commission had explained why it took the view that the differences between the hybrid core capital instruments and the transaction at issue were such that a comparison of that transaction with those instruments was of only limited value, and stated that, in particular, the Commission had drawn attention to the fact that the hybrid core capital instruments to which the applicants in that case referred generally constituted only a small part of the own funds of a bank, unlike the funds transferred to WestLB. The Court thus confined itself to ascertaining that the Commission's reasoning in that case was not vitiated by a manifest error of assessment, without confirming that the criterion of the large volume of funds transferred was always conclusive. Moreover, it observed that the Commission had a wide margin of assessment in making that determination (*WestLB*, cited in paragraph 7 above, paragraphs 350 and 351).

131 Next, as regards the reasons put forward by the Commission to the effect that, in consequence of the phased model, between 1999 and 2002 Helaba was able to use only part of the funds transferred to underpin its competitive business, it has been held in paragraphs 58 to 73 above that the Commission did not make a manifest error of assessment in accepting that phased model. Furthermore, while it is true, as the applicant points out, that the entire contribution was shown on Helaba's balance sheet from the date of the contribution, the fact remains that the part in excess of the annual tranches provided for by the phased model, like the part which was required to underpin housing promotion activities, was regarded by the Commission as fulfilling merely a liability function, not the expansion of its competitive business, and that, as a result, its remuneration was fixed by reference to the remuneration which a private investor would require for a guarantee, instead of by reference to the remuneration which such an investor would require for a silent partnership contribution enabling the bank to expand its competitive business. Given that the silent partnership contributions facilitate an immediate expansion of competitive business, the Commission was entitled to take the view – without making a manifest error of assessment – that, taking the phased model into account, the contribution at issue was not equivalent to a silent partnership contribution of EUR 1.2 billion enabling Helaba to expand its business immediately, but to a series of five silent partnership contributions of between EUR 180 million and EUR 380 million.

132 That conclusion is not affected by the applicant's argument that, where contributions are paid at different times, the conditions of each contribution differ, whereas the contribution at issue is subject to the same conditions. It must be noted that the applicant does not explain why the conditions applicable to five successive contributions would necessarily differ.

133 As regards, in the second place, the part of the issue attributable to each investor, the applicant maintains that the fact that the issue was not shared between a certain number of investors but was taken up by a single investor is also unusual. It states in that regard that the risk run by an investor increases gradually with the size of the capital contributed both in absolute terms and in comparison with the risk run by other operators making smaller investments. The applicant takes the view that, under those circumstances, the contribution at issue which was made by a single investor is similar to an investment in share capital.

134 In that regard, suffice it to note that the applicant does not put forward any evidence at all from which it might be concluded that it is common for the remuneration of an investor subscribing to part of a silent partnership contribution to vary according to the size of that part in the issue as a whole, and therefore that investors who subscribe to larger volumes are more highly remunerated than others. In addition, in the transactions which the Commission used for comparison purposes in the contested decision, reference is made only to a remuneration rate, and there is nothing to suggest that investors who invested more received a higher remuneration. Furthermore, the applicant does not explain how the increase in the risk run by the *Land* as a result of its wish not to split the special fund makes its investment similar to an investment in the share capital of a bank, since the latter investment is not necessarily distinguished by its size and a shareholder can subscribe to an amount that is smaller both in absolute terms and in comparison with total capital.

135 In those circumstances, it cannot be concluded from the applicant's arguments that the Commission made a manifest error of assessment in finding that the volume of

the contribution at issue did not preclude the view that that contribution had more in common with silent partnership contributions issued on the market than with share capital.

— Share capital buffer

136 The Commission took the view that the reduced share capital buffer was not such that it could rule out a private investor having made a similar investment – in the form of a silent partnership contribution – to the contribution at issue. It relied in that regard on the fact that the Landesbanken use silent partnership contributions to a greater extent than private banks since, as institutions governed by public law, they cannot raise share capital on the financial markets. It stated that investors, including some private investors, were more inclined to accept a smaller share capital buffer in the case of the Landesbanken because of their reduced risk structure (recital 134 to the contested decision).

137 The applicant submits that, although the Commission raises the fact that the share capital buffer is smaller in the present case than in that of private banks, it disregards the fact that the contribution at issue has four characteristics which give it a special liability quality and which make it appear to be a means – in common with share capital – of guaranteeing Helaba's capital base permanently. It objects, moreover, to the Commission's assessment that the reduced nature of the share capital buffer did not enable it to rule out a private investor making an investment comparable to the contribution at issue in the form of a silent partnership contribution.

138 As regards, on the one hand, the four characteristics of the contribution at issue which give it a special liability quality, first, the applicant mentions the fact that it represents an abnormally high proportion of Helaba's core capital, namely 40%. Second, it notes that this high proportion of Helaba's core capital was taken up by a single

investor whereas, in the silent partnership contributions used by the Commission for comparison purposes, no individual investor had more than 1%. The share capital buffer for the investor is thus 99% in the case of the silent partnership contributions used for comparison purposes and 60% in the case of the contribution at issue. Third, it emphasises that the whole of that contribution was deemed to be core capital and not merely equity capital. Fourth, it notes that the entire contribution was deemed to constitute core capital of Helaba and not just of the group to which Helaba belongs, thus giving Helaba greater flexibility regarding its use, with the result that a private investor would have required a premium on his remuneration.

139 In that regard it must be held, first of all, that the contribution at issue in itself represents a really very significant proportion of Helaba's core capital whereas, according to the Sydney Declaration, time-limited silent partnerships may account for no more than 15% of core capital. There is, without question, a difference between the contribution at issue and time-limited silent partnership contributions.

140 Next, as regards the fact that the contribution at issue was taken up by a single investor who, as a result, holds 40% of Helaba's equity capital, it must be held that, in economic terms, that fact cannot transform a silent contribution into share capital, in just the same way as the fact that an investor holds a minute proportion of the share capital does not make his investment any less of a share capital investment.

141 Admittedly, the equity share held by an investor determines the level of his exposure to risk, but it does not affect the nature of that risk or the classification of investments in economic terms. Thus, the essential characteristics distinguishing silent partnership contributions from share capital – their ranking in the event of insolvency or liquidation, conditions of payment of remuneration and the advantages or disadvantages to the bank associated with the use of one or the other approach – remain the same, irrespective of the size of the individual investment.

142 As to the fact that the contribution at issue was deemed to form part of the core capital of Helaba rather than of its group, it must be noted that the Commission and the interveners did not deny that this was in fact a particular feature of the contribution at issue. However, the fact – referred to by the applicant – that that classification gives Helaba greater flexibility in its use of the capital does nothing to increase the risk profile of the contribution at issue in comparison with silent partnership contributions or to make it similar to share capital.

143 Lastly, as regards the fact that the entire contribution at issue was regarded as core capital, the applicant merely mentions that feature without developing the argument. In so far as that feature is a product of the fact that the contribution at issue was devised as a 'perpetual' without a step-up provision, reference must be made to the findings of the Court in relation to the permanent nature of the contribution at issue (see paragraphs 150 to 154 below).

144 As regards, on the other hand, the Commission's assessment that the reduced share capital buffer was not such that it could rule out the possibility of a private institutional investor having made a similar investment – in the form of a silent partnership contribution – to the contribution at issue, the applicant maintains that the fact that the Landesbanken are more likely to resort to silent partnerships does not mean that investors will forgo appropriate remuneration. It adds that those silent partnerships were, in any event, taken up by their owners, public investors, not by private investors and, therefore, they could not be referred to by the Commission for comparison purposes. Concerning the Commission's assertion that investors would be more inclined to accept a smaller share capital buffer in the case of the Landesbanken because of their reduced risk structure, the applicant submits that the comparison between the rating of the Landesbanken and that of private banks shows that the risk structure of the Landesbanken is not reduced.

145 It must be noted that, as the applicant indicates, it is not a question of whether the contribution at issue could be issued on the market in spite of a share capital buffer of only 60%, but whether that factor means that the contribution at issue has more in

common, so far as its risk profile is concerned, with time-limited silent partnership contributions or with share capital and requires a higher level of remuneration.

146 In that regard, it is apparent from the documents before the court that, prior to the Sydney Declaration, silent partnership contributions represented only a small proportion of banks' core capital. It is only as a result of that declaration, in October 1998, that clarification was provided as to the fact that hybrid core capital instruments could be recognised as core capital beyond the 15% limit, and that the conditions for that recognition were specified. It may, therefore, be assumed that when the parties eventually reached agreement on the contribution at issue in December 1998, the effects of the Sydney Declaration in terms of the proportion of core capital obtained via hybrid core capital instruments, and thus as regards the share capital buffer, could not yet be seen on the market.

147 It follows from the contested decision (recitals 129 and 134) that both private banks and the Landesbanken subsequently increased the proportion of hybrid core capital instruments in their core capital, that increase being particularly significant in the case of the Landesbanken. It is also apparent from the contested decision (recitals 179 and 180) that the hybrid core capital instruments which were issued by the banks after the Sydney Declaration and which satisfied the declaration's conditions for recognition as core capital beyond the 15% cap were not remunerated at a much higher rate than silent partnership contributions issued previously. Lastly, it follows from the contested decision (recital 134) and from the Commission's reply to a written question of the Court that the investors who subscribed to the silent partnership contributions issued by the Landesbanken included private investors who had not required higher remuneration for contributions to take account of the banks' reduced share capital buffer.

148 In those circumstances, the applicant's arguments do not support the view that, in the light of the reduced share capital buffer, the risk profile of the contribution at issue is, in economic terms, similar to share capital.

149 In the light of the foregoing considerations, there is no need to examine the applicant's objections to the Commission's assertion that investors would be more inclined to accept a reduced share capital buffer in the case of the Landesbanken because of their reduced risk structure. The reasons why investors would be more inclined to accept a reduced share capital buffer in the case of the Landesbanken are unimportant in the present case, since it is established that the existence of a reduced share capital buffer does not prevent private investors from taking up the silent partnership contributions of the Landesbanken or induce them to seek higher remuneration than for silent partnership contributions issued by banks with a larger share capital buffer.

— Perpetuity of the contribution and the inability to transfer it

150 In the contested decision, the Commission took the view, in essence, that the perpetuity of the contribution and the inability to transfer it did not justify the remuneration for the contribution at issue being compared to the remuneration for share capital rather than to the remuneration for time-limited silent partnership contributions, and that the effect of that feature should be examined in the context of the calculation of adequate remuneration. It justified that assessment by stating that the perpetuity of the contribution at issue involved, primarily, the risk for the investor of not being able to profit from market interest rate increases, but that it did not affect the level of risk in the event of insolvency or liquidation (recital 138 to the contested decision).

151 The applicant submits that it is not the unlimited duration of the contribution at issue that increases its risk profile in comparison with silent contributions issued on the market, but the fact that the *Land* cannot withdraw its investment because the contribution is not fungible and that it cannot transfer its rights to a third party without Helaba's consent. By contrast, 'perpetuals' issued on the market are listed on the stock exchange, which means that investors can withdraw their investment at any time and are not tied to the bank indefinitely. In its reply, the applicant is critical of the fact

that, in its view, the Commission treats perpetuity and fungibility as though the two were completely unrelated, whereas the risk profile of the contribution at issue is the product of the interaction of those two characteristics, the result of which is that it is impossible for the *Land* to withdraw its investment. The applicant, moreover, opposes the Commission's arguments that fungibility is not precluded but merely restricted.

152 It must be noted that, in reply to a question put by the Court, the parties confirmed at the hearing that there are silent partnership contributions made, as in the present case, by mutual agreement between the issuing bank and investors, which are not listed on the stock exchange. It follows from this that the fungibility associated with the listing of a contribution on the stock exchange is not a characteristic of all silent partnership contributions taken up by private investors. It is not, however, apparent from the documents before the court that contributions which are negotiated by mutual agreement are remunerated at a higher rate than those listed on the stock exchange.

153 In any event, it must be observed that the contribution at issue can be distinguished from share capital in that respect also since, as the applicant submitted during the administrative procedure preceding the adoption of the contested decision (recital 68 to the contested decision), partners, at least of joint stock companies such as the German banks which issued the contributions used by the Commission for reference purposes, are free to sell their investments at any time.

154 It follows from this that, even on the assumption that the *Land*'s investment is not fungible and that that increases the risk of loss in the event of insolvency or liquidation in comparison with silent partnership contributions, this factor also distinguishes the contribution at issue from an investment in the share capital of the banks which issued the contributions used by the Commission for reference purposes, and does not mean that the Commission made a manifest error of assessment when it took the view that the contribution at issue should be compared with other silent partnership contributions issued on the market instead of with share capital, while

taking into account – by means of the requisite premiums, including that relating to perpetuity – its specific features.

Characteristics of the contribution at issue not relied on during the administrative procedure or considered in the contested decision

155 The applicant submits that inherent in the contribution at issue is a significant risk of loss both of the remuneration and of the funds contributed, even in circumstances other than those of liquidation or insolvency considered above. It refers in that regard to the fact that the contribution at issue participates in Helaba's annual losses and to the risks run by the *Land* of not being paid the remuneration if Helaba makes an annual loss and of not being able to recover the capital contributed.

156 As regards participation in Helaba's annual losses, the applicant submits that, in economic terms, the contribution at issue participates in those losses in the same way as share capital in so far as, under clauses 3(1) and 8(1) of the contract, the contribution participates fully in any annual loss made by Helaba, and any losses limit the right of the *Land* to be reimbursed in the event of withdrawal. It further submits that the fact that participation in losses is typical of all silent partnership contributions is irrelevant, since it is important to assess that factor in the context of all the economic features of the contribution at issue. It takes the view, furthermore, that the fact that, under clause 4 of the contract (clawback provision), in the event of a loss any future profits must be applied towards refinancing the contribution does not place the *Land* in a better situation than that of a shareholder because it does not profit, unlike shareholders, from the increase in the value of the undertaking.

157 It must be held in that regard that, while it is true that the participation in losses makes the contribution at issue similar to share capital, hence its recognition by BAKred as

part of Helaba's core capital, the fact remains that that does not distinguish it from other silent partnership contributions which are also recognised as core capital.

158 It is certainly the case that, in this instance, the reduction in the value of the contribution on account of Helaba's losses will be greater than it would be in the case of the contributions which the Commission used as a reference. Since, however, that is because the contribution at issue accounts for a greater proportion of Helaba's core capital than other contributions represent in the equity capital of the issuing banks, it is not a characteristic of the contribution at issue that can be distinguished from its volume in relation to Helaba's entire core capital (see paragraphs 136 to 149 above).

159 As regards the clawback provision in clause 4 of the contract (see paragraph 156 above), suffice it to note that, while it is possible – as the applicant claims – that it does not necessarily give the *Land* an advantage over investors in share capital, since the question which investment is more advantageous depends on the circumstances of each financial year, it must be held that it distinguishes them in any event, and therefore ensures that the contribution at issue has more in common with a silent partnership contribution, which may include such a provision, than with share capital.

160 In those circumstances, the participation of the contribution at issue in losses cannot demonstrate that the Commission made a manifest error of assessment in comparing the remuneration for the contribution at issue with remuneration for time-limited silent partnership contributions.

161 As regards the risk run by the *Land* of not receiving the remuneration if Helaba makes an annual loss, the applicant submits that the remuneration required to be paid to the *Land* represents a significant part of Helaba's profits and, in consequence, there is a significant risk that the *Land* will not receive it. The applicant maintains that the

remuneration required to be paid to the *Land* represented a much more substantial proportion of Helaba's profits in the year of the contribution at issue than the proportion which the remuneration for contributions issued by the private banks used for reference purposes in the contested decision represented in the profits of each of those banks.

162 As regards the risk run by the *Land* of being unable to recover the funds contributed, the applicant submits that, given the quantitative significance of the contribution at issue in relation to Helaba's core capital, Helaba would not be able to repay the contribution to the *Land* because its profits would not be such that it could replace the core capital which it would thereby lose.

163 It must be observed that those two characteristics of the contribution at issue are attributable, in essence, to the fact that it represents a greater proportion of Helaba's core capital than that represented by the reference transactions in the banks' core capital. As has been held in relation to participation in losses (see paragraph 158 above), there is no need, therefore, to examine those two characteristics separately. In addition, as regards the proportion of Helaba's profits in 1998 accounted for by the remuneration of the *Land*, it must be noted, first, that the applicant fails to take into account the fact that, under the phased model, Helaba was required to remunerate the entire contribution at issue – with the exception of the part needed to underpin the promotion of housing construction – at the rate of 1.4% only from 2003 and, second, that it uses for its comparison Helaba's profit after tax in 1998 instead of its annual pre-tax surplus, although there is no dispute about the fact that, since the contribution at issue is a silent partnership contribution, under German legislation its remuneration constitutes an operating expense payable before tax.

164 It follows from this that the applicant's arguments in relation to the risks run by the *Land* of not receiving the remuneration if Helaba makes an annual loss and of being unable to recover the funds contributed by way of a repayment do not support the conclusion that the Commission made a manifest error of assessment in comparing

the remuneration for the contribution at issue with the remuneration for time-limited silent partnership contributions.

The market situation at the time of the transfer of the contribution at issue

165 First, the applicant claims that the Commission erroneously applied the private investor test by failing to put itself in the situation that obtained on the date of that contribution, 31 December 1998, in order to classify the contribution at issue in economic terms.

166 It observes in that regard that, in recital 129 to the contested decision, the Commission refers to the practice of private banks described by the Federal Republic of Germany and summarised in recitals 96 and 99 to that decision. In those recitals, the Commission indicated that the Federal Republic of Germany had explained that (i) only a few months after Helaba, Deutsche Bank had taken up a 'perpetual' on the capital market; (ii) since 1999, the market had not attached any major importance to the distinction between financial instruments of limited and unlimited duration; and (iii) the applicant's assertion that only share capital could be used for very large volumes was at odds with the size of the silent partnership contributions which private credit institutions had taken up on the capital market in 1998 and in 1999 and since. It observes, moreover, that the table in recital 101 to the contested decision shows the trend between 1998 and 2003 of the proportion of the core capital of three private banks that was made up of hybrid capital. It maintains, referring to the practice of German banks thus presented by the Federal Republic of Germany, that the Commission is relying on information which was not available until after the contribution at issue was made.

167 The applicant adds that, at the end of 1998, the *Land* could not foresee the subsequent trends in silent partnership contributions and 'perpetuals' on the capital market. It claims that, therefore, for in classifying the contribution at issue in economic terms,

the Commission was required to take into consideration only the market situation as it was in 1998, not future trends of the capital market which were unknown at the time the contribution at issue was made.

168 It must be borne in mind that, according to the case-law, comparisons between the conduct of public investors and that of private investors must be made in relation to the attitude which a private investor would have had at the time of the transaction in question, having regard to the information available and developments foreseeable at that time (Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 76, and *WestLB*, cited in paragraph 7 above, paragraph 246).

169 In the present case, it must be held, first of all, that the Commission's reference in recital 129 to the contested decision to the practice of German banks is intended merely to substantiate its interpretation of the Sydney Declaration as not permitting the conclusion to be drawn that innovative permanent financial instruments cannot under any circumstances be recognised as core capital or that they too are covered by the limit of 15% of core capital. The Commission thus refers to that practice, stating that it supports the contention that innovative permanent financial instruments can be used as equity capital beyond the 15% limit. The Commission does not, therefore, base its assessment on those transactions postdating the contribution at issue, but merely uses them to support its own interpretation of the Sydney Declaration.

170 In any event, it must be held that the applicant does not explain why the market trend following the Sydney Declaration was not foreseeable by the *Land* and Helaba when they reached agreement on the contribution at issue. That explanation is all the more necessary since it follows from the contested decision that this market trend confirmed the assessment of the parties to the contribution at issue that, on the one hand,

'perpetuals' did not have to be remunerated by reference to share capital and, on the other, the size of the share capital buffer did not affect the level of remuneration.

171 Second, the applicant denies that, at the time of the contribution at issue, there was a developed market for hybrid core capital instruments in Germany on which Helaba could have issued a contribution such as the contribution at issue. It thus maintains that a 'perpetual' without a step-up clause such as the contribution at issue could not have been issued in 1998 for institutional investors such as the *Land*. It was only from 2004 on that institutional investors would have agreed to take up such 'perpetuals'. Moreover, these 'perpetuals' covered a smaller volume and were listed on the stock exchange. Furthermore, the contribution at issue could not have been issued subsequently because of its volume, owing to the fact that it was taken up by a single investor, and recognised in full as core capital – of Helaba, not of the group to which it belongs.

172 The applicant submits that the Commission overlooks that fact when it states that Helaba could have obtained funds by issuing several smaller tranches. It argues, inter alia, that that assertion infringes the private investor test since it involves taking into account the conduct of an investor in a situation other than that of the *Land*, and an inversion of priorities in so far as it is based on the alternatives which Helaba would have had in the future instead of on the question whether a private investor would have granted Helaba the same contribution on the same terms. It takes the view, therefore, that the lack of development of the hybrid core capital instruments market in Germany should have led the Commission to conclude that Helaba could only have obtained a similar volume of core capital on the market in the form of share capital.

173 It should be noted that the applicant does not directly challenge the Commission's reference in recital 137 to the contested decision to the existence of a 'perpetual' without a step-up clause issued in 1987 and taken up by institutional investors, and does

not put forward any arguments to demonstrate that the Commission was not entitled to base its assessment on that evidence. Thus, although it states that the first issue of a 'perpetual' without a step-up clause taken up by German institutional investors was in 2004 and the first issue of that kind by a German bank in 2005, those assertions are not sufficient to demonstrate that the Commission made a manifest error of assessment in relying on the transaction mentioned in recital 137 to the contested decision in rejecting the argument that institutional investors were not prepared to subscribe to 'perpetuals' without a step-up clause, and therefore that the contribution at issue could be compared only to share capital, on account of its unlimited duration.

174 As regards the differences invoked by the applicant between the contribution at issue and silent contributions issued on the market, it must be held that these correspond to arguments which have already been considered and rejected.

175 With regard to the applicant's argument that the Commission infringed the private investor test by stating that Helaba could have obtained funds by issuing several smaller tranches, it must be borne in mind that, while it is true that the private investor test requires an assessment of whether such an investor would have proceeded with the transaction in question on the same terms, the fact remains that, according to the case-law cited in paragraphs 35 and 36 above, the purpose of the control of State aid is to determine whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions and, with that aim in mind, it cannot be the case that only the investor's point of view must be taken into account. Therefore, the applicant cannot claim that the question whether Helaba could have obtained the same advantages at the same price on the market is irrelevant, when that question is crucial for determining what the outcome of negotiations between Helaba and a hypothetical private investor in the situation of the *Land* would have been.

176 In those circumstances, the applicant's complaints relating to the application of an incorrect reference period and an erroneous assessment of the market situation at the time of the transfer of the contribution at issue must be dismissed.

Conclusion as to the classification of the contribution at issue as a silent partnership contribution

177 There is no dispute about the fact that the contribution at issue is a special instrument which does not correspond precisely either to silent partnership contributions issued on the market, whether of limited or unlimited duration, or to share capital.

178 However, it is apparent from the foregoing review that the contribution at issue is similar to time-limited silent partnership contributions recognised as core capital on account of the following characteristics: its ranking in the event of liquidation or insolvency, both in comparison with creditors of the bank and with the owners; the fact that there is an annual remuneration obligation the amount of which is fixed in the contract; the fact that the remuneration is suspended in the event of an annual loss, that it is the only profit an investor can make from his contribution in the absence of any participation in increases in the value of the undertaking, and that Helaba is obliged to pay unpaid remuneration in the years following the year, or years, in which the remuneration was not paid; the fact that it participates in the bank's annual losses and the fact that there is a clawback provision in case the value of the contribution is reduced by losses.

179 By contrast, the contribution at issue can be distinguished from silent partnership contributions which are time-limited and recognised as core capital, and is similar to share capital in that it is of unlimited duration and, as a result, could be recognised as core capital beyond the 15% limit, and in that it represents a very significant proportion of the core capital and was recognised as core capital of Helaba, not of the group to which it belongs.

180 Lastly, it is distinguishable both from the majority of silent partnership contributions which are time-limited and recognised as core capital and from the share capital of private banks which issued the contributions used by the Commission for comparison

purposes in that the *Land*'s investment is not fungible, or is fungible in only a very limited way. Furthermore, it is distinguishable from the silent partnership contributions used by the Commission as a reference and from a large number of share capital investments in that the *Land* has a very significant proportion of the bank's equity capital.

181 It follows from this that the only characteristics of the contribution at issue which distinguish it from time-limited silent partnership contributions and which, at the same time, it has in common with share capital are, on the one hand, its unlimited duration and, on the other, the fact that it accounts for more than 15% of Helaba's core capital. However, it is apparent from the examination above that the applicant has not demonstrated that these characteristics, which are specific to 'perpetuals', result in a market remuneration more akin to that of share capital than to that of time-limited silent partnership contributions and, moreover, that there is no reason to think that the *Land* and Helaba were unable to foresee that trend.

182 In the light of the foregoing, the applicant's arguments do not support the proposition that the Commission made a manifest error of assessment in concluding, after an overall review of the characteristics of the contribution at issue, that it had more in common with silent partnership contributions than with share capital and that, therefore, its remuneration should be compared to the remuneration for time-limited silent partnership contributions of a size regularly seen on the market, to which a premium should be added if necessary.

4. *Comparison of the remuneration for the contribution at issue with the liability remuneration required on the market*

183 With regard to the comparison of the remuneration for the contribution at issue with the liability remuneration required on the market, the applicant challenges the Commission's assessments concerning the account taken of the additional charge arising from the trade tax which Helaba has to pay by reason of the contribution at issue, the comparison of the initial remuneration agreed by the *Land* and Helaba with the basic

liability remuneration required on the market, and the comparison of the perpetuity premium agreed in the present case with perpetuity premiums required on the market.

(a) Taking the trade tax into account

The contested decision

184 In the Commission's view it was appropriate to take into account – for the purposes of a comparison between the remuneration agreed for the contribution at issue and the market remuneration – the effect of the trade tax to which the contribution at issue is subject, which, in this instance, is 0.26% per annum. It stated in that regard that, although that tax had to be paid by institutional investors conducting business in Germany, who would require a higher remuneration as a result, in this instance it had to be paid by Helaba because the *Land* was not liable for it. The Commission therefore took the view that the total charge for Helaba which had to be compared to the market remuneration range was not the 1.4% remuneration agreed between the parties but 1.66% (recitals 156 to 159 to the contested decision).

Arguments of the parties

185 The applicant challenges that assessment and argues that investors do not take the tax status of the recipient of an investment into account in their expectations of yield, and that the Commission had not established that, on the market, the recipient would be in a position to bear the investor's full tax burden. It claims that there is no difference in the amount of remuneration paid to different investors for the same contribution, even though domestic investors not engaged in any industrial or commercial activity

and foreign investors are not subject to trade tax when making silent partnership contributions and are, therefore, in the same situation as the *Land*.

186 The applicant further submits that, in any event, the additional burden to be borne by Helaba is not equal to the trade tax rate but considerably less, in so far as that tax constitutes a business expense for Helaba and, accordingly, reduces its taxable income. Thus, after payment of corporation tax (40% in Germany at the time) and the solidarity surcharge (5.5%), the additional charge is only 0.15%.

187 The Commission and the interveners oppose those arguments.

Findings of the Court

188 As regards, first of all, the need to take into account the effect of the trade tax on the cost to Helaba of the contribution at issue, it must be noted that the applicant does not deny that Helaba is required to pay that tax because the *Land* is not liable for it. It does indeed state that certain other investors are not liable for that tax either and that that does not alter the amount of remuneration paid, but the Federal Republic of Germany and Helaba confirmed at the hearing that, while it is true that banks must, as a rule, pay trade tax on remuneration paid to investors who are not established in Germany or not engaged in any industrial or commercial activity, the fact remains that neither the banks nor the German authorities are aware of the identity of investors holding interests arising from silent partnership contributions and that, therefore, the banks do not pay trade tax in respect of remuneration paid, although some of it is paid to investors who are not liable to tax.

189 It must be observed that, since the Commission's reasoning is based not on the fact that the *Land* is not required to pay the tax, but on the fact that Helaba is thereby bearing an expense which it would not have to bear if the contribution had been made by a private investor on the market, the banks' non-payment in practice of trade tax in respect of remuneration paid to investors who are not established in Germany or who are not engaged in any industrial or commercial activity means that the applicant's argument is irrelevant. In the present case, unlike in the case of other silent partnership contributions on the market, Helaba has to bear an additional expense as a result of the payment of trade tax. That expense, while not involving a higher remuneration for the *Land*, has to be taken into account in assessing whether, on account of the contribution at issue, Helaba is bearing an expense at least equivalent to that borne by banks issuing silent partnership contributions on the market and, therefore, whether it is receiving an advantage.

190 In those circumstances, it must be held that the applicant has not demonstrated that the Commission made a manifest error of assessment by taking into account the effect of the trade tax on the total expense borne by Helaba on account of the contribution at issue.

191 Next, as regards the calculation of the actual charge borne by Helaba, it is not, in the present case, a question of establishing the final net cost to Helaba of the contribution at issue, but of comparing that cost with the expense associated with a time-limited contribution taken up by a private investor. To that end, the charges arising from one or other contribution can be compared before or after tax, provided that they are assessed at the same point in time. In so far as the Commission takes as a reference in the contested decision the pre-tax charge represented by the silent contributions which it uses for comparison purposes, it is necessary also to take into account the pre-tax expense resulting from trade tax (see, to that effect, *WestLB*, cited in paragraph 7 above, paragraph 384).

192 It follows from this that the applicant has also failed to demonstrate that the Commission made a manifest error of assessment in concluding that the charge resulting

from payment of trade tax, which must be taken into account in order to compare the remuneration of the contribution at issue with that of existing contributions on the market, is the pre-tax charge.

(b) Comparison of the initial remuneration with the basic liability remuneration required on the market

The contested decision

193 The Commission states that the review of the 10 transactions referred to by the Federal Republic of Germany, set out in recital 164 to the contested decision, indicates a liability remuneration range of 0.75% to 1.6% per annum (recitals 162, 163, 165 to 167 to the contested decision).

194 The Commission goes on to consider the various specific features of the contribution at issue that could have an effect on the amount of remuneration. It takes the view that it is not necessary to apply a premium in respect of the volume of the transaction or a reduction in respect of Helaba's rating. It considers, however, that, as a result of the reduced share capital buffer, it should be noted that a private investor would not have accepted a basic liability remuneration in the lower part of the range (recitals 168, 169, 171 and 172 to the contested decision).

195 The Commission concludes from this that, since the expense borne by Helaba on account of the contribution at issue is in the middle or upper part of the market range, there is no evidence of an advantage for Helaba or, therefore, of State aid (recital 172 to the contested decision).

Arguments of the parties

196 In the first place, the applicant observes that, owing to its risk profile, the contribution at issue should be compared to a share capital investment and not to a time-limited silent partnership contribution, and submits that, as a result, the Commission's calculation, based on a market range established from liability remuneration fixed in respect of time-limited silent partnership contributions, is incorrect. In addition, by erroneously comparing the contribution at issue to silent partnership contributions, the Commission omitted to take into account the fact that, apart from the premium which had to be applied to take account of the perpetuity of the contribution at issue, other premiums would be necessary to take account of Helaba's financial situation, the lack of publicity and lower transaction costs.

197 In the second place, the applicant criticises the way in which the Commission calculated the basic liability remuneration.

198 It submits that the Commission did not assess the level of the basic liability remuneration in the light of the market situation and environment as at the end of 1998 but in the light of later transactions.

199 Moreover, it submits that, owing to the differences between the contribution at issue and the reference transactions, the remuneration of the contribution at issue should be above the basic liability remuneration market range established on the basis of the reference transactions. It takes the view that the Commission not only failed correctly to assess the differences between the contribution at issue and the reference transactions which it examined, but, in addition, failed to examine other significant differences.

200 With regard to the differences which the Commission examined, namely the volume of the contribution at issue, the size of the share capital buffer and Helaba's rating, the

applicant claims that all these factors should have resulted in a premium on the basic liability remuneration as compared with the reference transactions. Regarding the differences between the contribution at issue and the reference transactions which the Commission did not examine and which should have resulted in an increase in the basic liability remuneration, the applicant mentions, first, the fact that the entire contribution at issue was taken up by a single investor and, second, the fact that the contribution at issue is not fungible, with the result that the *Land* cannot withdraw its investment from Helaba.

201 Lastly, the applicant submits that the USD 1 billion Dresdner Bank contribution mentioned in the contested decision together with other reference transactions proves that the remuneration of the contribution at issue should have been above the reference range since, in spite of what – in the applicant's view – is a much lower risk profile, that contribution was remunerated at a higher rate than the contribution at issue.

202 The Commission and the interveners oppose those arguments.

Findings of the Court

203 In the first place, as regards the applicant's argument that the range applied by the Commission is incorrect because it is based on transactions which cannot be compared with the contribution at issue, suffice it to note that an examination of the classification of the contribution at issue reveals that the Commission did not make a manifest error of assessment in finding that the contribution at issue had more in common with silent partnership contributions than with share capital (see paragraph 181 above).

204 In the second place, as regards the Commission's review of the question whether the initial remuneration of the contribution at issue is in line with the market, the

applicant's argument that the Commission did not take into account the market environment at the date of the contribution at issue must be rejected at the outset. It must be held that, even if no account is taken of the five transactions in 1999 referred to by the Commission, it follows from a review of the five remaining transactions that the market range of 75 to 160 basis points established by the Commission remains unchanged, since the transactions at the upper limit (Bayerische Hypo- und Vereinsbank contribution of DEM 1.2 billion) and lower limit (second tranche of the contribution of USD 700 million issued by Deutsche Bank) of that range both occurred in 1998. As regards the applicant's allegation that those contributions cannot, however, be compared to the contribution at issue because they were of limited duration, it must be borne in mind that that is not a characteristic that precludes any comparison.

205 Next, the Court must consider each of the eight factors which the applicant regards as requiring a premium to be put on the market range of basic liability remuneration and which the Commission either assessed incorrectly or failed to consider.

206 As regards, first of all, Helaba's financial situation, the applicant states that Helaba's profits in 1998 were relatively low in the light of the amount of remuneration which had to be paid to the *Land*, as a result of which there was a danger that the profits would not be sufficient to pay the remuneration agreed. It further submits that Helaba's other financial statistics (return on capital, distribution of profits, core capital ratio) were consistently significantly lower than those of the private banks between 1984 and 1994.

207 In that regard, it must be held that, by its argument relating to Helaba's allegedly reduced profits in comparison with the level of remuneration, the applicant reiterates the argument concerning the risk of loss of remuneration set out in paragraph 161 above. However, as has been established in paragraph 163 above, the applicant's comparison between the remuneration required to be paid by Helaba from 2003 and its profits in 1998 does not show that there is a particular risk of loss of remuneration. Concerning the argument that Helaba's other results were lower than those of the

major private banks, it is sufficient to note that, although the contribution at issue was negotiated and transferred to Helaba at the end of 1998, the applicant refers to data concerning the period from 1984 to 1994. In those circumstances, it must be held that the applicant's arguments do not permit the inference that the Commission made a manifest error of assessment in failing to find that, owing to Helaba's financial situation, the remuneration should have been higher than was agreed.

208 Second, as regards the absence – largely – of any publicity, owing to the fact that Helaba obtained the contribution at issue from a single investor, the applicant submits that the damaging effect of publicity in the event of difficulties or changes in relation to the contribution can be avoided or at least controlled in the present case. It maintains that a private investor would have required a premium on the basic liability remuneration to offset that advantage.

209 It must be held that that brief assertion by the applicant is not sufficient to demonstrate that, on the market, the matter alleged actually entails a premium on the basic liability remuneration and that, as a result, the Commission made a manifest error of assessment in failing to declare such a premium in the present case. Furthermore, while it follows in particular from the parties' references to a silent partnership contribution taken up by an insurance company that private investors also can subscribe to the whole of a silent partnership contribution, the applicant does not put forward any evidence to show that such a premium is actually required on the market.

210 In addition, as the applicant itself recognises, the fact that the contribution at issue comes from a single investor does not mean that Helaba can evade all publicity. Helaba cannot prevent the *Land* from raising any difficulties or changes in relation to the contribution, particularly since such issues are liable to be discussed publicly within the Hessischer Landtag (Parliament of the *Land*), in the same way as the initial subscription of the contribution at issue was discussed.

211 Third, as regards Helaba's allegedly lower transaction costs, the applicant claims that, owing to the fact that Helaba obtained the contribution from a single investor, it makes significant cost savings in respect of the launch of the issue as well as of its administration and implementation. It submits that a private investor would also have required a premium on the basic liability remuneration to offset that advantage.

212 It must be held that the applicant's unsubstantiated statement does not demonstrate that, on the market, the matter alleged would have resulted in a premium on the basic liability remuneration. In addition, the *Land* observes that it also made significant cost savings by transferring the entire special fund to Helaba instead of dividing the contribution at issue between different banks and that, as a result, a premium is not justified. In those circumstances, this argument also does not permit the inference that the Commission made a manifest error of assessment in failing to find that a remuneration premium should be applied for that reason.

213 Fourth, as regards the volume of the transaction, the applicant objects to the Commission's assessment that the fact that the volume of the contribution at issue is considerably higher than that of the contributions used for comparison purposes does not have to result in a premium since the contribution at issue is, by virtue of the phased model, equivalent to a series of five smaller contributions. It further submits that the Commission contradicts the line of argument which it had developed in the judicial proceedings culminating in the *WestLB* judgment, cited in paragraph 7 above, in which it had stated that an investor operating in a market economy who is 'confronted with what, in practice, are abnormally elevated sums [would have] required a premium on [the] return'.

214 The applicant repeats the arguments which it advanced against acceptance of the phased model. However, it is apparent from paragraph 131 above that the Commission did not make a manifest error of assessment in taking the view that the contribution at issue could be compared to a series of five smaller silent contributions, so far as the calculation of the appropriate remuneration for the expansion of competitive business is concerned.

215 In any event, it must be held that, even without taking the phased model into account, it does not follow from a review of the transactions which the Commission took into account in recital 164 to the contested decision that the large volume necessarily necessitates a premium on the liability remuneration. Thus, a liability remuneration of 1.20% was fixed for the SGZ-Bank contribution (October 1998) of only DEM 50 million (approximately EUR 25 million), whereas Deutsche Bank paid a liability remuneration of only 0.75% and 0.8% for the tranches of its contribution of USD 700 million (January 1998).

216 Concerning the argument put forward by the Commission during the judicial proceedings culminating in the *WestLB* judgment, cited in paragraph 7 above, suffice it to recall that the decision at issue in that case was annulled by the Court and that, in the 2004 WestLB decision, the Commission did not impose the premium on account of the large volume of the transaction which it had previously tried to justify.

217 In those circumstances, it must be held that the applicant has not demonstrated that the Commission made a manifest error of assessment in failing to find that the remuneration should have been higher than was agreed, on account of the overall volume of the contribution at issue.

218 Fifth, as regards the share capital buffer, the applicant takes the view that, although the Commission found in recital 169 to the contested decision that the size of the contribution at issue as against the share capital was such that the remuneration for that contribution is in the upper part of the market range for basic liability remuneration, it should have taken into account also the fact that the entire contribution was regarded as core capital above the 15% limit of hybrid core capital instruments laid down by the Sydney Declaration, and that this was the case with regard to Helaba, as opposed to the group to which it belongs.

219 It must be held that, in so far as recognition of the entire contribution as core capital of Helaba was made possible by its permanent nature, there is no reason to conclude

that the matter alleged by the applicant necessitates a separate premium from that relating to its unlimited duration. As regards the fact that the contribution at issue was recognised as core capital of Helaba, as opposed to the group to which it belongs, it must be borne in mind that the applicant confines itself to stating that that recognition gives Helaba greater flexibility in its use of the funds. Having regard to the Commission's wide discretion in the determination of market remuneration, it must be held that that allegation cannot in any way demonstrate that there was a manifest error of assessment on the part of the Commission.

220 Therefore, it must be held that the applicant's arguments do not permit the inference that the Commission made a manifest error of assessment in failing to conclude that the remuneration should have been higher than agreed, on account of the smaller share capital buffer.

221 Sixth, as regards Helaba's long-term rating, the applicant criticises the Commission's assessment in recital 171 to the contested decision that a private investor would take the view that the risk of loss with Helaba is comparable to that of an investment in one of the major private banks referred to in that decision. It states that it is inconceivable that, disregarding State guarantees, Helaba's rating and the rating of the major private banks referred to in the contested decision should be comparable and, therefore, that the reference transactions can be used for comparison purposes without any modification. It submits, moreover, that the Commission did not give reasons for its assessment in that regard.

222 It must be noted that the applicant merely states – in support of its assertion that it is inconceivable that, without State guarantees, Helaba's long-term rating and that of the major private banks referred to in the contested decision should be comparable – that, if Helaba's ratios had been compared to those of the major private banks, it would 'presumably' have obtained a less favourable rating.

223 Furthermore, the applicant does not challenge the assertion of the Federal Republic of Germany – to which the Commission refers in the contested decision (recital 171) – that no methodology for calculating the regional banks' long-term rating, disregarding institutional liability and guarantor liability, existed before 2001 at the earliest. It is true that, in its reply, the applicant maintains that, if those State guarantees are not taken into account, Helaba's rating in 1998 and in 1999 was lower than that of the major private banks, and it relies in that respect on Helaba's intrinsic and financial strength ratings, comparing them to the private banks' ratings in those years. However, given that it is apparent from the document provided to support that assertion that intrinsic and financial strength ratings are different from long-term ratings, the mere reference to Helaba's lower ratings is not sufficient to demonstrate, in the absence of other details, that its long-term rating would necessarily have been lower than that of the major private banks if it had been determined without regard to State guarantees, or that there was, at the end of 1998, a means of determining such a rating in respect of Helaba.

224 In those circumstances, it must be concluded that the applicant does not demonstrate that the Commission made a manifest error of assessment in assuming that, in the absence at the end of 1998 of a specific methodology for calculating the regional banks' long-term rating, disregarding State guarantees, a private investor would have taken the view that the risk of loss with Helaba was comparable to that of an investment in one of the major private banks referred to in that decision.

225 Furthermore, the contested decision contains an adequate statement of reasons in that regard. It must be noted that the assessment by the Commission to which the applicant objects did not purport to deny the relevance of any remuneration premium, but concerned the reduction sought by the Federal Republic of Germany on account of the allegedly low level of risk associated with an investment in Helaba owing to the State guarantees. This explains why the Commission confined itself to indicating why the calculation of the remuneration did not have to be based on Helaba's long-term rating at the end of 1998 and does not concentrate on the precise rating which it would have had without State guarantees.

226 Seventh, as regards the fact that the entire contribution was taken up by a single investor, the applicant submits that, in the reference transactions, the silent partnership contributions were taken up by a number of investors, each investing, in general, between EUR 5 million and EUR 10 million or, but only exceptionally, up to EUR 100 million. It states that, although the *Land* acquired 40% of Helaba's own funds, in the reference transactions, the share of individual investors in the own funds of the banks concerned was less than 1%.

227 The applicant disputes the Commission's assertion in its defence that the distinction made according to each investor's share of the issue is completely unfounded when compared with market practices at the end of 1998. It submits in that regard that that assertion is at odds with the case-law of the Court, which held in *WestLB*, cited in paragraph 7 above (paragraph 255), that a private investor 'wishes to maximise his profits but without running excessive risks in comparison with other participants in the market'. It maintains that, in comparison with other market operators, an investor runs a much greater risk if he is the sole investor in an issue, particularly if the total volume of that issue is substantial, than by subscribing – as in the case of the German private bank transactions referred to by the Commission for comparison purposes – jointly with other market participants to a much smaller tranche of an issue which, moreover, has a smaller total volume.

228 It further submits that the contribution at issue considerably raises the risk profile of the *Land*'s portfolio, owing to the concentration of risk in just one debtor. It observes in that regard that the diversification of risk is a general principle of commercial risk management and that the supervisory rules relating to 'large risks' proceed on the principle that the concentration of risk in a single debtor is particularly dangerous.

229 It must be observed in that regard that, although subscription to the whole of a contribution representing 40% of the issuing bank's own funds represents a greater risk for the investor than subscription to less than 1% of those funds, a remuneration

premium is justified only if that factor constitutes an advantage for the issuing bank for which it is prepared to pay, or if that bank needs the funds proposed by the investor and is not in a position to obtain them from others. By contrast, while the increase in risk for the investor stems from a decision which he has taken for his own reasons, without being influenced by the bank's wishes or requirements, the bank will refuse to pay a remuneration premium and will obtain funds from other investors (see, to that effect, *WestLB*, cited in paragraph 7 above, paragraph 320).

230 In the present case the increase in risk which, for the *Land*, lies in the fact that it has a significant proportion of Helaba's own funds, is the result of its decision not to divide the special fund because of the disadvantages that that would entail, and not the interest of Helaba which, as has been established (see paragraphs 39 to 42 above), did not need a significant increase in its funds so urgently as to be persuaded to accept a remuneration premium.

231 Furthermore, there is no reason to conclude that Helaba would have been unable to obtain on the market, from a number of investors if necessary, funds in the amount of the contribution at issue, taking into account the phased model, on terms that would also allow them to be recognised as core capital and in return for a basic liability remuneration equivalent to the rate agreed by the *Land* and Helaba.

232 Consequently, while the size of the *Land*'s proportion of the core capital of Helaba entailed an increase in risk for the *Land*, it is not clear that that amounted to an advantage for which Helaba should have paid a premium. In those circumstances, it must be concluded that the Commission did not make a manifest error of assessment in failing to conclude that the remuneration should have been higher than was agreed, on account of the fact that the contribution at issue was taken up by a single investor.

233 Eighth, as regards the lack of fungibility of the contribution at issue, or its reduced fungibility, the applicant submits that that factor distinguishes the contribution at issue from the transactions used by the Commission for comparison purposes, since the *Land* was thereby precluded from withdrawing its investment.

234 In that regard, it must be noted, as in paragraph 229 above, that the fact that one aspect of the transaction entails an increase in the risk run by an investor does not justify an increase in the remuneration unless that aspect constitutes an advantage for the bank or the bank is not in a position to refuse the funds proposed.

235 In the present case, the lack of fungibility of the contribution at issue, or its reduced fungibility, does not entail any advantage for Helaba.

236 It is apparent from the documents before the court that the silent partnership contributions issued on the market are issued via a company which takes up the contribution as a silent partner and raises the necessary capital on the market. The investors do not, therefore, take up the silent partnership contribution directly from the issuing bank but from the intermediary company. The latter, by contrast, as a silent partner, may not transfer its rights in the silent contribution without the consent of the issuing bank.

237 In the circumstances of the present case, the *Land*, which already had capital to invest, participates in the transaction as a silent partner instead of as an intermediary company. As a result, for Helaba, the transaction proceeds in the same way as contributions that are issued on the market, and it derives no additional advantage from the fact that the contribution at issue is not listed on the stock exchange, since the only relevant characteristics as far as Helaba is concerned are those which allow the contribution to be regarded as core capital above the 15% limit laid down by the Sydney Declaration for hybrid core capital instruments, namely the unlimited duration, the silent partners lack of entitlement to withdraw the contribution and the absence of a step-up clause. It must be noted in that regard that, when questioned by the Court at the hearing in relation to the advantages which Helaba derived from the contribution

at issue not having been listed on the stock exchange, the applicant confirmed that it did not know whether that aspect did in fact constitute an advantage for Helaba.

Conclusion concerning the comparison of the basic remuneration with the basic liability remuneration required on the market

238 It follows from all the foregoing that, in the circumstances of the present case, the Commission was entitled to conclude, without making a manifest error of assessment, that a private investor in a similar situation to that of the *Land* would not have been able to obtain a higher initial remuneration from Helaba than was agreed between the parties, since the matters involving an increase in risk for the *Land* arise from the nature of its special fund and from its decisions, and do not represent any advantage for Helaba in comparison with what it could have obtained on the market. In those circumstances, the Commission did not make a manifest error of assessment in finding that the total expense to Helaba of 1.43% arising on the basis of the initial remuneration of the contribution at issue, taking into account the effect of the trade tax, did not give Helaba an advantage which it would not have been able to obtain under market conditions.

(c) The comparison of the perpetuity premium with the liability remuneration premium required on the market

The contested decision

239 In the contested decision, the Commission found that the contribution at issue differs from most of the transactions referred to by the Federal Republic of Germany in that it constitutes a 'perpetual', and took the view that that merits a remuneration premium since it means that the *Land* is faced with an increased risk of being unable to follow variations

in interest rates and, for Helaba, the added economic benefit of being able to exceed the 15% cap fixed by the Sydney Declaration (recitals 173 and 174 to the contested decision).

240 The Commission states that, in assessing whether the 0.23% rate – corresponding to the perpetuity premium agreed between the parties together with the corresponding proportion of the trade tax – is in line with the market, it cannot, or can to only a very limited extent, rely on market data from the time of the transaction, since the parties were acting in effect as market pioneers. It asserts, however, that a public investor or a public bank cannot be prevented from acting as a market pioneer and that it is, therefore, appropriate to examine only whether the determination of the perpetuity premium was manifestly wrong in economic terms, that is, whether it was based, for example, on false premisses (recitals 176 and 177 to the contested decision).

241 It states that, in the light of the limited data available for the year of the contribution at issue and the following year, the calculation put forward by the Federal Republic of Germany, resulting from a comparison of the remuneration for a Deutsche Bank 'perpetual' and a silent partnership contribution of Dresdner Bank, and culminating in a premium of approximately 0.29%, was plausible. It concluded from this that there was no basis for the view that the relevant comparative rate of 0.23% per annum for the perpetuity premium lies below the market range and that there was therefore any favouring of Helaba, in other words State aid (recitals 182 and 183 to the contested decision).

Arguments of the parties

242 The applicant submits that the Commission made a manifest error of assessment in taking the view that there was no need to modify the reference range calculated on the basis of time-limited silent partnership contributions in order to take account of the unlimited duration of the contribution at issue.

243 In the first place, the applicant states that the Commission erred in concluding that the *Land* and Helaba acted as pioneers and that, as a result, they had to be given a wider margin of discretion. It maintains that Helaba and the *Land* did not act as pioneers, since no other transaction with the same characteristics as the contribution at issue was completed subsequently and, above all, because it is apparent from the debates in the Hessischer Landtag prior to the implementation of the contribution at issue that the parties sought faithfully to copy transactions carried out between other *Länder* and other Landesbanken, the remuneration for which was deemed by the Commission to contain elements of State aid.

244 In the second place, the applicant submits that the Commission was not entitled to take into account in its examination 'perpetuals' from the period May 1999 to December 2003. It maintains in that regard that if no market data are available, the Commission cannot assume that the circumstances which a private investor would have taken into account in the period from May to July 1999, or in December 2003, already applied, as such, at the end of 1998, since the actual evolution of the European capital market proves otherwise. It takes the view that, as a result, the transposition of the competitive situation in the year 1999 to the year 1998, without any justification, is a blatant mistake.

245 In the third place, it submits that, in any event, the four transactions – three of which were carried out by Deutsche Bank and one by Dresdner Bank – which the Commission used for reference purposes to calculate the perpetuity premium are not comparable to the contribution at issue as regards the total volume and the volume invested by the investor, the proportion of core capital of the issuing banks accounted for by the various contributions, their recognition as core capital of the bank or of the group, and the possibility of withdrawing the investment.

246 In the fourth place, the applicant submits that, contrary to the Commission's claim, the larger premium applied to the remuneration of the Deutsche Bank 'perpetual', as against the silent partnership contribution of Dresdner Bank, cannot be justified by the more favourable rating of the 'perpetual'. The applicant explained in reply to a

question put by the Court at the hearing that it intended, by that argument, to submit that the less favourable rating of the Deutsche Bank 'perpetual', as against that of the time-limited silent partnership contribution of Dresdner Bank, did not permit the inference that the market perpetuity premium was below the 0.29% rate calculated by comparing the three transactions, since ratings are affected by many factors.

247 The Commission and the interveners oppose those arguments.

Findings of the Court

248 With regard, in the first place, to the applicant's argument that the *Land* and Helaba were not pioneers, since they merely sought to copy the earlier transactions of the Landesbanken, first, it must be noted that – as Helaba points out – it is not borne out by the transcript of the meeting of the Hessischer Landtag's Economics Committee on 2 December 1998 on which the applicant relies. Admittedly, it is apparent from that document that those transactions were taken into account, but it is equally apparent that the *Land* and Helaba also took into account the fact that the Commission had initiated proceedings in respect of those transactions and that discussions had taken place with a view to reaching agreement on the terms of the contribution at issue. Second, concerning the argument that no other transaction comparable to the contribution at issue was completed subsequently, it is sufficient to refer back to the preceding analysis of the classification of the contribution at issue and to the account taken of its differences for the purposes of determining the market remuneration.

249 As regards, in the second place, the applicant's argument that the Commission was not entitled to take into account 'perpetuals' dating from May 1999 to December 2003, it must be observed that the Commission could not challenge the perpetuity premium agreed between the *Land* and Helaba without a minimum of information to support its conclusion that that premium was below market rate. It was with a view to finding that information, and thus to limiting the discretion of the parties to the

contribution at issue, that the Commission examined the subsequent market trend. In those circumstances, the applicant's objection, aimed at preventing the Commission from using data relating to the period after the contribution at issue, is not capable of demonstrating that the Commission made a manifest error of assessment in concluding that there was no basis on which to take the view that the perpetuity premium agreed between the *Land* and Helaba was not in line with the market.

250 In any event, it must be held that the applicant's argument that the volume of the market in hybrid core capital instruments increased significantly in 1999 is not sufficient to show that the Commission made a manifest error of assessment in concluding that it was entitled to rely on transactions carried out after the contribution at issue, since there was no reason to assume that a remuneration premium for the perpetuity of a silent partnership contribution varied much over time (recitals 177 and 178 to the contested decision). The mere fact that the volume of the market in hybrid core capital instruments increased significantly in 1999 does not mean that, contrary to the Commission's assertion in the contested decision, the perpetuity premium was lower in that year, and therefore that the Commission's use of data relating to that period could distort its conclusion. Moreover, the applicant does not explain how the increase in the volume of the market had an effect on the rate of the perpetuity premium. Nor does the applicant put forward any arguments to show that the *Land* and Helaba were not able legitimately to calculate in December 1998 the amount of the premium which would subsequently be established by other banks.

251 As regards, in the third place, the complaint that the contribution at issue is not comparable to the four contributions mentioned by the Commission, the applicant relies on arguments which have already repeatedly been advanced in support of its assertion that the contribution at issue has a risk profile that precludes its comparison with other silent partnership contributions, and which have been rejected by the Court.

252 The applicant also states that the fact that the contributions used by the Commission for comparison purposes are listed on the stock exchange suggests that they are

not of unlimited duration from the investor's point of view and that, as a result, the increased risk of loss of capital as compared with a time-limited financial instrument is, in so far as it exists, negligible. By contrast, in the case of the contribution at issue, the *Land* would not be able to withdraw its investment and, as a result, the perpetuity premium ought to be higher than in the case of silent partnership contributions listed on the stock exchange.

253 It must be noted, however, that the difference in the degree of fungibility between the contributions used by the Commission for comparison purposes and the contribution at issue and, in consequence, in the possibility of withdrawal of the investment is merely a product of the fact that the *Land*, unlike investors in silent partnership contributions listed on the stock exchange, did not invest liquid – and thus fungible – assets, but a special fund which it did not wish to sell and for which it wanted to be reimbursed only in kind. Furthermore, the inability – or very limited ability – of the *Land* to withdraw its investment does not give Helaba an additional advantage which it should therefore remunerate.

254 Consequently it must be held that, in the present case, in negotiations under normal market conditions, it would have been impossible for a private investor in the same situation as the *Land* to disregard the fact that the inability – or limited ability – to withdraw the investment was the product of its decisions in relation to the administration of the special fund and not of Helaba's requirements. Thus, such an investor should have taken into consideration Helaba's point of view and the fact that Helaba would not be prepared to pay a higher remuneration for a disadvantage to the *Land* resulting from its own decisions and not amounting to an additional advantage for Helaba.

255 As regards, in the fourth place, the applicant's argument that the less favourable rating of the Deutsche Bank 'perpetual' as compared with that of the time-limited silent partnership contribution of Dresdner Bank precludes a reduction of the perpetuity premium calculated by comparing those transactions, it must be held that the Commission did not deem the calculation proposed by the Federal Republic of Germany to be correct; it merely confirmed that it was plausible. Furthermore, the applicant's argument effectively prevents the Commission from making any market comparison in the present case since, as it acknowledged at the hearing, the remuneration of any

transaction completed on the market depends on a number of factors, including the effect on the final remuneration which is difficult to quantify precisely.

256 In any event, it must be observed that, since the Commission's conclusion in relation to the perpetuity premium that was agreed in the present case is not based on that calculation alone, that argument cannot, even if well founded, demonstrate that that conclusion is manifestly wrong. As stated in paragraphs 240 and 241 above, the Commission took into account in particular the fact that the *Land* and Helaba were acting as market pioneers and, alternatively, the fact that the comparison of the remuneration of 'perpetuals' mentioned by the Federal Republic of Germany was not evidence that the range of remuneration of 'perpetuals' was higher than that of time-limited silent partnership contributions.

257 In the light of all the foregoing, it must be held that the applicant has not established that the Commission made a manifest error of assessment in concluding that there was no evidence that the relevant comparative rate of 0.23% per annum for the perpetuity premium was below the market range and that, as a result, Helaba was treated more favourably and was thus in receipt of State aid.

Conclusion on the examination of the market nature of the liability remuneration

258 It is apparent from the foregoing that the Commission did not make a manifest error of assessment in concluding that the cost borne by Helaba on account of the contribution at issue was in line with the liability remuneration agreed on the market in respect of comparable transactions and, therefore, did not confer an advantage on Helaba which it would not have obtained under normal market conditions.

5. *The Commission's deduction from the remuneration of the refinancing costs arising for Helaba from the lack of liquidity of the contribution*

(a) The contested decision

259 The Commission states that, given that the contribution at issue did not provide Helaba with liquidity, Helaba bore additional refinancing costs as compared with those which a bank in receipt of a liquid contribution would have had to bear, since Helaba still had to obtain such liquidity on the market in order to be able to expand its business in the same way (recital 184 to the contested decision). It takes the view, therefore, that Helaba was required to remunerate only the risk to which the *Land* exposed its funds, that is to say, that it was required to pay the *Land* only the liability remuneration above the interbank refinancing interest rate applicable (recitals 162 and 187 to the contested decision).

260 The Commission rejects the applicant's argument that only the net refinancing costs had to be deducted from the remuneration, stating that, unlike the WestLB case referred to by the applicant, the contribution at issue does not provide Helaba with an additional tax reduction, as compared with that provided by a liquid contribution, which would justify a lesser reduction (recitals 185 and 186 to the contested decision).

(b) Arguments of the parties

261 The applicant submits that the contested decision is vitiated by a failure to state reasons and, moreover, that it is incompatible with the private investor test.

262 As regards the failure to state reasons, the applicant submits that the full deduction of the refinancing rate conflicts totally with the Commission's stance in the decision initiating the formal investigation procedure and with the case-law of the Court, and maintains that, that being the case, the Commission should have devoted particular care to the statement of reasons for its decision. It submits that the contested decision does not disclose the criteria on which the Commission relied in concluding that Helaba was actually bearing additional refinancing costs up to the gross refinancing rate, why Helaba has to pay only the liability remuneration above the reference interest rate, whether the liability remuneration should be applied to the gross refinancing rate or to the Libor or Euribor rates, or whether the reference rate and the Libor rate are the same.

263 As regards the application of the private investor test, the applicant submits that, in taking the view that Helaba only has to pay for the risk to which the *Land* exposes its special funds by opting for the legal form of a silent partnership contribution, the Commission's application of the test was erroneous because (i) the lack of liquidity would already have been offset by the reduced transfer value of the special fund; (ii) a private investor would not accept that his remuneration should be reduced on account of the lack of liquidity of his investment; and (iii) in any event the Court has already had occasion to rule that a private investor would accept only a reduction up to the actual costs borne by the bank on account of the lack of liquidity.

264 The Commission and the interveners oppose those arguments.

(c) Findings of the Court

265 As regards the alleged failure to state reasons, it follows from recitals 184 to 187 to the contested decision that the Commission took the view that a bank incurs higher costs on account of the fact that an investment in core capital is not liquid, as compared with the costs associated with a liquid investment, since the bank has to procure a level of liquidity on the market equivalent to the value of the investment. The bank

would not, therefore, accept that investment unless the agreed remuneration took account of the additional costs arising from the lack of liquidity of the investment and, accordingly, ensured that the costs of such an investment were the same as the costs of an investment including the transfer of liquid assets.

266 Where, as in the case of silent partnership contributions such as the contribution at issue, both the remuneration for the contribution and the additional costs are paid before tax, the Commission takes the view that the costs of a liquid and of a non-liquid contribution cannot be the same unless the remuneration for the contribution is calculated without taking account of the interest rate which, in the case of liquid silent partnership contributions, is intended to remunerate the availability of liquidity. However, where, as in the WestLB case, the remuneration for the investment is paid after tax because the investment is not in the form of a silent partnership contribution, although the refinancing costs are always deemed to be business expenses and are paid before tax, only the net refinancing costs may be taken into account since, in the opposite case, the non-liquid investment would be less onerous for the bank than a liquid investment. In the latter case, the Commission takes the view that an investor would require his remuneration to be higher to offset that advantage for the bank.

267 It must be held that the Commission has adequately explained – including in the light, inter alia, of the WestLB case – why, in its opinion, Helaba is, in the present case, effectively bearing the additional refinancing costs up to the gross refinancing rate, as compared with a liquid silent partnership contribution, and, therefore, why Helaba has to pay only the liability remuneration above the reference interest rate. Furthermore, in the light of that reasoning, it was not necessary for the Commission to indicate whether the liability remuneration should have been applied to the gross refinancing rate or to the Libor or Euribor rates, or what the reference rate would have been.

268 As regards the applicant's arguments concerning the justification for the deduction of the financing costs, these must be examined separately.

The argument that the lack of liquidity was already taken into account via the reduced transfer value

269 The applicant submits in this regard that, although the portfolio of special fund loans amounted to approximately EUR 4 billion as at 31 December 1998, the silent partnership contribution entered on Helaba's balance sheet amounted to only EUR 1.264 billion. It submits that the determination of the cash value made the contribution at issue the same as any other type of asset, including liquid assets, of the same amount, particularly in so far as it was supposed to produce interest at the normal market rate. It infers from this that a private investor would take into account the income which Helaba draws from the increase in the value of the special fund and would place it alongside any refinancing costs borne by the bank.

270 It must be observed that, as the Commission states, the valuation of the special fund as at the date of its transfer to Helaba has no connection with the additional costs which the contribution at issue represent for Helaba over and above those of a liquid silent partnership contribution. The fact that the valuation of the special fund was carried out not only by the parties to the contribution at issue but also by BAKred – in order to establish the value to be entered on Helaba's balance sheet as core capital – clearly shows that no account was taken in that valuation of the disadvantages caused to Helaba by the lack of liquidity and the costs of the refinancing which it had to undertake in order to expand its business as much as possible. That value, which was calculated in order to protect third party creditors, is thus the same, irrespective of whether Helaba should decide actually to expand its business as much as possible or not. It is thus an objective value which does not depend on the use of the special fund. That value would be the same whether the fund had been sold to a private undertaking or to a public authority simply wishing to carry on the business of the special fund and which, therefore, would not have needed to obtain liquidity up to the value of the fund.

271 Furthermore, that conclusion is borne out by the expert report requested by the Commission during the administrative procedure in the WestLB case. The example given by that report, concerning the sale by the authorities of the United Kingdom of

Great Britain and Northern Ireland of property rented to military personnel at less than market rents, the purchase price of which was equal to the cash value, confirms that that value corresponds to the objective sale price, irrespective of the buyer's intended use of the fund transferred.

272 The fact, which is noted in that report and relied on by the applicant in the present case in challenging the deduction of refinancing costs, that, once the cash value has been determined, the funds transferred are supposed to produce interest at market rates may be correct but cannot preclude such a deduction. First, it follows from the use of the expression 'is supposed' in that report that it is an opinion and not an incontrovertible fact which may be taken into account in offsetting the refinancing costs. Thus, it cannot be ruled out that, some years after its initial valuation, the cash value of the fund may not be equal to that initial value together with outstanding interest, but may be lower because, for example, of the non-repayment of part of the loans granted. Second, it follows from the contested decision, in particular from recitals 18 and 30, that the value of the fund entered on the balance sheet remained stable between 1999 and 2003 and that the transfer of the special fund to Helaba does not mean an influx of liquidity or of revenue for the bank, since the payments relating to the construction of social housing are allocated to the special fund and must be used to provide assistance. It follows from this that the fact that the cash value of the special fund is below its nominal value does not mean that Helaba makes an annual gain.

273 Accordingly, it must be concluded that, as the Commission and the interveners maintain, the fact that the cash value of the special fund on the date of its transfer is – as the parties and BAKred acknowledge – lower than its nominal value does not offset, and is not intended to offset, the financing costs borne by Helaba to procure liquidity on the market up to the amount of the contribution at issue. This argument must therefore be rejected without the Commission being required, as the applicant suggests, to supply the two expert reports determining the current value of the contribution at issue that are referred to in recital 16 to the contested decision.

The argument that a private investor would not have accepted a deduction of refinancing costs

274 The applicant submits that, in taking the view that a private investor would accept a reduction of his remuneration on account of the non-liquid nature of his contribution, the Commission made two errors – an accounting error, and a macroeconomic error.

275 The accounting error lies in the link established between the *Land*'s decision to transfer its special fund and Helaba's decision to accept it. The applicant claims that each decision was governed by parameters – likely return, risk, refinancing costs – which are not set by the parties but by the capital market, and that an investor will not proceed with his contribution without expecting a return appropriate to the risk taken. As regards the Commission's objections that the applicant's reasoning is based on a 'separation theory' which, aside from the fact that it is not the only theory to have been formulated, conflicts with the private investor test, the applicant submits that there is only one 'separation theory' and that the private investor test not only does not conflict with it but is based upon it.

276 The macroeconomic error lies in the fact that the Commission concluded that a private investor would have made part of his assets available to Helaba's creditors for an unlimited period at a rate of 1.4%, which is not only much lower than the risk-free borrowing rate at that time – namely 4% – but, moreover, does not even match the long-term inflation rate. The applicant also challenges the Commission's assertion that the remuneration rate was below that of a liquid contribution because it was not an ordinary contribution. It submits in that regard that there is nothing unusual about the contribution at issue in so far as contributions are often made in kind, such as in the form of property, land or production facilities.

277 In that regard, it follows from the *WestLB* judgment, cited in paragraph 7 above, that, with regard to the classification of an investment in an undertaking as State aid, it

cannot be contended that, when calculating the appropriate return, only the investor's point of view is relevant. The Court thus considered that, in the course of negotiations under normal conditions of a market economy, it would have been impossible for a private investor in the same situation as the *Land* of North-Rhine Westphalia to ignore the non-liquidity of the capital contributed and the fact that, for WestLB, that capital was of limited use. It had therefore concluded that the *Land* of North-Rhine Westphalia could not have required the same return on that capital as for liquid capital (*WestLB*, cited in paragraph 7 above, paragraphs 326 and 328). It must, moreover, be borne in mind that, in the application of the law on State aid, it is the existence of an advantage for the undertaking that is decisive. It follows from this that, in a case such as the present case, where the *Land* seeks to invest a particular type of asset, a transaction cannot be deemed to give rise to State aid where, following negotiations between the public authority wishing to invest and the undertaking, the terms which the latter is prepared to accept on account of the disadvantages facing that undertaking because of the nature of the capital transferred result in a remuneration that is lower than that agreed on the market for cash investments. In so far as those terms are not more advantageous for the undertaking than those which it could have obtained if the transaction related, as would normally be the case, to liquid capital, it does not gain an advantage which it would not have been able to obtain on the market. By contrast, it cannot be held that, for a transaction of that kind not to be regarded as giving rise to State aid, the public authority must always receive the same remuneration for its investment as an investor who is prepared to transfer liquid capital.

278 In those circumstances, the applicant's arguments relating to inflation and the risk-free borrowing rate must be rejected in so far as they are based on the premiss that it is only the investor's point of view that counts and that all that is relevant is the comparison between the remuneration received by the *Land* and that which would have been required by an investor assuming the same risks, irrespective of the advantages and disadvantages for Helaba arising from the contribution at issue as compared with the reference transactions.

279 That conclusion is unaffected by the applicant's argument that there is nothing unusual about the contribution at issue inasmuch as contributions in kind, such as

property, land or production facilities, are common. In that regard, on the one hand, it must be noted that the applicant does not claim that hybrid core capital instruments such as the contribution at issue are taken up on the market in exchange for assets such as property or land. On the other hand, that comparison disregards the fact that the contribution at issue is of a special nature, even in comparison with such assets. Not only is the contribution at issue not liquid, but Helaba cannot obtain liquidity by selling it or using it for its own gain.

280 In those circumstances, it must be concluded that the applicant's argument that the rate agreed between the parties to the contribution at issue is below the risk-free borrowing rate and inflation does not permit the inference that the Commission made a manifest error of assessment in taking the view that, since the contribution at issue does not provide Helaba with liquidity, which it must therefore procure on the market, Helaba was required to remunerate the *Land* only in respect of the risk to which the *Land* exposed its assets (liability premium).

The fact that an investor would, at most, have accepted only a deduction of refinancing costs corresponding to the actual costs borne by Helaba

281 The applicant notes that, thanks to the contribution at issue, Helaba is able to expand its business significantly and submits that, in consequence, the refinancing costs should not be attributed to one 'unit of business' but to the whole of the business generated by the contribution. It asserts that the Commission should have compared the economic advantages and disadvantages of a liquid contribution, on the one hand, and the contribution at issue, on the other, and concludes that the non-liquid nature of the contribution at issue could justify at the very most a reduced return and not a flat-rate deduction of the refinancing costs. It takes the view, moreover, that the Commission did not take account of the fact that certain transactions do not require liquidity but generate income for the bank.

282 Furthermore, the applicant takes the view that, even if the full refinancing rate had to be taken into account, the refinancing costs constitute a business expense which

reduces Helaba's basis of assessment, with the result that Helaba's actual cost, after tax, is below the refinancing rate.

283 As regards the applicant's argument that the Commission should have compared the economic advantages and disadvantages of the contribution according to whether or not it was in the form of cash, it must be noted that a non-liquid contribution does not entail additional advantages for a bank as compared with a liquid contribution. Thus, the business expansion opportunity arising as a result of the increase in own funds, both in respect of business requiring liquidity and that requiring only liability capital, is the same, irrespective of the nature of the assets transferred to the bank. By contrast, a non-liquid contribution entails additional costs for the bank, unless the bank enters only into transactions which do not require liquidity. The applicant does not claim that that is the case so far as Helaba or banks which have issued silent partnership contributions on the market are concerned. Moreover, in the calculations included in its written statements to demonstrate that Helaba's relative economic loss is substantially below the full amount of its costs, the applicant also proceeds on the principle that the bank will seek to obtain liquidity up to the amount transferred.

284 As regards the applicant's calculations, moreover, these were made using an example based on a contribution of EUR 100, a business growth factor of 12.5, a refinancing rate of 4% and a lending rate of 6.6% for Helaba's customers. The applicant explains that, in those circumstances, Helaba would make a profit before payment of the remuneration of EUR 36.50 in the case of a liquid contribution and of EUR 32.50 in the case of a non-liquid contribution, and that, as a result, it makes a loss of EUR 4 – that is 10.96% – if it receives a non-liquid contribution. It proposes, therefore, to reduce by 10.96% the remuneration payable for the liquid contribution – namely 5.4%, corresponding to the risk-free borrowing rate of 4% plus the 1.4% liability premium agreed between the *Land* and Helaba. It concludes, therefore, that the *Land* ought to be paid a remuneration of 4.81%.

285 It must be noted at the outset that these calculations are largely speculative. While the refinancing rate for risk-free loans used by the applicant is that which applied to 10-year federal bonds in Germany at the time of the contribution at issue, the fact

remains that Helaba will have to pay a higher rate than the federal bond rate in order to obtain refinancing on the market (see paragraph 13 above). As regards the rate of 6.6%, leaving aside the fact the applicant does not explain in its pleadings on what that figure is based, it is clear that a bank does not apply just one rate to all transactions, at all times and for all its customers.

286 In any event, it must be held that the partial deduction of refinancing costs suggested by the applicant only partly offsets the higher costs which the contribution at issue represents for Helaba as compared with a liquid contribution. While it follows from the calculation proposed by the applicant that the refinancing costs borne by Helaba in order to obtain liquidity on the market would be EUR 4 for a loan of EUR 100, the reduction of the remuneration which it would pay to the *Land* would only be EUR 0.59. Therefore, by using the method put forward by the applicant, the cost which Helaba would bear on account of the contribution at issue would be higher than that which would arise in connection with a liquid contribution.

287 In those circumstances, the applicant's argument does not prove that the Commission made a manifest error of assessment in taking the view that the gross refinancing costs were deductible in the present case in order not to make the contribution at issue more costly for Helaba than a liquid contribution, which a private investor would have been unable to require in the circumstances of the present case.

288 With regard to the applicant's argument that the disadvantage caused to Helaba by the refinancing costs is mitigated by the advantage which it derives from the fact that those costs are expenses which reduce its basis of assessment and therefore the amount of tax, suffice it to note that, even if that is in fact the case, the profits which Helaba makes after tax are thus also lower than those which it would have made if the contribution had been liquid. In those circumstances, the non-liquid nature of the contribution at issue does not represent an advantage for Helaba.

289 The present case must thus be distinguished from the WestLB case in which the Commission – without its action being questioned by the Court – had approved only the

deduction of the net refinancing rate, not the gross rate as demanded by the Federal Republic of Germany and the parties to the transaction, owing to the fact that, since WestLB – unlike Helaba – was required to remunerate the investor after tax, it would have made more profit with the transfer of a non-liquid asset than it would have made with liquid capital.

290 Since the impact of the refinancing costs on the bank's profits was lessened by virtue of the fact that the reduction of the basis of assessment meant that less tax was payable, the impact of those costs on the remuneration also had to be reduced so as not to allow the bank to profit both from the tax reduction and an excessive reduction of the remuneration. Thus, in deducting from the remuneration the net refinancing costs, the Commission offset the increase in WestLB's expenses incurred in connection with those costs and their reduction resulting from the reduction of the remuneration to be paid, making the transaction similar to a transaction involving a transfer of liquidity.

291 In view of all the foregoing, it must be held that the applicant has not established that the Commission made a manifest error of assessment with regard to the account taken of the refinancing costs borne by Helaba owing to the non-liquid nature of the special fund.

292 In those circumstances, it must be held that the applicant has not demonstrated that the Commission made a manifest error of assessment in concluding, in essence, that the charge borne by Helaba in respect of the part of the contribution which it was able to use to underpin its competitive business and arising from the agreed remuneration, the trade tax and the refinancing costs, as well as the charge of 0.3% for the rest of the contribution at issue, was the same as the charge which Helaba would have borne if it had obtained funds entailing the same advantages on the market. In particular, the Commission did not make a manifest error of assessment in concluding, in the light of the context of the transaction, that, while the fact that the *Land* contributed a significant proportion of Helaba's core capital and cannot freely withdraw its investment may indeed increase the risk run by the *Land*, it does not represent an additional advantage for Helaba and would not have enabled a private investor to obtain a remuneration premium.

293 The applicant's pleas alleging an infringement by the Commission of Article 87 EC and a failure to state reasons for the contested decision must, therefore, be dismissed.

294 Accordingly, the action is dismissed.

The parties' other applications

295 The applicant asks the Court to order the Commission, in accordance with Article 64(3) of the Rules of Procedure, to produce (i) the expert report which was lodged by the Federal Republic of Germany during the administrative procedure and relates to the priority of the contribution at issue in the event of Helaba's insolvency, and is mentioned in recital 131 to the contested decision; (ii) the two expert reports establishing the cash value of the contribution at issue mentioned in recital 16 to the contested decision; and (iii) the agreement or agreements reached between Helaba's shareholders giving rise to the *Land*'s 'controlling influence' to which the Commission referred in its Decision C(2005) 3232 final of 6 September 2005 on the transfer of the Hessian Investment Fund as silent partnership participation to Landesbank Hessen-Thüringen Girozentrale, at issue in the case giving rise to the judgment of today's date in *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 31 above.

296 The applicant also requests the Court to hear the oral testimony of the experts, Mr H. and Mr F.

297 The applicant, moreover, asks the Court to order Helaba to produce statistics in respect of its market share in Hessen, Thuringia and Germany in the years 1998 to 2004.

298 Lastly, it proposes that a number of witnesses be heard if the Commission challenges certain assertions made by the applicant in relation to the admissibility of the action.

299 At the request of the Court (see paragraph 25 above), the Commission produced the expert report which was provided by the Federal Republic of Germany during the administrative procedure and which relates to the priority of the contribution at issue in the event of Helaba's insolvency. However, the Court considers that, in view of the explanations given by the parties during the proceedings, there is no need to request the production of the two expert reports establishing the cash value of the contribution at issue. With regard to the agreement or agreements reached by Helaba's shareholders to which the Commission refers in Decision C(2005) 3232 final, it must be held that, since none of the Commission's assessments in the contested decision are based on the *Land*'s influence on Helaba, there appears to be no need for the document to be produced.

300 The Court considers, further, that there is no need to hear the oral testimony of the experts Mr H. and Mr F., since their reports have already been placed on the file.

301 In addition, in the absence of a ruling on the admissibility of the present action, it is not necessary to approve the applicant's request that Helaba be ordered to produce statistics in respect of its market shares in Hessen, Thuringia and Germany for the years 1998 to 2004, or to summon as witnesses the persons whom the applicant proposed should testify if the Commission should challenge certain assertions made by the applicant in relation to the admissibility of the action.

302 With regard to the applicant's application for confidential treatment in respect of the reply (see paragraph 20 above), suffice it to note that, in so far as the information which the applicant regards as confidential does not appear in the version of the reply lodged, the application is devoid of purpose.

303 Finally, the application for the removal from the file of certain documents annexed to the reply (see paragraph 22 above) must be allowed, since the documents concerned are internal documents of the Commission.

Costs

304 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 form of order sought by the Commission, the *Land* and Helaba.

305 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the Federal Republic of Germany is to bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Orders the documents produced by the Bundesverband deutscher Banken eV at Annexes 9 and 10 to the reply to be removed from the file;

2. Dismisses the application;

3. Orders the Bundesverband deutscher Banken to bear its own costs and to pay those incurred by the European Commission, the *Land* Hessen and Landesbank Hessen-Thüringen Girozentrale;

4. Orders the Federal Republic of Germany to bear its own costs.

Czúcz Vadapalas Labucka

Delivered in open court in Luxembourg on 3 March 2010.

[Signatures]

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