COMMISSION DECISION (EU) 2025/906

of 22 November 2024

on State aid SA.48580 (2017/C) implemented by Germany for WestSpiel

(notified under document C(2024) 8105)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 20 June 2017, the Commission received two complaints lodged by the association of gambling halls (*Fachverband Spielhallen e.V.*, 'FSH') and another complainant (together 'the complainants') pertaining to the alleged State aid granted to Westdeutsche Spielbanken GmbH & Co. KG ('WestSpiel') by the Land of North Rhine-Westphalia (*Nordrhein-Westfalen*, 'NRW').

(2) The complaints were registered separately under cases SA.48580 and SA.48842. On 16 April 2018, the Commission merged the two files under case SA.48580.

(3) On 2 August 2018, the Commission forwarded the non-confidential version of the complaints to Germany and requested additional information. After requesting and obtaining an extension of the deadline to reply, by letter of 2 October 2018, Germany submitted its views on the complaints and replied to the request for information.

(4) On 6 February 2019, the Commission requested further documents from Germany, which were provided by the latter on 22 February 2019. On 12 June 2019, the Commission forwarded the non-confidential version of Germany's submission of 2 October 2018 to the complainants, inviting them to state their views with regard to the arguments put forward by Germany. On 8 August 2019, the complainants submitted their views in reaction to Germany's arguments, maintaining their complaints.

(5) On 8 October 2019, the Commission requested additional documents from Germany, which were provided on 24 October 2019.

(6) By letter of 9 October 2019, the complainants formally requested the Commission to adopt a decision on the matter, pursuant to Article 265(2) of the Treaty on the Functioning of the European Union ('TFEU').

(7) By letter dated 9 December 2019, the Commission informed Germany that it had decided to initiate the formal investigation procedure laid down in Article 108(2) TFEU ('the opening decision'). By email of 15 January 2020, Germany confirmed that the opening decision contained no confidential information.

([1]) OJ C 59, 21.2.2020, p. 14.

(8) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* ([2]). The Commission invited interested parties to submit their comments on the alleged aid/measure.

(9) On 27 January 2020, the Commission forwarded the complainants' submission of 8 August 2019 to Germany.

(10) On 2 March 2020, Germany submitted comments on the opening decision and on the complainants' submission of 8 August 2019. Following a phone conference between the Commission and Germany on 3 June 2020, Germany submitted further written comments, substantiating its position, on 17 June 2020. No third-party comments were submitted within the deadline set in the opening decision.

(11) The complainants submitted observations on 6 August 2020, and Germany provided comments on those observations on 1 October 2020.

(12) On 18 December 2020, Germany submitted to the Commission updates as regards WestSpiel's privatisation. Additional updates on the same privatisation process were submitted by Germany on 2 February 2021. On 10 February 2021, Germany submitted to the Commission an indicative timeline revealing its planned steps in view of finalising WestSpiel's privatisation process.

(13) On 11 February 2021, the Commission sent a request for information, to which Germany replied on 25 and 26 February 2021.

(14) On 16 March 2021, WestSpiel submitted observations on the case and updates on the process regarding WestSpiel's sale. On 24 March 2021, the Commission held a phone call with Germany.

(15) Germany provided additional information to the Commission on 20 July and 8 September 2021.

(16) On 14 March 2022, the Commission sent an additional request for information, to which Germany replied on 4 April 2022. The Commission sent another request for information on 11 July 2022, to which Germany replied on 18 July 2022.

(17) On 12 May 2023, the Commission sent an additional request for information, to which Germany replied on 14 July 2023.

2. DETAILED DESCRIPTION OF THE AID

2.1. Legal context at the time when the alleged measures were granted

(18) The subject of this case is the financial support WestSpiel received from the State in the period between 2009 and 2015 through the measures described below in Section 2.3.

(19) When the alleged measures were granted, i.e. in the period between 2009 and 2015 for the annual loss coverage and in 2015 for the capital injection, the German legal system distinguished between two types of games of chance.

(20) On the one hand, certain gambling machines could be freely operated by specialised gambling halls or by restaurants, provided that the rules of the regulation on games (*Spielverordnung*) were complied with. In accordance with the regional gambling halls regulations (*Spielhallengesetze der Bundesländer*), a licence was necessary to operate commercial (private) gambling halls (*gewerbliche Spielhallen*).

([2]) Commission Decision of 9 December 2019 on State aid SA.48580 (2017/FC) – Alleged aid to WestSpiel (OJ C 59, 21.2.2020, p. 14).

(21) On the other hand, live gaming or casino games (blackjack, roulette, etc.) (i.e. so-called '*großes Spiel*') and other gambling machine games were considered to be too risky; offering such games was therefore in principle prohibited. By derogation to that rule, the German *Länder* were competent to allow certain (mainly public) operators (*Spielbankunternehmen*) to offer such games, through licences granted at regional level, on the basis of the conditions laid down by the laws of the respective gambling acts (*Spielbankgesetze*).

(22) The objectives of the SpielbG NRW ([3]) were laid down in Article 1 SpielbG NRW. Notably, the regulatory objective was to prevent the addiction to games of chance and betting, to guide the natural gambling instinct of the population into ordered and monitored paths, to ensure player and youth protection and to ensure proper conduct of operators and an orderly and transparent operation of games of chance.

(23) In accordance with Article 2(2) SpielbG NRW, up to five public casinos could be authorised in NRW. In contrast to the situation in other *Länder*, the SpielbG NRW did not provide for the possibility of granting licences also to private operators prior to WestSpiel's sale. In the light of the requirements set out in Articles 2(1) and 3(1) SpielbG NRW, WestSpiel was *de facto* the only licensee of casinos in NRW, operating in 2019 four casinos in Aachen, Bad Oeynhausen, Dortmund (Hohensyburg) and Duisburg. WestSpiel held a so-called 'framework licence' since 1975.

2.2. **The beneficiary**

(24) WestSpiel was a casino operator active in NRW. Until the merger of WestSpiel with the limited liability company Westdeutsche Spielbanken GmbH ('WestSpiel GmbH') ([4]) on 13 January 2021 (see recital (29)), WestSpiel's sole limited partner *(Kommanditistin)* was NRW.BANK and WestSpiel GmbH was the personally liable partner or general partner *(Komplementärin)* of WestSpiel.

(25) On 26 November 2015, NRW and NRW.BANK concluded a trustee agreement ('the trustee agreement') according to which:

— NRW undertook, following the conclusion of a silent partnership agreement between NRW.BANK and WestSpiel, to provide an amount of EUR 64,8 million to NRW.BANK; and

— NRW.BANK undertook to accept such trust funds, to use them exclusively in order to establish, in its own name but on account of NRW, a silent partnership with WestSpiel pursuant to Articles 230 et seq. of the German Commercial Code (*Handelsgesetzbuch, HGB*) in accordance with the silent partnership agreement, and in this context to make a contribution of EUR 64,8 million ('silent contribution') to WestSpiel.

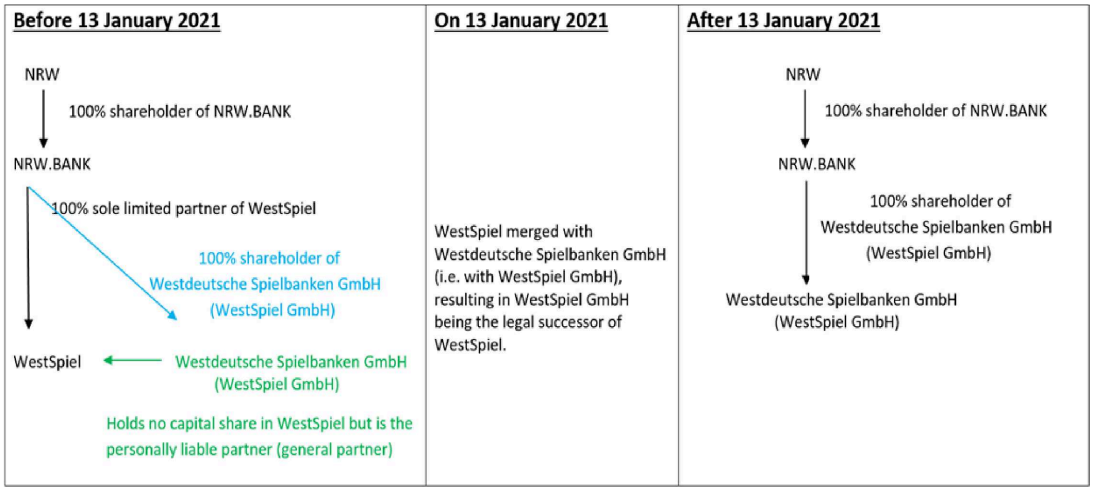
(26) On 1 December 2015, a silent partnership agreement was concluded between NRW.BANK and WestSpiel. It contained the obligation of NRW.BANK to make the silent contribution of EUR 64,8 million available to WestSpiel after the inflow of the funds into NRW.BANK as trustee. Following the conclusion of the silent partnership agreement between NRW.BANK and WestSpiel and the receipt of the funds by NRW.BANK, NRW.BANK contributed the funds in the amount of EUR 64,8 million to WestSpiel. Such silent contribution of EUR 64,8 million (which was to be booked on a separate silent contribution account) was shown in the equity of WestSpiel besides NRW.BANK's contribution as limited partner of WestSpiel.

([3]) In NRW, gambling activities offered in casinos are subject to the gambling act NRW (Gesetz über die Zulassung öffentlicher Spielbanken im Land Nordrhein-Westfalen, *Spielbankgesetz NRW*, 'SpielbG NRW'). After the measures had been granted, the SpielbG NRW was amended by Article 35 Section 2 of the law of 29 May 2020; GV. NRW. Ausgabe 2020 Nr. 19 vom 2.6.2020 Seite 357 bis 380 | RECHT.NRW.DE.

([4]) WestSpiel GmbH did not make any contribution to the capital of WestSpiel and therefore did not hold any capital share. As general partner (without capital contribution), WestSpiel GmbH was responsible for the business management of WestSpiel. Furthermore, WestSpiel GmbH was general partner of Casino Duisburg GmbH & Co. KG, the former 100 % subsidiary of WestSpiel, without any capital share, and as such also responsible for the business management of Casino Duisburg GmbH & Co. KG. WestSpiel GmbH did not engage in any operating business.

(27) On 4 January 2021, NRW.BANK, WestSpiel and – in view of the merger between WestSpiel and WestSpiel GmbH – WestSpiel GmbH entered into a dissolution agreement pursuant to which the silent partnership between NRW.BANK and WestSpiel was dissolved with effect of 8 January 2021 and subsequently wound-up. The remaining silent contribution of (after loss participation) approximately EUR 46,5 million (exactly EUR 46 516 909,42) was paid back to NRW.

(28) WestSpiel kept the legal form of a limited partnership (*Kommanditgesellschaft*) until 13 January 2021. The sole limited partner of WestSpiel was NRW.BANK and the personally liable partner or general partner was WestSpiel GmbH, as described above. NRW.BANK, which is solely owned by NRW, was also the sole shareholder of WestSpiel GmbH. After 13 January 2021, with a capital share of EUR 35,5 million, which corresponded with the liable contribution (*Hafteinlage*), NRW.BANK held 100 % of the shares in WestSpiel (Article 3 of the articles of association of WestSpiel of 1 December 2007, in their latest version).



(29) In the context of a wider reorganisation of the WestSpiel group, which was in particular carried out in order to support and facilitate the (intended) sale of the group, on 22 December 2020, WestSpiel GmbH and WestSpiel entered into a notarial merger agreement pursuant to which – based on the financial statements of WestSpiel as of 31 December 2019 – WestSpiel transferred all of its assets to WestSpiel GmbH, with effect as of 1 January 2020, in accordance with German company law. Upon registration of such merger with the competent commercial register on 13 January 2021, the merger became legally effective, resulting in WestSpiel GmbH becoming the legal successor of WestSpiel.

(30) In September 2021, following a tender procedure ([5]), WestSpiel was sold to the Gauselmann Group ([6]) ([7]). According to publicly available information ([8]), following the sale, WestSpiel's activities in the four casinos in Aachen, Bad Oeynhausen, Dortmund (Hohensyburg) and Duisburg are now operated under the name 'Merkur Spielbanken NRW GmbH' ([9]).

([5]) https://igamingbusiness.com/nordrhein-westfalen-launches-westspiel-privatisation-tender/.
([6]) According to Germany's submission of 4 April 2022, WestSpiel's sale was a share deal and not an asset deal. WestSpiel's shares were sold to the Gauselmann Group for a price of EUR 141,8 million. Germany further clarified that the Share Purchase Agreement provides for a potential (future) purchase price reduction in the amount of any recovered State aid, up to a maximum of EUR 30 million, to be paid to WestSpiel in the event of a legally binding recovery of State aid; these conditions were announced in advance and equally offered to all bidders interested in the purchase of WestSpiel's shares.
([7]) The term 'WestSpiel' defined in recital (1) above also refers to the merged, and then sold entity.
([8]) https://www.waz.de/wirtschaft/gauselmann-gruppe-uebernimmt-westspiel-casinos-in-nrw-id232845809.html.
([9]) See entity data in competent commercial register (Registerportal | Homepage).

(31) In its reply of 4 April 2022, Germany explained that WestSpiel's legal personality did not change following its sale: the company's activities would be continued on its own account in the same legal entity. Only the name of the company was changed to 'Merkur Spielbanken NRW GmbH', with the commercial register number (Duisburg HRB 19356) remaining unchanged.

(32) The context of WestSpiel's fiscal and regulatory situation – at the time when the alleged measures were granted – is particularly relevant for the present case ([10]). WestSpiel was subject to the regular German tax regime (corporate income tax, trade tax) with regard to the income generated from non-gaming-related activities (e.g. restaurants). As for gaming activities, WestSpiel was subject to a specific tax regime (Articles 12 and 13 SpielbG NRW (old version)) ([11]). Taxes were mainly levied on gross gaming revenue ('GGR'), not profits. WestSpiel was subjected to a 30 % taxation of its casinos' GGR (increased by another 10 percentage points in cases of an annual GGR exceeding EUR 15 million per casino) pursuant to Article 12 SpielbG NRW (old version). WestSpiel was subjected to another 15 % taxation on GGR, referred to as 'additional receipts' (*Zusätzliche Leistungen*), pursuant to Article 13 SpielbG NRW (old version). In accordance with Article 12 SpielbG NRW (old version), the tax levied was intended to finance activities in the general interest.

(33) In addition to these taxes on GGR, Article 14 SpielbG NRW (old version) required WestSpiel to transfer 75 % (and in certain cases more) of its profits to NRW by means of a profit skimming mechanism. Unlike the taxation of GGR under Articles 12 and 13 SpielbG NRW (old version), the profit skimming mechanism applied to the overall company activities (i.e. was not limited to the profits generated through gaming activities). In particular, it applied for the sale of the artworks in the year 2014.

2.3. **The alleged measures**

(34) According to the complainants, WestSpiel would have received unlawful and incompatible State aid under the following three measures:

(a) alleged annual loss coverage by its shareholder NRW.BANK since 2009;

(b) alleged granting of a licence to operate a fifth casino in Cologne;

(c) alleged EUR 64,8 million capital injection in 2015.

(35) In the opening decision, the Commission only opened the formal procedure on measures (a) and (c) above. It took a no objection decision concerning measure (b) above on the ground that the alleged granting of a licence to WestSpiel to operate a fifth casino in Cologne did not constitute aid (see recital 97 and conclusion of the opening decision). As a result, this measure is outside the scope of the present Decision, which will only deal with measures (a) and (c) above.

2.3.1. *Annual loss coverage*

(36) The complainants allege that WestSpiel would have received annual loss coverage from its sole limited partner NRW.BANK from 2009 to 2015.

([10]) The question of whether the differentiated fiscal treatment of WestSpiel involves in itself unlawful State aid is the subject of Commission Decision C(2019) 8819 final of 9 December 2019 on the State aid SA.44944 (2019/C) (ex 2019/FC) and SA.53552 (2019/C) (ex 2019/FC) – Tax treatment of public casinos operators in Germany and Alleged guarantee for public casinos operators in Germany (OJ C 187, 5.6.2020, p. 80). The Decision has been appealed in Case T-510/20; the General Court rejected the appeal in its order of 22 October 2021, *Fachverband Spielhallen and LM* v *Commission*, T-510/20, ECLI:EU:T:2021:745. The General Court's order has been appealed in Case C-831/21 P.

([11]) This was the version of the SpielbG NRW of 13 November 2012 (GV. NRW. S. 524, 530; SpielbG NRW 2012,NW – Spielbankgesetz NRW – Gesetze des Bundes und der Länder (lexsoft.de)) before the amendment by Article 35 Section 2 of the law of 29 May 2020.

(37) While WestSpiel was still able to generate profits in the years 2005 to 2008, the company did not manage to continue to do so in the following years. Overall, in the years 2009 to 2015, WestSpiel generated an annual GGR of approximately EUR 79,6 million to EUR 101,1 million. As a result of the taxation of GGR under Articles 12 and 13 SpielbG NRW (old version), WestSpiel generated overall losses of between approximately EUR 3,5 million and EUR 9 million in the years 2009 to 2013 and in 2015 ([12]). By contrast, the sale of two artworks by WestSpiel resulted in extraordinary income of approximately EUR 114,4 million in 2014, which is why WestSpiel generated an overall profit of approximately EUR 86,4 million in that year.

(38) WestSpiel's annual results (i.e. the remaining profits after application of the profit skimming mechanism in 2014 and the losses in all other years between 2009 and 2015) were credited/debited in the capital account of NRW.BANK. As a result, NRW.BANK's capital account for its sole limited partnership in WestSpiel was valued at approximately EUR 27,6 million in 2009, but only at EUR 12,5 million in 2015 ([13]).

(39) The complainants consider that between 2009 and 2015, WestSpiel would have received loss coverage in the amount of approximately EUR 63,6 million, as evidenced by its annual reports.

(40) In their submission of 8 August 2019, the complainants take the view that, due to the corporate structure of WestSpiel, NRW.BANK (as sole limited partner of WestSpiel) would have borne approximately EUR 24,8 million of the losses between 2009 and 2017, while NRW (in its role as trustor behind NRW.BANK's silent partnership in WestSpiel, following the trustee agreement and the silent partnership agreement concluded in 2015, as further detailed in Section 2.3.2 below) would have borne approximately EUR 9,1 million of the losses over the same period. In this context, the complainants indicate that WestSpiel would be a public undertaking as per Commission Directive 2006/111/EC ([14]) and that the use of the resources put at its disposal (i.e. its capital) but permanently controlled by the State would qualify as State resources.

(41) In addition, the complainants take the view that most likely WestSpiel would not have been able to bear its own losses over the past years in the absence of the EUR 64,8 million capital injection, a situation in which a prudent private investor would not have continued to bear the annual losses generated by WestSpiel (as NRW and NRW.BANK would have done). Finally, the complainants submit that Germany's assertion that WestSpiel's negative annual results would have mainly been attributable to its high tax burden would be incorrect. Notably, the complainants estimate that WestSpiel's tax burden was in constant decline over the years, while the cost ratios before tax rose in the period under review from 2005 to 2015. According to the complainants, it would follow that WestSpiel's losses were and are not caused by the high tax burden but are attributable to extremely high cost ratios. Finally, the amounts covered by the (partial) liquidation of the risk fund (see footnote 12) could not be deducted from WestSpiel's losses (as Germany argues) since it would have been unclear which risks were supposed to be covered by this fund.

(42) According to the complainants, the annual loss coverage by NRW.BANK would be funded by State resources and imputable to the State given that NRW.BANK would solely be owned by NRW and that government members would be members of its board and involved in decisions on granting annual loss coverage. The complainants take the view that, according to case-law, it would not be necessary to establish in every case that there has been a transfer of State resources. It would be sufficient that resources are placed at the disposal of a public undertaking for the measure in question to fall within the scope of Article 107(1) TFEU.

([12]) Figures do not take into account compensations of losses achieved by the (partial) liquidation of a risk fund for WestSpiel created for covering uninsurable general and special gambling risks. The creation of the fund is based on the framework licence of the Ministry of the Interior and Municipal Affairs of NRW to operate the casinos in NRW and on the articles of association of WestSpiel. Under the articles of association, WestSpiel had to create the risk fund itself. In the balance sheet, the risk fund is a special item on the liabilities side between equity and reserves.

([13]) Figures take into account compensations of losses achieved by the (partial) liquidation of the risk fund, as well as the debiting of losses on NRW.BANK's silent participation in 2015.

([14]) Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17, ELI: http://data.europa.eu/eli/dir/2006/111/oj).

(43) Since NRW.BANK only covered losses of WestSpiel and not of other undertakings, the complainants consider that the annual loss coverage would confer a selective advantage on WestSpiel. With regard to the year 2014, the complainants consider that the extraordinary revenue generated through the sale of the artworks must be disregarded, since without the sale WestSpiel would have generated an operating loss of approximately EUR 21 million that year. Overall, the complainants consider that, in view of the cost ratio before tax, WestSpiel's difficult financial situation could not be justified with an allegedly high tax burden. Against this background, the annual loss coverage by NRW.BANK would not have corresponded to the behaviour of a hypothetical private market investor. Besides, the complainants consider that, in view of the competition between public casinos and private operators of gambling halls, the measure would also distort or threaten to distort competition and would affect trade between Member States.

(44) Finally, according to the complainants, the measure would not be compatible with the internal market. Notably, WestSpiel would qualify as an undertaking in difficulty within the meaning of the Commission's Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ('the R&R Guidelines') ([15]), while the measure would not be in line with the requirements of the R&R Guidelines.

2.3.2. *Alleged capital injection in 2015*

(45) The complainants also allege that WestSpiel would have received a EUR 64,8 million capital injection from NRW.BANK in 2015.

(46) According to the complainants, while WestSpiel would have generated losses in the years before and after 2014, the company would have generated profits of approximately EUR 86,4 million in 2014. These profits, however, would not have originated from the operational business of WestSpiel but from the sale of two artworks. As a result, the profit skimming mechanism in Article 14 SpielbG NRW (old version) would have led to a payout of profits in the amount of approximately EUR 82 million to NRW in 2014.

(47) In 2015, a part of the skimmed profits, i.e. EUR 64,8 million, would have been 'reinjected' into WestSpiel as follows: NRW and NRW.BANK concluded the trustee agreement by which NRW.BANK became the trustee of a silent contribution by NRW to the partnership capital of WestSpiel. This silent contribution in the amount of EUR 64,8 million was added to the partnership capital contributed by NRW.BANK.

(48) The trustee agreement between NRW and NRW.BANK was concluded on 26 November 2015 and contained the obligation of NRW to provide NRW.BANK with the nominal amount of EUR 64,8 million no later than ten (10) banking days after the signature of the trustee agreement but not before the signature of a silent partnership agreement between NRW.BANK and WestSpiel. Germany confirmed that NRW.BANK received the payment on 10 December 2015.

(49) The silent partnership agreement between NRW.BANK and WestSpiel was concluded on 1 December 2015 and contained the obligation of NRW.BANK to make the contribution of EUR 64,8 million no later than five (5) banking days after the inflow of the contribution into NRW.BANK as trustee. Germany confirmed that WestSpiel received the payment on 15 December 2015.

([15]) Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

(50) The complainants take the view that the capital injection made in 2015 would constitute State aid within the meaning of Article 107(1) TFEU. Notably, the complainants contend that the injection of EUR 64,8 million would have equipped WestSpiel with new capital, which a private market investor would not have done. Notably, this would follow from WestSpiel's annual report of 2015 which refers to an 'Independent Business Review' of 29 April 2015 carried out by [a renowned auditing company] (*)) ('the [IBR] Report') stating that the business plan for WestSpiel was '*not unrealistic but in parts challenging or ambitious*' and that the management case was '*not an unrealistic, but overall significantly risky scenario*' ([16]). According to the complainants, the capital injection would have been carried out without a prior analysis of whether the return of this investment would be in line with the average return of machine-based gambling of between 10 % and 39 %, on average 24 %.

(51) In addition, while the injected additional capital would have been intended to be used for setting up the fifth casino in Cologne, the complainants allege that NRW would not have carried out any proper analysis of the expected returns to be generated by the fifth casino. For these reasons, the capital injection would have been manifestly not in line with the Market Economy Investor Principle ('MEIP') and would have conferred a selective advantage on WestSpiel.

(52) With regard to the '*overall concept to secure WestSpiel's future*' as claimed by Germany, comprising the sale of the artworks and the injection of the profits generated by the sale but skimmed from the company via the profit skimming mechanism, the complainants take the view that Germany's qualification of the profit skimming mechanism based on Article 14 SpielbG NRW would be in contradiction to Germany's position in case SA.44944 ([17]). While, according to the complainants, in the present case Germany had presented profit skimming as a normal profit appropriation under the provisions of the HGB, in case SA.44944 Germany argued that the profit skimming in accordance with Article 14 SpielbG NRW was a tax within the meaning of Article 3(1) of the German Fiscal Code (*Abgabenordnung*).

(53) According to the complainants, in any event, neither from a short-term perspective nor from a long-term perspective, would the 2015 capital injection have been in line with the MEIP test. From a short-term perspective, the complainants allege that Germany would not have carried out any *ex ante* assessment of the profitability of the capital injection, as required by applicable case-law. Notably, according to the complainants, Germany would have had to compare the projected financial situation of WestSpiel with and without the capital injection. From a long-term perspective, by taking into account the future fiscal revenue of the State generated via the taxes levied under Articles 12, 13 and 14 SpielbG NRW (old version), Germany would have failed to distinguish the State's capacity as a tax authority from its capacity as an economic operator (i.e. as a partner in WestSpiel).

2.4. **Grounds for initiating the procedure**

(54) On 9 December 2019, the Commission decided to initiate the formal investigation procedure regarding the alleged annual loss coverage from 2009 to 2015 and the alleged capital injection in 2015.

2.4.1. *Alleged annual loss coverage*

(55) In recitals 62 and 63 of the opening decision, the Commission stated that an advantage could not be excluded, as it was unclear whether WestSpiel's shareholders, NRW.BANK and NRW, actually bore (part of) WestSpiel's losses or decided on whether the capital required to cover the losses would be made available or not, or both.

(*) Confidential information.

([16]) See page 10 of the [IBR] Report.

([17]) See Decision C(2019) 8819 final, https://ec.europa.eu/competition/state_aid/cases1/202023/283549_2161703_113_2.pdf.

(56) In addition, the Commission stated in recital 64 of the opening decision that the mere fact that NRW.BANK accepted further losses of WestSpiel despite the repeated losses over the previous years without carrying out an *ex ante* assessment of whether or not to maintain its shareholding in WestSpiel or to liquidate it so as to keep the part of the capital not yet lost, might have constituted an undue advantage in itself, since it could be assumed that a private investor under comparable circumstances would not have acted in that way.

(57) Against this background, the Commission considered in recital 65 of the opening decision that the legal set-up and corporate structure of WestSpiel, as well as the different legal instruments by which shareholders provided equity had to be further clarified in order to assess the State aid implications of these operations.

2.4.2. *Alleged capital injection in 2015*

(58) In recitals 79 to 84 of the opening decision, the Commission took the view that the profit skimming mechanism appeared to be a special tax on the income of the NRW public casinos operator, i.e. WestSpiel.

(59) The Commission noted that Germany could not in case SA.44944 claim that public casinos would have been (potentially) confronted with a disadvantageous tax regime (hence no fiscal advantage for WestSpiel) and in the present case SA.48580 claim that the profit skimming mechanism would have been a distribution of profits to shareholders (hence no taxation) that simply injected part of the distributed profits in WestSpiel.

(60) The Commission concluded in recital 83 of the opening decision that, against this background, the profit skimming mechanism pursuant to Article 14 SpielbG NRW (old version) did not seem to be a mere automatic profit distribution from WestSpiel to its shareholder, to which NRW.BANK could renounce. The 2015 capital injection had a different nature than the profit skimming mechanism. As a self-standing measure and based on the MEIP, it appeared to have conferred an advantage on WestSpiel.

3. COMMENTS FROM INTERESTED PARTIES

(61) The Commission did not receive any comments from interested parties within the deadline set in the opening decision.

4. COMMENTS FROM GERMANY

(62) According to Germany, none of the alleged aid measures would involve State aid within the meaning of Article 107(1) TFEU.

4.1. Alleged annual loss coverage

(63) On the alleged annual loss coverage, in essence, Germany argues that WestSpiel would have never received direct or indirect compensation for its losses from NRW.BANK but would have merely consumed its own equity capital (contributed in 1978 and 2002) to compensate its accumulated losses. Germany argues that the alleged measure would not have involved any payments from NRW.BANK, and therefore that this measure would not have involved State aid.

(64) Germany explains that, according to German company law, shareholders would have to show a reduced capital in the balance sheet when the company in which they hold shares incurs losses. In this sense, standard accounting rules under German company law applicable to limited partnerships ([18]) would stipulate that in the case at hand the capital was automatically consumed, i.e. the partnership's capital account would have automatically been debited with the amount of losses without any decision to be taken by the shareholder.

([18]) See Article 167 HGB in conjunction with Article 120 HGB (version of the HGB before the amendment of 1 January 2024 by Section 34(4) of the law of 22 December 2023, BGBl. 2023 I Nr. 411) ('old version').

(65) In addition, Germany indicates that NRW.BANK could not '*decide on whether the capital required to cover the losses is made available [to WestSpiel] or not*' (recital 62 of the opening decision). In this sense, based on the legal dispositions of the German law, Germany explains that:

(a) Like any trading company, WestSpiel must draw up annual accounts for the close of each financial year (Article 242 et seq. HGB). The annual accounts consist of a balance sheet and a special profit and loss account (Article 242(3) HGB). In this respect, the company is bound by law. If the financial situation of the company, and in particular the consumption of equity, are not shown at the correct amount in the annual accounts, the persons involved could be liable to prosecution for fraudulent accounting (Article 331 HGB).

(b) Contrary to the claims of the complainants, a partner (with regard to the capital already contributed to the company) could not therefore unilaterally '*decide on whether the capital required to cover the losses is made available or not*' ([19]). Shareholders would be deprived of this decision, as equity reduction by means of offsetting with the equity share of the partner is based on Article 161(2) HGB in conjunction with Article 120 HGB (old version). The latter provision states:

— (First section) '*At the end of each financial year, the profits and losses for the year shall be determined on the basis of the balance sheet, and each partner's share of such profits and losses shall be calculated.*'

— (Second section) '*The profits due to a partner shall be added to the partner's share of capital; the losses allocated to a partner, as well as any money withdrawn from the share of capital during the financial year, shall be deducted therefrom.*'

(c) If equity consumption occurs, this would not mean that the limited partner contributes new funds (or takes a decision on the use of funds already contributed). It would only mean that, due to the losses and the consumption of equity, the value of the partner's stake is reduced. In the group's profit and loss account, it would therefore be a matter of '*charging the net loss for the year (…) to the capital account of NRW.BANK (limited partner)*'. However, this would be a purely technical accounting procedure, i.e. the debiting of a balance-sheet item (the capital account). It would not be a matter of a '*debiting procedure (…) to transfer funds from an account of NRW.BANK to WestSpiel*' ([20]), but of the fact that the equity granted to the company in previous years has been reduced, which would be recorded in accordance with accounting rules.

(d) This rule, which in principle could be found at all trading companies in the Union and large parts of which would have been harmonised and put into concrete terms by Union secondary legislation, would serve to protect creditors. Any losses incurred would therefore necessarily be absorbed by equity.

(e) A partner would not be able to evade this mechanism. The partners would therefore not be free to decide whether the equity is consumed. Against this background, the understanding of the law expressed by the complainants ([21]) would be, according to Germany, wrong and not showing the consumption of partnership capital in the annual accounts would be a criminal offence.

(66) As regards WestSpiel's 2007 articles of association, in the period before the silent participation (i.e. 2009-2014), Germany confirms that they entailed no contractual clause leading to a different mechanism than the automatic consumption of partnership capital described in recital 63 of the opening decision. These 2007 articles of association would have been a mere clarification repeating the applicable German law ([22]).

([19]) See recital 62 of the opening decision.
([20]) See recital 63 of the opening decision.
([21]) See recital 62 of the opening decision.
([22]) WestSpiel's (2007) articles of association have been redrafted and entered into force on 26 January 2016. Germany provides additional elements confirming that neither in the years before the amendment of the articles of association in 2016 nor afterwards was there any transfer of financial resources or liquidity by the limited partner when losses were allocated. Regarding the steps that had to be followed to allocate the annual losses, there was no difference between the 2007 articles of association and those of 2016. They were allocated in proportion to the capital share (owned by NRW through the silent participation and by NRW.BANK). Moreover, the silent participation agreement foresaw that it could not be unilaterally dissolved by one of the parties. In any event, as explained in recital 66 of the opening decision, the Commission concludes that the same considerations apply for losses generated in the subsequent years (i.e. after 2015, under the 2016 articles of association) and (presumably) charged to the capital accounts of NRW.BANK and NRW (in its role as trustor behind NRW.BANK's silent partnership in WestSpiel).

(67) Germany also confirms that NRW.BANK and NRW did not contractually enter into any additional obligations in favour of WestSpiel (guarantees, commitments, etc.).

(68) In recital 64 of the opening decision, the Commission also raised doubts about the alleged measure because it could not exclude that an advantage was granted to WestSpiel based on the fact that NRW.BANK maintained its shareholding in WestSpiel despite its continuous losses, '*since it cannot be assumed that a private investor under comparable circumstances would have acted in that way*'. Germany is of the view that this doubt would not be justified. In order to explain that a private investor would have indeed acted in the same way, Germany describes two different scenarios of action by NRW.BANK (the liquidation and the sale of WestSpiel).

– *First scenario: the liquidation of WestSpiel*

(69) According to Germany, during the period in question (2009 to 2015), NRW.BANK could not have kept the original capital contribution of EUR 35,5 million by liquidating WestSpiel. For reasons related to the protection of creditors, the liquidation of WestSpiel or the withdrawal of a partner would be subject to very narrow limits under German company law. While Germany admits that a dissolution is possible by resolution of the partners (Article 131 HGB (old version)) ([23]), it adds that, after the dissolution, the winding-up or liquidation starts as an arrangement pursuant to Article 145 et seq. HGB (old version) ([24]) and Article 730 et seq. of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*). Germany explains that this liquidation would be a complex and lengthy process, during which the liquidators must wind up the ongoing business of the company, collect receivables, convert the remaining assets into cash and satisfy the creditors (Article 149(1) HGB) ([25]). The remaining partnership assets have to be distributed by the liquidators among the partners in proportion to their respective shares of capital (Article 155(1) HGB) ([26]).

(70) Furthermore, Germany argues that, within this liquidation process, as described in recital (69), NRW.BANK would have had to meet a large number of liabilities to third parties, including significant pension liabilities. In addition, contract termination costs (e.g. employment and rental contracts) would have had to be taken into account. Also, there would probably have been significant reductions in book values caused by the liquidation of fixed and current asset items. The contribution of NRW.BANK as sole limited partner of WestSpiel would also necessarily have been affected in the sense that only in the case of a positive balance would a contribution value have remained for NRW.BANK (see Article 171(1) HGB in conjunction with Article 167(3) ([27]), Article 149, first sentence, Article 161(2) HGB). Therefore, already according to rough estimates, the liquidation value of WestSpiel would have been clearly negative.

(71) Therefrom, Germany concludes that a liquidation process would not have resulted in NRW.BANK, during the period in question, being able to keep the original capital contribution by dissolving WestSpiel. In this respect, Germany also argues that it should be taken into account that, at that point in time, NRW.BANK would have already invested a considerable amount of capital (EUR 35,5 million of original contribution) in WestSpiel. According to Germany, a private investor who already invested in an undertaking would also weigh up the risk of a further investment differently from an investor without an existing stake. In this context, it is recognised that, in the case of a majority participation, long-term strategic considerations can justify a lower return than the average market return ('owner effect').

– *Second scenario: the sale of WestSpiel*

(72) Consequently, the first scenario being excluded, Germany argues that NRW.BANK could have only avoided the burden caused by WestSpiel's losses through a sale. Economically, however, during the period in question (2009 to 2015), WestSpiel would have been in a rather unattractive condition for a buyer, so most probably no satisfactory purchase price could have been obtained.

([23]) Article 131 HGB is now Article 140 HGB after the amendment of 1 January 2024.
([24]) Article 145 HGB is now Article 143 HGB after the amendment of 1 January 2024.
([25]) Article 149, first sentence, HGB is now Article 148(2) and Article 148(5), first sentence, HGB after the amendment of 1 January 2024.
([26]) Article 155(1) HGB is now Article 148(8) HGB after the amendment of 1 January 2024.
([27]) Article 167(3) HGB is now limited to Article 167 HGB after the amendment of 1 January 2024.

(73) According to Germany, NRW commissioned the [IBR] Report (2015), which included a multiplicity of indicators and would therefore be more comprehensive than an ordinary private investor test.

(74) Germany in particular mentions page 101 where the report states that the payment balance of WestSpiel, even with the capital injection in the form of the silent participation planned at the time, would become positive only in the years 2021 to 2023. This is also shown in the penultimate line in the graph below, extracted from the [IBR] Report.

[…]

4.2. **Alleged capital injection in 2015**

(75) In recital 77 of the opening decision, the Commission identified two lines of reasoning submitted by Germany with regard to the 2015 capital injection. First, the injection would have constituted a mere (partial) 'reinjection' of the profits skimmed from WestSpiel. Second, the injection would have been, in any event, in line with the MEIP given that, by injecting the capital through its silent contribution, NRW would have acted like a private investor under comparable circumstances. In its comments on the opening decision, Germany addresses these two lines of reasoning and provides a series of alternative arguments.

(76) First, with regard to the (partial) 'reinjection', Germany argues, in essence, that the two operations (the profit skimming and the capital injection) would have to be seen as one single operation (an overall concept, referred to by Germany as 'a single intervention' or 'one complex measure') and could not be considered separately.

(77) According to Germany, the (partial) 'reinjection' could not be viewed in isolation from the sale of the two artworks and in particular not in isolation from the profit skimming in favour of NRW because: (a) the two measures were adopted in close chronological succession; and (b) the sale of the artworks was conditional on the assurance of the authorities involved that the skimmed profits from the sale be (partially) repaid in the form of the capital injection. The (partial) 'reinjection' of the funds was part of an overall concept decided before the sale of the artworks. This would be made clear from internal and public documents ([28]). Therefore, under this 'global assessment', the capital injection should not be considered in isolation but as a sub-measure of one overall measure consisting in the application of the fiscal framework to WestSpiel (in particular Article 14 SpielbG NRW (old version), i.e. the profit skimming that was applied to the profits from the sale of the artworks) ([29]).

(78) Second, with regard to the MEIP, as explained in recitals 85 to 89 of the opening decision, Germany is of the view that the 2015 capital injection performed by NRW would have corresponded to the behaviour of a private investor under comparable circumstances. Germany bases its reasoning on a 'short-term view' and a 'long-term view'. According to the 'short-term view', the EUR 64,8 million capital injection into WestSpiel in 2015 would have been concluded in line with market conditions as a self-standing measure ([30]). Regarding the 'long-term view', Germany relies on the *EDF* case-law ([31]) to argue that it could factor future higher tax revenues into the assessment. In addition, Germany argues that the capital injection would have been necessary to restore WestSpiel's profitability and thus to keep the capital already invested in the company. In particular, Germany

([28]) As an example, at the NRW.BANK Guarantors' Meeting of 13 March 2014, an explicit reservation was formulated to the effect that the sale of the artworks is agreed only if the necessary funds can be used by WestSpiel, i.e. they are available to it on a permanent basis.

([29]) But also potentially Articles 12 and 13 SpielbG NRW (old version), i.e. the taxes on WestSpiel's gross gaming revenue, if a 'wider perspective' (looking at the overall fiscal framework) was applied.

([30]) Germany explains that together with the profit skimming, the capital injection led to an overall profit of EUR 17,2 million for the State, which is above a profit of EUR 0 in the counterfactual scenario, namely in the absence of a capital injection. In other words, by receiving EUR 82 million from WestSpiel in 2014 (under Article 14 SpielbG NRW (old version)) and injecting in it only EUR 64,8 million in 2015, the State retained EUR 17,2 million overall, which is superior to 0 in the counterfactual scenario. According to Germany, the Commission's considerations in paragraphs 78 et seq. and 88 et seq. of the opening decision that such a 'net calculation' was inadmissible, since the profit skimming under Article 14 SpielbG NRW (old version) was 'an integral part of the specific fiscal and regulatory regime of the SpielbG NRW which the State applied exclusively to WestSpiel' was not in line with the case-law. Germany also explains that the mere fact that a payment obligation is a 'part of a specific fiscal and regulatory regime' cannot lead to this payment obligation being considered in isolation from the economic whole of 'the sale of artworks, profit skimming and reinjection'. This view was supported by the judgment of the General Court of 26 February 2019, T-865/16, ECLI:EU:T:2019:113.

([31]) Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318.

explains that there would not have been any alternative option to the model involving the sale of the artworks/profit skimming/capital injection. The only possible alternative option would have been not to implement the measures and to therefore lose the complete value of the share in WestSpiel as well as the prospect of future revenues. According to Germany, especially a liquidation of the company would not have been an *'economically imaginable solution'*. In order to explain the reasons that led Germany to this opinion, Germany repeats the same arguments that it had already presented to describe its position on the counterfactual scenarios to the annual loss coverage on the effort, cost and time involved with the liquidation process as well as on the various liabilities which would have led to a negative liquidation value of WestSpiel (see recitals (69) to (71)).

(79) Third, Germany explains that the capital injection would not have granted any advantage to WestSpiel given the latter's structural disadvantage (in particular due to the profit skimming that was applied to the profits from the sale of the artworks). The structural disadvantage for WestSpiel would have consisted of its obligation to bear a significantly higher tax burden under Articles 12 to 14 SpielbG NRW (old version). According to Germany, in accordance with the case-law, there would be no advantage within the meaning of Article 107(1) TFEU if compensation is granted merely for a structural disadvantage ([32]). Germany adds that it would follow from the case law that compensation for additional charges arising from a derogating scheme which does not apply to competitors does not constitute State aid if there is an inextricable link between the compensatory measure in question and its purpose of compensating for the additional costs arising from the particular structural problems ([33]). This would be a consequence of the principle that State support constitutes an economic advantage within the meaning of Article 107(1) TFEU only if the undertaking is relieved of costs that are 'normally' to be supported by undertakings ([34]). Only relief from such costs could lead to the recipient undertaking being placed in a more favourable competitive position than its competitors. In the case of WestSpiel, the State intervention would have aimed at keeping the costs of WestSpiel at the level of those of its competitors. As such, the sole purpose of the capital injection operated by way of the silent participation (as described in recital (47)) would have been to compensate for WestSpiel's structural disadvantage.

(80) Fourth, Germany also alleges that the same result brought about by the capital injection could actually have been achieved by simply changing the national legislation, i.e. the applicable tax provisions. In the present case, the legislator would have been free to include a clarification in Article 14 SpielbG NRW (old version) according to which this provision applied only to profits arising from the normal gaming operations of the casino operator, i.e. WestSpiel, but not to any extraordinary income. To this end, it would have sufficed, for example, to add a new paragraph 4 stating *'Profit skimming pursuant to this provision shall occur only in so far as the annual net profits shown are attributable to actual casino operations. Other profits shall be subject to standard taxation.'* In this case, no (partial) 'reinjection' would have been required as the proceeds from the sale of the artworks would not have been subject to the profit skimming mechanism.

([32]) Judgment of the General Court of 14 July 2016, *Germany* v *Commission,* Case T-143/12, ECLI:EU:T:2016:406, paragraph 143 *et seq.*; judgment of the General Court of 16 March 2004, *Danske Busvognmænd v Commission,* Case T-157/01, ECLI:EU:T:2004:76, paragraph 57; judgment of the Court of Justice of 23 March 2006, *Enirisorse* v *Sotacarbo,* Case C-237/04, ECLI:EU:C:2006:197, paragraphs 42 to 48.

([33]) Judgment of the Court of Justice of 8 December 2011, *France Télécom* v *Commission,* Case C-81/10 P, ECLI:EU:C:2011:811, paragraph 42 *et seq.*; judgment of the General Court of 30 November 2009, *France Télécom and others* v *Commission,* Joined Cases T-427/04 and T-17/05, ECLI:EU:T:2009:474, paragraph 207 *et seq*; judgment of the General Court of 28 November 2008, *Hotel Cipriani and others v Commission,* Joined Cases T-254/00, T-270/00 and T-277/00, ECLI:EU:T:2008:537, paragraphs 185, 187 and 189; judgment of the Court of Justice of 9 June 2011, *Hotel Cipriani and others* v *Commission,* Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, ECLI:EU:C:2011:368, paragraphs 89, 97 and 100.

([34]) Judgment of the Court of Justice of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority,* Case 30-59, ECLI:EU:C:1961:2, paragraphs 3 and 43; judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España* v *Ayuntamiento de Valencia,* Case C-387/92, ECLI:EU:C:1994:100, paragraphs 12 and 13; judgment of the Court of Justice of 1 December 1998, *Ecotrade* v *Altiforni e Fernere di Servóla,* Case C-200/97, ECLI:EU:C:1998:579, paragraph 34; judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline* v *Finanzlandesdirektion für Kärnten,* C-143/99, ECLI:EU:C:2001:598, paragraph 3; judgment of the Court of Justice of 3 March 2005, *Wolfgang Heiser* v *Finanzamt Innsbruck,* Case C-172/03, ECLI:EU:C:2005:130, paragraph 36; judgment of the Court of Justice of 30 June 2016, *Belgium* v *Commission,* Case C-270/15, ECLI:EU:C:2016:489, paragraphs 34 to 36.

(81) Fifth, Germany also explains that NRW and subsequently the NRW.BANK Guarantors' Meeting decided on 8 May 2018 to dispose of the entire 100 % participation of NRW.BANK in WestSpiel. Following the sale, the silent participation of NRW.BANK, which held this in trust for NRW, had to be returned and thus terminated; in other words, following the sale, the book value of NRW's silent participation was to be repaid to NRW ([35]). In Germany's view, the return of the silent partnership by WestSpiel would have been equivalent to a broad repayment of the (alleged) State aid. In this sense, WestSpiel's sale would have shown that the capital injection in 2015 corresponded to the behaviour of a private investor and (also for this reason) did not represent any State aid. The decision in favour of the capital injection in 2015 would have made economic sense, as NRW would not only have expected to retrieve the book value of its silent participation through WestSpiel's sale, but also to make a profit from the disposal of NRW.BANK's participation in WestSpiel. In this context, by letter of 8 September 2021, Germany informed the Commission that the second and last partial repayment of the silent participation of EUR 11 516 909 (on the first partial repayment, see recital (90)) was effected by WestSpiel (from its own liquid funds) on 26 July 2021 ([36]).

(82) Finally, as concerns the presence of State resources, Germany puts forward that the capital injection would not have entailed any State resources, since the funds stemmed from the sale of WestSpiel's own artworks. Germany explains that no economic operator would ever have undertaken such a sale if it could not and was not permitted to assume that the proceeds of the sale or in any case a large proportion of them would be transferred back to it. Against this background, the purely formal consideration, according to which the funds from the sale of the artworks are deemed to be State resources only because they accrued to the State for a 'legal second', would seem artificial and inappropriate. According to Germany, the funds for the (partial) 'reinjection' of capital in the form of a silent participation would have rather originated from the proceeds of the sale of two artworks owned by WestSpiel and would not have been available if WestSpiel had decided not to sell the two artworks. At the same time, WestSpiel would have only decided to sell the two artworks because it relied on the assurance of the authorities involved that the profits skimmed from the sale would be (partially) 'reinvested' in WestSpiel.

4.3. **Additional arguments**

(83) With regard to both the annual loss coverage and the capital injection, Germany is of the view that these measures could not have distorted competition and affected trade between Member States, in view of WestSpiel's monopoly position in NRW. More particularly, Germany considers that the casino market would have been closed to competition pursuant to Articles 1 and 3 SpielbG NRW (old version) in the relevant period (2009 to 2015). In

([35]) As explained in recital (30), WestSpiel was in the meanwhile sold, in September 2021.

([36]) In its reply of 4 April 2022, Germany explained how the amount of each of these two re-payments was determined. They explained the following.

— The silent participation was dissolved as of 8 January 2021 with the signing of the dissolution agreement on 4 January 2021.

— Pursuant to Articles 12.1 to 12.3 of the silent partnership agreement, the silent partner was entitled to a compensation payment as a result of the mutual dissolution of the silent partnership or as a result of any termination of the silent partnership by the silent partner.

— Pursuant to Article 12.2, first and second sentence, and Article 12.3, first sentence, of the silent partnership agreement, the total amount of the compensation payment corresponded to the book value of the silent partnership as of 31 December 2020. In accordance with the agreement, the book value as of 31 December 2020 was calculated as the balance of the contribution account, the loan account and the loss account of the silent partnership as shown in the audited and certified annual financial statements of the company as at 31 December 2020. Accordingly, the silent partnership still participated in the 2020 annual result.

— As the audited annual financial statements for the 2020 financial year were not yet available at the time the dissolution agreement was signed in January 2021 and it was therefore not yet possible to make a secure, final binding determination of the compensation amount, both parties agreed in the dissolution agreement on repayment in two instalments.

— The first instalment was set at an amount of EUR 35 million in such a way that, on the basis of the preliminary estimate of the annual result for the 2020 financial year, which according to Germany was still subject to uncertainties, an overpayment would be avoided with a probability bordering on certainty.

— The second and final instalment was set at the amount of the difference between the book value of the silent partnership according to the annual financial statements as at 31 December 2020, which were finally audited on 20 April 2021, and the amount of the first instalment of EUR 35 million. The book value of the silent partnership in the audited financial statements as at 31 December 2020 finally amounted to EUR 46 516 909. The second instalment was therefore EUR 11 516 909.

Germany's view, despite the statements in WestSpiel's 2014 annual report (recital 57 of the opening decision) ([37]), it could not be argued that WestSpiel operates on the same market within the meaning of Union competition law as the online service providers who, to date, have been operating illegally in Germany. In any event, Germany explains that, from a procedural point of view, the aspect of whether or not the measures entail State aid could be left open, based on the Commission's decisional practice ([38]).

(84) A first possible compatibility basis would be Article 107(3), point (c) TFEU, in view of the liberalisation of the gaming market. Germany explains that the Commission would have considered privatisations as an objective of common interest ([39]) and Article 107(3), point (c) TFEU as being fulfilled in cases where the measures were necessary for the privatisation of the State-owned company and the measures solely covered the competitive disadvantage of the state-owned company compared to its competitors ([40]). In Germany's view, the requirements established by the Commission's decisional practice would be fulfilled in the case at hand. In this sense, (a) the objective of common interest would be the market opening of the sector ([41]); (b) the measures would be necessary for the attainment of that objective ([42]); and (c) the measures would also be proportionate ([43]).

(85) As an alternative, Germany considers that the R&R Guidelines could be a relevant compatibility basis. In this sense, Germany asserts that, while WestSpiel was not an undertaking in difficulty at the time the alleged measures were granted, it would become one in case the Commission were to order recovery of aid and would qualify for rescue and restructuring aid ([44]).

5. OBSERVATIONS FROM WESTSPIEL AND THE COMPLAINANTS

(86) After the deadline for comments on the opening decision expired, the Commission received observations from WestSpiel as well as from the complainants. For the sake of completeness, these observations are summarised below.

([37]) '*… As the complainants have pointed out, it appears from the statements in WestSpiel's 2014 annual report that WestSpiel itself considered the competition with commercial gambling operators and online gambling as a main reason for the losses generated by WestSpiel in that year …'.[…].*

([38]) See e.g. recitals 487 and 583 and Article 2(2) Commission Decision C(2014) 6849 final of 1 October 2014 in case SA.14093 – measures implemented by Belgium in favour of Brussels South Charleroi Airport and Ryanair (OJ L 325, 30.11.2016, p. 63); recitals 190, 191 and 257 and Article 2(2) of Commission Decision C(2014) 5084 final of 23 July 2014 in cases SA.19880 and SA.32576 – Flughafen Weeze/Niederrhein und Flughafen Niederrhein GmbH (OJ L 269, 15.10.2015, p. 1); recital 120 of Commission Decision 2009/613/EC of 8 April 2009 on the measures implemented by the United Kingdom in favour of Royal Mail (OJ L 210, 14.8.2009, p. 16); recital 139 and Article 1 of Commission Decision C(2019) 6836 final of 20 September 2019 in case SA.34402 on the measure implemented by Germany for Hochschul-Informations-System GmbH (OJ L 74, 11.3.2020, p. 22); and particularly in privatisation cases recital 102 of Commission Decision 2008/722/EC of 10 May 2007 on the State aid which Greece is planning to implement for the early voluntary retirement scheme of OTE (OJ L 243, 11.9.2008, p.7).

([39]) See recital 307 of Commission Decision 2008/765/EC of 11 December 2007 on the aid No C 7/06 (ex NN 83/05) implemented by Finland for Tieliikelaitos/Destia (OJ L 270, 10.10.2008, p. 1).

([40]) See recital 157 of Commission Decision C(2012) 1834 final of 21 March 2012 on the measure SA.31479 (2011/C) (ex 2011/N) which the United Kingdom plans to implement for Royal Mail Group (OJ L 279, 12.10.2012 p. 40).

([41]) The measures contribute to the attainment of an objective of common interest, namely the privatisation and thereby the market opening of the casino sector in NRW.

([42]) The steps taken in the present case, i.e. the capital injection in order to compensate for the structural disadvantage, are important stages in adapting the undertaking to progressive liberalisation in the casino sector in North Rhine-Westphalia. Due to the measures, private investors will be inclined to acquire WestSpiel which will lead to its privatisation. Therefore, the measures are necessary for the attainment of the privatisation of WestSpiel and for the market opening in the casino sector.

([43]) The measures aim solely to compensate the competitive disadvantage of the state-owned company compared to its competitors. Germany explained that the tax burden of WestSpiel differs significantly from the tax framework for private companies active in the overall gambling sector, and the measures in question did not lead to any 'overcompensation'. The tax burden comparison shows that, in the relevant period since 2006, the tax burden of WestSpiel was in 13 of 14 years noticeably higher than it would have been under normal company taxation. In the period 2009 to 2013 alone, North Rhine-Westphalia was able to collect a total of EUR 253,2 million from the levies pursuant to Articles 12 to 14 SpielbG NRW (old version). In the absence of any State intervention the company would not be able to compete on its merits with its competitors.

([44]) Germany explains that the Commission approved aid in similar cases, e.g. Commission Decision 2005/345/EC of 24 February 2004 on restructuring aid implemented by Germany for Bankgesellschaft Berlin AG (OJ L 116, 4.5.2005, p. 1).

5.1. **Observations from WestSpiel**

5.1.1. *Alleged annual loss coverage*

(87) As regards the alleged annual loss coverage, WestSpiel explains that the alleged compensation for losses paid by NRW.BANK to WestSpiel would be no more than the normal share of losses borne by a limited partner in a limited partnership operating at a loss. In particular, there would be no associated injection of new capital. There would be no measure attributable to the State either, since the consumption of capital would be automatic in the event of losses by the limited partnership, i.e. independent of any decision by the limited partner.

5.1.2. *Alleged capital injection in 2015*

(88) As regards the capital injection in 2015, WestSpiel brings forward that it would not have received any fresh capital from its shareholder. Rather, in agreement with its shareholder, it sold some of its own assets (i.e. two paintings by Andy Warhol) to secure sufficient liquidity for the necessary restructuring.

(89) WestSpiel submits that, while it would be true that as a result of the 75 % profit skimming provided for in Article 14(1) SpielbG NRW (old version) the proceeds of the sale of the two artworks initially had to be transferred to NRW, this would not have been a stand-alone measure. Indeed, this transfer would have merely been an intermediate step in a multi-stage transaction, the design and aim of which from the outset would have been to use the proceeds of the sale to return to WestSpiel. These funds would have been needed for WestSpiel's restructuring via a silent participation in its partnership capital by NRW.BANK. Without the certainty that the proceeds would be (partially) 'reinjected' into WestSpiel, WestSpiel's management would have never agreed to the sale of the paintings, as that sale would have turned out to be extremely detrimental to the company.

(90) WestSpiel also explains that, in the context of the 13 January 2021 intra-group restructuring (see recital (29)), the silent participation in WestSpiel was dissolved. A first instalment of EUR 35 million was repaid by WestSpiel (from its own liquid funds) on 19 January 2021. The remaining amount was repaid in the second quarter of 2021 after approval of WestSpiel's annual accounts comprising the second and last instalment (see recital (81), sixth sentence).

5.2. **Observations from the complainants**

5.2.1. *Alleged annual loss coverage*

(91) As regards the alleged annual loss coverage, the complainants make no observations but limit themselves to asking that Germany be obliged to ensure that WestSpiel reimburses NRW for the annual loss coverage allegedly granted since 2009.

5.2.2. *Alleged capital injection in 2015*

(92) With regard to the alleged capital injection in 2015, the complainants maintain and elaborate on their position, as also submitted in cases SA.44944 and SA.53552, that the profit skimming provided for in Article 14 SpielbG NRW (old version), would technically not be a tax but a distribution of profits to NRW in its role as trustor behind NRW.BANK's silent partnership in WestSpiel.

(93) The complainants explain that, contrary to the Commission's conclusions in recitals 83 and 84 of the opening decision, it would be the relevant Member State's law alone that is decisive in all cases for the classification of a levy as a tax in connection with the application of Union State aid law. In other words, according to the complainants, a measure being investigated under Union State aid law would only be a tax if the national law classifies it as such. However, the complainants add, it would by no means be necessary to qualify the profit skimming mechanism under Article 14 SpielbG NRW (old version) as a tax in order to arrive at the conclusion that the capital injection forming the subject of the present complaint constitutes illegal State aid. This would be because, even if the profit skimming is not regarded as a tax but as a distribution of profits to the (indirect) partner, the State aid nature of the capital injection would derive from the non-fulfilment of the prerequisites of the MEIP test, for the reasons expressed by the Commission in recitals 90 to 93 of the opening decision.

6. ASSESSMENT

6.1. Existence of State aid

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

(95) A measure qualifies as State aid if the following cumulative conditions are met: (a) the measure is imputable to the Member State and granted through State resources; (b) it confers a selective economic advantage to certain undertakings or the production of certain goods; (c) the advantage distorts or threatens to distort competition; and (d) the measure affects intra-EU trade.

(96) In the following sections, the Commission will assess the criteria of the State aid definition of Article 107(1) TFEU for each of the two measures complained about.

6.1.1. *Alleged annual loss coverage from 2009 to 2015*

(97) As regards the annual loss coverage measure, the key question is whether the measure gave an advantage to WestSpiel. The Commission considers that the annual loss coverage would not confer an advantage to WestSpiel and that therefore, due to the cumulative nature of the criteria under Art. 107(1) TFEU, the existence of State aid can be excluded without it being necessary to assess the other criteria.

(98) An advantage within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention ([45]). Only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention ([46]). Whenever the financial situation of an undertaking is improved as a result of State intervention ([47]) on terms differing from normal market conditions, an advantage is present. To assess this factor, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been taken ([48]). Since only the effect of the measure on the undertaking matters, it is irrelevant whether the advantage is compulsory for the undertaking in that it could not avoid or refuse it ([49]).

(99) The Commission takes the view that the annual loss coverage does not confer an advantage to WestSpiel due to two lines of reasoning, as WestSpiel merely consumed its own capital when it was following its obligation under German company law (see Section 6.1.1.1) and as a comparable private investor would have acted in the same manner and therefore the measure was granted at normal market conditions (see Section 6.1.1.2).

6.1.1.1. Automatic consumption of the capital

(100) Firstly, in recital 62 of the opening decision the Commission could not conclude and take a final view on whether NRW.BANK and NRW actually bore (part of) WestSpiel's losses or decided on whether the capital required to cover the losses would be made available or not, or both. The Commission was, at that preliminary stage (see recitals 63 to 65 of the opening decision), of the view that NRW.BANK's capital account would have been debited with WestSpiel's losses, so that funds would have been transferred from an account of NRW.BANK to WestSpiel, and that the measure *prima facie* involved an advantage within the meaning of Article 107(1) TFEU. However, it invited Germany to provide further clarification to assess the State aid implications of the operation.

([45]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, Case C-39/94, ECLI:EU:C:1996:285, paragraph 60; judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, Case C-342/96, ECLI:EU:C:1999:210, paragraph 41.

([46]) Judgment of the Court of Justice of 2 July 1974, *Italy v Commission*, Case C-173/73, ECLI:EU:C:1974:71, paragraph 13.

([47]) The term 'State interventions' does not only refer to positive actions by the State but also covers the fact that the authorities do not take measures in certain circumstances, for example to enforce debts. See for example the judgment of the Court of Justice of 12 October 2000, *Spain* v *Commission*, C-480/98, ECLI:EU:C:2000:559, paragraphs 19 and 20.

([48]) Judgment of the Court of Justice of 2 July 1974, *Italy v Commission*, Case C-173/73, ECLI:EU:C:1974:71, paragraph 13.

([49]) See recital 69 of Commission Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1); opinion of Advocate General Fennelly of 26 November 1998, *France v Commission*, C-251/97, ECLI:EU:C:1998:572, paragraph 26.

(101) As described in recitals (63) to (67), in its comments on the opening decision Germany explains that WestSpiel would actually never have received direct compensation for its losses from NRW.BANK as its sole limited partner but in reality only consumed its equity capital (which was contributed in 1978 and 2002) to compensate its accumulated losses; i.e. there were no direct payments from NRW.BANK. Germany instead refers to the mechanism of offsetting losses through the automatic deduction from the partnership's capital account under German company law.

(102) On the basis of these positions and for the following reasons, the Commission takes the view that the annual loss coverage did not confer an advantage to WestSpiel, as it did not involve any transfer of funds from outside of the company and constituted a pure legal automatism to offset WestSpiel's losses within its own accounts according to an obligation under German company law.

(103) The annual loss coverage was indeed only a consequence of the obligation under Article 161(2) HGB in conjunction with Article 120 HGB (old version) that, in case of annual losses registered in the balance sheet of a limited partnership, the losses allocated to a partner are automatically deducted from the capital share. Therefore, the share of the annual losses of NRW.BANK as sole limited partner of WestSpiel was deducted from the already existing equity capital of the company and did not require any contribution of new capital from outside of the company. Due to this pure legal automatism, the State was also not at all involved in the process and an active decision on granting annual loss coverage was not taken.

(104) Therefore, contrary to the Commission's findings in recital 63 of the opening decision, no transfer of funds from a capital account of NRW.BANK to WestSpiel took place; indeed, according to the compensation mechanism foreseen by the HGB, WestSpiel's losses were immediately offset at the end of every year within the company's equity capital (that was once provided by NRW.BANK as sole limited partner of WestSpiel) and therefore the mechanism solely took place within WestSpiel's own accounts. Hence, WestSpiel did not receive any payments from outside of the company and therefore its economic situation was not improved through the loss coverage mechanism.

6.1.1.2. Behaviour of a comparable private investor

(105) Secondly, the Commission revises its position presented in recital 64 of the opening decision that the mere fact that NRW.BANK accepted further losses of WestSpiel despite the repeated losses over the previous years, without carrying out an *ex ante* assessment of whether or not to maintain its shareholding in WestSpiel or to liquidate it so as to keep the part of the capital not yet lost, might have constituted an undue advantage in itself, since it could not be assumed that a private investor under comparable circumstances would have acted in that way. As explained in recital (68), Germany is of the view that this doubt would not be justified. In order to explain that a private investor would have indeed acted in the same way, Germany describes two different scenarios of action by NRW.BANK (the liquidation and the sale of WestSpiel).

(106) On the basis of the additional information provided by Germany and in view of the following assessment, the Commission takes the view that a private investor under comparable circumstances would not have chosen one of the alternative scenarios, the liquidation or the sale of WestSpiel (counterfactual scenarios) over the granting of the annual loss coverage (factual scenario), as the latter constitutes the most rational scenario. WestSpiel would have received the same economic benefit under normal market conditions and (additionally to the reasons presented in Section 6.1.1.1) the annual loss coverage did not confer an advantage to WestSpiel.

– *Assessment of the counterfactual scenarios (liquidation and sale)*

– *Scenario 1: liquidation of WestSpiel*

(107) In its comments on the opening decision, Germany explains that, during the period concerned from 2009 to 2015, NRW.BANK could not have kept its original capital contribution into WestSpiel by way of a liquidation of the company (see recitals (69) to (71)), as the liquidation value of WestSpiel would have been clearly negative after the winding-up/liquidation process on the basis of Article 143 et seq. HGB and Article 730 et seq. BGB.

(108) The Commission agrees with Germany insofar as it explains that a liquidation of WestSpiel would not have been an economically reasonable alternative to the annual loss coverage, as the following considerations indeed show that the liquidation value of WestSpiel would have been negative.

– *Liquidation value according to Germany's description of the process*

(109) By describing the theoretical system and process of the liquidation of WestSpiel, Germany explains in a detailed and comprehensible way why the capital necessary to satisfy the creditors according to Article 148(5), first sentence, HGB would have exceeded the available capital of WestSpiel. The Commission understands from this description that the compensation for a large number of liabilities to third parties, including significant pension liabilities, contract termination costs (e.g. employment and rental contracts) and the liquidation of fixed and current asset items, would have had to be taken into account and would have led to significant reductions in WestSpiel's book values.

(110) Moreover, the Commission confirms the argument provided by Germany that NRW.BANK's contribution would also necessarily have been affected in the sense that only in the case of a positive balance would a contribution value have remained for NRW.BANK (see Article 171(1) HGB in conjunction with Article 167(3), Article 149, first sentence, Article 161(2) HGB) (see recital (70)). The Commission clarifies that Article 171(1) HGB in conjunction with Article 167(3) HGB (old version) states that the limited partner is directly liable towards the creditors of the company but that this liability is limited to the capital investment/remaining capital contribution (*'Haftsumme'*) of the partner. In this context, the Commission notes that this limited liability also applies to the liquidation process. The remaining part of the capital contribution of the limited partner, amounting to EUR 35,5 million originally contributed by NRW.BANK (see recital (28)), would be part of this capital used to compensate for the liabilities of the company.

(111) The Commission notes that Germany has provided a detailed analysis of the liquidation scenario for WestSpiel but without providing any substantiated evidence of the allegation that the liquidation value was negative, for example by justifying the individual liabilities of WestSpiel towards third parties with specific numbers. Germany only vaguely mentions *'estimated calculations'* which are not in any way substantiated.

– *Liquidation value according to WestSpiel's annual accounts*

(112) The argument brought forward by Germany *('the liquidation value of Westspiel would have been negative')* in order to reject the liquidation scenario, is in any case confirmed by the findings in the annual accounts and in the annual consolidated accounts/group management reports of WestSpiel carried out by [another renowned auditing company] ('[XY] Reports').

(113) In particular, the relation between liabilities and capital during the period from 2009 to 2015 depicted in these documents would have led to a negative liquidation value of WestSpiel: According to the annual account for the business year 2009, the total amount of WestSpiel's liabilities was at EUR 25,3 million and the company's capital amounted to EUR 27,9 million. Then, from the business year 2010 on, the amount of liabilities (at EUR 22,7 million) exceeded WestSpiel's capital (at EUR 22,1 million) and the situation remained unchanged in the years until 2015. Therefore, at this time, after satisfying its creditors on the basis of Article 148(5), first sentence, HGB by compensating for liabilities with capital, WestSpiel would have indeed shown a negative liquidation value, as alleged by Germany.

(114) From the foregoing assessment and on the basis of the situation described by Germany as demonstrated in recitals (69) to (71), the Commission takes the view that, at the time when the annual loss coverage was granted, a liquidation of WestSpiel would not have been an economically reasonable alternative to the annual loss coverage.

– *Scenario 2: sale of WestSpiel*

(115) In its comments on the opening decision, Germany explains that the only way in which NRW.BANK could have avoided the burden caused by WestSpiel's losses would have been by way of a sale (see recitals (72) to (74)). According to Germany, a sale before 2015 would have resulted in Germany obtaining no satisfactory price and hence incurring accrued losses. Germany provides evidence in the form of a reference to page 101 of the [IBR] Report, which states that the payment balance of WestSpiel, even with the capital injection planned at the time in the form of the silent participation, would become positive only in the years from 2021 to 2023. Indeed, as explained in recital (30), WestSpiel was finally sold to the Gauselmann Group in September 2021 for a purchase price of EUR 141,8 million.

(116) For the following reasons, the Commission takes the view that also a sale of WestSpiel would not have been considered by a comparable private investor during the period where NRW.BANK decided to continue covering WestSpiel's losses.

– *Assessment of the general financial situation of WestSpiel from 2009 to 2015*

(117) Like for the first scenario (see recitals (112) to (114)), the Commission again examined the evidence provided by Germany on the basis of WestSpiel's annual accounts and of the [XY] Reports for the years 2009 to 2015 and notes that the business figures therein confirm a lack of rationality of a sale of WestSpiel during this time.

(118) For the first scenario (the liquidation), the Commission limited its assessment of the annual accounts and [XY] Reports to the relation between the capital of WestSpiel and its registered liabilities towards third parties. With regard to the second scenario (the sale), the Commission considers it necessary to additionally look at the general economic situation of WestSpiel in the different years and at the estimation given by the [XY] consultants concerning the future development of WestSpiel's profitability in order to evaluate the rationality of a sale.

(119) The Commission understands the following from the available annual accounts and [XY] Reports with regard to WestSpiel's situation in the years 2009 to 2015:

— According to the [XY] Reports, in 2009, WestSpiel already experienced a declining GGR that could be traced back to changes in national legislation with regard to the non-smoking policy in NRW in force since 2007 and stricter admission controls for casinos, as well as to the development of commercial games/illegal online gaming and the new taxation system for casinos in NRW in place since 1 January 2008. For 2009, WestSpiel registered final net losses amounting to EUR 7,9 million. By then, WestSpiel was still subject to a 50 % taxation of its casinos' GGR ([50]). The [XY] Report shows that the management of WestSpiel, and therefore also NRW.BANK as its sole limited partner, was aware of this situation and of the risks endangering the continuation of the company. Therefore, WestSpiel's management took several preventive measures like initiating a restructuring process and making requests for a reduction of the casino tax for specific casino locations.

— In 2010, the situation developed similarly to the year 2009 and additional measures for cost reduction like the adaptation of products and offers were taken. Final net losses of EUR 12 million were forecasted for 2012 (almost twice the amount of final net losses of EUR 5,8 million in 2010).

([50]) See Article 12 SpielbG NRW, introduced by Gesetz des Landes Nordrhein-Westfalen zum Staatsvertrag zum Glücksspielwesen in Deutschland of 30 October 2007; GV. NRW. Ausgabe 2007 Nr. 24 vom 14.11.2007 Seite 441 bis 460 | RECHT.NRW.DE.

— In 2011, the [XY] Report assesses a slight improvement of the situation of WestSpiel, with lower net losses at EUR 3,5 million.

— The net losses in 2012 rose to EUR 10,3 million and the GGR of WestSpiel was continuously declining. Still, the [XY] Report finds nearly balanced accounts for this year thanks to the positive annual results of the casino location in Duisburg. Nevertheless, the management expected a massive burden for WestSpiel's liquidity in 2013.

— From 2012 on, the new casino tax model with a lower GGR of 30 %, as described in recitals (31) and (33), was in place ([51]). WestSpiel still registered net losses amounting to EUR 8,96 million in 2013, leading the management to the development of a further restructuring to ensure liquidity until 2022, involving the sale of the artworks and the capital injection after the profit skimming, as described in recitals (46) and (47). The [XY] Report forecasts a final net profit of EUR 4,4 million for 2014 following from the restructuring.

— According to the [XY] Report for 2014, as a consequence of the implementation of the restructuring measures, a positive result in the form of a net profit amounting to EUR 3,3 million was achieved by WestSpiel, followed by net losses lower than EUR 1 million in 2015.

(120) Therefore, the documents available to the Commission confirm the allegation made by Germany that at no point in time throughout the years 2009 to 2015 WestSpiel would have been an attractive investment for a theoretical buyer, due to its continuous net losses and to the occurring struggles with legislative challenges at national level.

(121) Insofar as Germany refers to the forecast of WestSpiel's liquidity on page 101 of the [IBR] Report (on the basis of the annual accounts/[XY] Reports of 2013 and 2014), the Commission notes that, contrary to what Germany describes, the analysis does not include the situation with the capital injection as part of the restructuring but the development of WestSpiel's liquidity without the planned capital injection (after the sale of the artworks and the profit skimming). Nevertheless, this incorrect interpretation of the [IBR] Report by Germany does not change the Commission's opinion and further confirms it, as the chart in recital (74) shows that, without the capital injection, WestSpiel's payment balance would have remained negative until 2021. Hence, in the Commission's view it is not realistic that NRW.BANK could have compensated the losses incurred in the capital provided to WestSpiel with the purchase price obtained from a sale at this point in time.

(122) Moreover, the sale of a business, similarly to the liquidation, involves a complex and lengthy legal process. Besides the general rules laid down by commercial law and company law, there are also requirements under labour law concerning e.g. the transfer of personnel according to Article 613a BGB and the design of social plans within the meaning of Article 112 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) as well as under tax law (such as the obligation to pay income tax, trade and corporate tax, and value added tax) and under competition law (concerning a possible merger being subject to EU merger control rules).

(123) From the foregoing, the Commission takes the view that the sale of WestSpiel would not have been a reasonable option for Germany at the time when the annual loss coverage was granted.

– *Assessment of the factual scenario (annual loss coverage)*

([51]) See Article 12 SpielbG NRW, as amended by Article 3 of Gesetz zum Ersten Staatsvertrag zur Änderung des Staatsvertrages zum Glücksspielwesen in Deutschland (Erster Glücksspieländerungsstaatsvertrag – Erster GlüÄndStV); GV. NRW. Ausgabe 2012 Nr. 29 vom 22.11.2012 Seite 523 bis 546 | RECHT.NRW.DE.

(124) The Commission takes the view that the factual scenario chosen by NRW.BANK is the most reasonable approach by a shareholder.

(125) In general, annual loss coverage by shareholders is also common practice in companies, often on the basis of profit and loss transfer agreements within corporate structures concluded between the parent company and its subsidiaries ([52]). Moreover, this annual loss coverage can rather be seen as passive behaviour of an investor, as shareholders are obliged to offset losses in the annual accounts of a company with their equity share under German company law, as explained in recitals (103) and (104), and therefore the annual loss coverage turns out to be a purely automatic mechanism that does not require a separate decision of a shareholder.

(126) Therefore, the Commission takes the view that, even without an expert report or other supporting documents, among the three scenarios (immediate sale /liquidation / 'no action'), a private investor would have selected the third scenario.

(127) In this sense, neither the sale of a business immediately after becoming loss-making nor the investment of fresh capital in order to maintain a (loss-making) business afloat can be said to always be MEIP-compliant. Rather, it is the case that any decision (be it divestment, maintaining the *status quo*, or adding fresh capital) needs to be assessed on its own merits, on a case-by-case basis, and evaluated against the behaviour of a prudent market investor.

– *Conclusion on the advantage*

(128) Therefore, in view of the above, the Commission concludes that the alleged annual loss coverage did not confer an economic advantage on WestSpiel, since such payments were only consuming WestSpiel's own capital (see recitals (100) to (104)) and given that NRW.BANK behaved in an economically rational way when deciding to maintain its capital contribution in WestSpiel, in the sense that it made economic sense not to sell at loss but rather to wait for better times (even if it may have meant to – possibly – continue incurring losses, i.e. seeing WestSpiel's capital reduced even to a larger extent) when it could compensate this capital consumption by selling WestSpiel at a profit.

6.1.2. *Alleged capital injection in 2015*

6.1.2.1. Relation between the profit skimming mechanism and the capital injection

(129) In order to decide if the alleged capital injection is to be qualified as State aid, the Commission first has to assess the question whether the profit skimming in 2014 ([53]) and the injection of capital amounting to EUR 64,8 million by NRW into WestSpiel in 2015 have to be regarded as two different measures or as one single operation.

(130) On the basis of the information provided by Germany on the system of the capital injection (see recitals (48) and (49)), it follows that the obligation of NRW.BANK to contribute additional partnership capital to WestSpiel became legally binding on 1 December 2015 in accordance with the trustee agreement and when the outstanding payment condition ('*... not before signature of the silent partnership agreement ...*', as explained in recital (26)), was

([52]) See for example Commission Decision C(2011) 632 final of 23 February 2011 on the State aid SA.20255 C 58/06 (ex NN 98/05) implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr (OJ L 210, 17.08.2011, p. 1); Commission Decision C(2011) 3899 of 15 June 2011 on the State aid SA.31296 (N 322/2010) – Germany – Kommunale Wasserwerke Leipzig GmbH (OJ C 1, 04.01.2013, p. 2); Commission Decision C(2024) 2781 final of 13 June 2024 on the State aid SA.55744 (2024/C) (ex 2019/FC) – Alleged aid to WestVerkehr (OJ C, C/2024/4762, 30.07.2024, p. 1); Commission Decision C(2022) 639 final of 31 January 2022 on the State aid SA.50952 (2022/C) (ex 2018/FC) – Alleged State aid measures in favour of DB Cargo (OJ C 316, 18.08.2022, p. 20). This practice is also supported by Article 302(1) AktG, which explicitly provides for the possibility of annual loss coverage by the other party of a controlling or profit transfer agreement.

([53]) On the basis of Article 14 SpielbG NRW (old version) (see recital (32)), which required WestSpiel to transfer 75 % of its overall annual profits, hence an amount of approximately EUR 82 million after the sale of two artworks, to NRW.

fulfilled. Therefore, the Commission takes the view that the actual granting date of the measure was 1 December 2015. The Commission's position is also not changed by the fact that the contribution funds were only transferred from NRW to NRW.BANK as trustee on 10 December 2015 and that the final transfer of these funds from NRW.BANK to WestSpiel took place on 15 December 2015, as this constituted a mere completion of the process.

(131) Germany considers that the profit skimming mechanism and the capital injection would have to be seen as one single operation, and that NRW could as well have modified Article 14 SpielbG NRW (old version) instead of injecting capital into WestSpiel.

(132) According to Germany, when assessed as a whole, the skimming of profits in 2014 amounting to approximately EUR 82 million, combined with the 'reinjection' in 2015 of EUR 64,8 million into WestSpiel, would have led to a net financial flow in the amount of approximately EUR 17,2 million from WestSpiel to the State. Based on this view, Germany argues that, if at all, the measure would have conferred a disadvantage rather than an advantage on WestSpiel. However, the Commission disagrees with this line of argumentation. Indeed, the profit skimming and the capital injection are not sub-measures of one complex measure. They are two different measures, which follow their own logic. In the case at hand, the capital injection cannot be seen as a sub-measure of one overall measure. The money paid by WestSpiel in the first step, within the profit skimming mechanism based on Article 14 SpielbG NRW (old version), was due as tax and was taken by the State acting in its capacity as a State authority.

(133) The capital injection is a separate measure, as it clearly results from its nature and subject-matter, its context, the objective pursued, and the rules to which it is subject: By contrast to the profit skimming mechanism, the capital injection is not a tax measure, as it is not taken by the State in its quality of fiscal authority but stems from a decision of the State in its role as shareholder and therefore as investor. Furthermore, the measures have neither been adopted under the same rules, nor with the same operating modalities. Indeed, the profit skimming regime was adopted already in 2008, while the capital injection was granted on 1 December 2015, as explained in recital (130). The 'two-step approach' (i.e. the 2014 profit skimming and the 2015 capital 'reinjection') referred to by Germany only happened in that sequence as a consequence of the tax regime, which was created seven years before and was maintained after the capital injection. It cannot be alleged either that this capital injection was foreseeable at the time of the creation of the profit skimming regime.

(134) In addition, the fact that NRW had not amended the SpielbG NRW in order to compensate for the 'structural disadvantage' caused by the profit skimming mechanism shows that NRW considered the profit skimming mechanism as an extraneous factor and not as part of its shareholder arrangements with WestSpiel. Therefore, the profit skimming mechanism and the capital injection cannot be seen as one single operation but have to be seen as two different measures.

– *Conclusion on the relation between the profit skimming mechanism and the capital injection*

(135) On the basis of the above, the Commission concludes that Germany's reasoning on the presence of one single operation cannot be used to exclude the existence of an advantage, as the profit skimming and the capital injection have to be regarded as two independent measures.

6.1.2.2. Assessment of the capital injection

(136) As the profit skimming and the capital injection are self-standing measures (see Section 6.1.2.1), the two have to be assessed separately. The profit skimming mechanism provided for by Article 14 SpielbG NRW (old version) does not constitute State aid in the sense of Art. 107(1) TFEU. It already results from the nature of the profit skimming mechanism that there is no transfer of State resources that could improve the economic situation of an undertaking, as the flow of funds goes from the public casino to the State and not the other way round. The following assessment will therefore solely focus on the capital injection.

6.1.2.2.1. Undertaking

(137) State aid rules only apply where the beneficiary of a measure is an undertaking. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ([54]). The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities ([55]).

(138) WestSpiel as a public casino offers services (especially gambling services but also catering services) against remuneration (entrance fees, a fraction of the bets, prices for other services) on a market. Therefore, WestSpiel carries out economic activities for State aid purposes and can thus be qualified as an undertaking in the sense of Article 107(1) TFEU.

6.1.2.2.2. State resources and imputability

(139) Only advantages granted directly or indirectly through State resources constitute State aid within the meaning of Article 107(1) TFEU ([56]). State resources include all resources of the public sector ([57]), including resources of intra-State entities (decentralised, federated, regional or other) ([58]) and, under certain circumstances, resources of private bodies. It is irrelevant whether or not an institution within the public sector is autonomous ([59]).

(140) Resources of public undertakings also constitute State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of these resources ([60]). For the purposes of State aid law, transfers within a group of public undertakings may also constitute State aid if, for example, resources are transferred from the parent company to its subsidiary (even if they constitute a single undertaking from an economic point of view) ([61]). What is decisive for financial resources to be qualified as State resources is not an actual transfer of the resources but the fact that the resources are under the control of the State and that the State authorities dispose over these resources ([62]).

(141) In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. Imputability is less evident, however, if the advantage is granted through public undertakings. In such cases, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure ([63]). The mere fact that a measure is taken by a public undertaking is not per se sufficient to consider it imputable to the State ([64]). Therefore, the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken ([65]).

([54]) Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, Case C-222/04, ECLI:EU:C:2006:8, paragraph 107.

([55]) See recitals 6 and 7 of Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

([56]) Judgment of the Court of Justice of 24 January 1978, Van Tiggele, Case C-82/77, ECLI:EU:C:1978:10, paragraphs 25 and 26; judgment of the General Court of 12 December 1996, Air France v Commission, Case T-358/94, ECLI:EU:T:1996:194, paragraph 63.

([57]) Judgment of the General Court of 12 December 1996, Air France v Commission, Case T-358/94, ECLI:EU:T:1996:194, paragraph 56.

([58]) Judgment of the Court of Justice of 14 October 1987, Germany v Commission, Case C-248/84, ECLI:EU:C:1987:437, paragraph 17; judgment of the General Court of 6 March 2002, Territorio Histórico de Álava and Others v Commission, Joined Cases T-92/00 and 103/00, ECLI:EU:T:2002:61, paragraph 57.

([59]) Judgment of the General Court of 12 December 1996, Air France v Commission, Case T-358/94, ECLI:EU:T:1996:194, paragraphs 58 to 62.

([60]) Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, Case C-482/99, ECLI:EU:C:2002:294, paragraph 38; judgment of the Court of Justice of 29 April 2004, *Greece v Commission*, Case C-278/00, ECLI:EU:C:2004:239, paragraphs 53 and 54; judgment of the Court of Justice of 8 May 2003, *Italy and SIM 2 Multimedia v Commission*, Joined Cases C-328/99 and C-399/00, ECLI:EU:C:2003:252, paragraphs 33 and 34.

([61]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, Case C-39/94, ECLI:EU:C:1996:285, paragraph 62.

([62]) Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, Case C-482/99, ECLI:EU:C:2002:294, paragraphs 36 and 37.

([63]) Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, Case C-482/99, ECLI:EU:C:2002:294, paragraph 52.

([64]) Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, Case C-482/99, ECLI:EU:C:2002:294; judgment of the General Court of 26 June 2008, *SIC v Commission*, Case T-442/03, ECLI:EU:T:2008:228, paragraphs 93 to 100.

([65]) Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, Case C-482/99, ECLI:EU:C:2002:294, paragraph 55.

(142) As regards the Commission's conclusion in recital 94 of the opening decision that the capital injection is granted from State resources, Germany argues (see recital (82)) that the capital injection would not entail State resources, since the capital injected would have actually stemmed from the sale of two of WestSpiel's artworks and therefore from the price of EUR 114,4 million that the buyer paid for the artworks.

(143) With regard to the State resources criterion, the Commission does not agree with Germany's argument, as the profit skimming of approximately EUR 82 million was a step which took place between the sale of the artworks and the capital injection. Through the profit skimming, this amount was transferred from WestSpiel to the State and, as of that moment, one cannot consider that these resources were private, as the State was exercising control over these resources.

(144) As regards the imputability of the measure, the Commission notes that the decision to inject capital was taken by NRW as described in recitals (47) to (49) and that the considerations for the loss coverage in recital 70 of the opening decision apply *mutatis mutandis* (see recital 95 of the opening decision). As explained therein, the Commission notes that: (i) NRW.BANK is the promotional bank of NRW, whose mission is to support its owner – NRW – in the completion of its structural and economic policy tasks; (ii) NRW is the guarantor of NRW.BANK; and (iii) the governing bodies, in particular the Board of Guarantors and the supervisory body, are composed for the most part of persons holding public office.

(145) The Commission also stated in recital 70 of the opening decision that these considerations would be subject to additional clarifications, as regards in particular the structure of NRW.BANK, its decisional processes and the State's involvement in (possible) decisions. In this context, the Commission notes that:

— According to the Public Governance Report within the financial report of NRW.BANK for the year 2015 ([66]), NRW is the guarantor and sole shareholder of NRW.BANK. In this context, NRW has equipped NRW.BANK with specific liability instruments, namely institutional liability and guarantor liability, and NRW has provided an explicit refinancing guarantee.

— NRW.BANK disposes of a Board of Guarantors where NRW exercises its rights within its legal empowerment and as owner of NRW.BANK, and exercises its voting rights through two representatives. Other members of the Board of Guarantors are the minister of economic affairs of NRW, the minister of finance of NRW and the minister for housing of NRW as well as members *ex officio*.

— With regard to the Administrative Board of NRW.BANK, the Public Governance Report explains that, as the supervisory body of NRW.BANK, it is its role to monitor the management carried out by the Executive Board and to appoint and remove the members of the Executive Board. In 2015, the Administrative Board consisted of 15 members in total, of which 7 members, and hence the majority, were delegated by NRW as the guarantor of NRW.BANK.

— Moreover, NRW.BANK is additionally supervised by the State, more specifically by the ministry of the interior of NRW and by the ministry of housing of NRW (with regard to housing matters).

(146) In light of the indicators presented above, the Commission takes note that through its role as sole guarantor of NRW.BANK, exercising voting rights through its ministers in the Board of Guarantors and having delegated the majority of the members of the supervisory body, which controls the actions of the Executive Board of NRW.BANK, NRW and thus the State exercised a decisive influence over NRW.BANK and on the decisions taken within its corporate bodies at the time when the capital was injected into WestSpiel in 2015. Therefore, the Commission notes that the capital injection can also be regarded as being imputable to the State.

(147) Therefore, the Commission takes the view that, as regards the 2015 capital injection, the actions of NRW.BANK entail a transfer of State resources and are imputable to the State.

([66]) See financial report of NRW.BANK 2015, pages 7-23.

6.1.2.2.3. Advantage

(148) As described above, an advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. According to the case-law of the Union Courts, to assess the presence of an advantage, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been taken ([67]).

(149) The Commission considered in recital 76 of the opening decision that the injection of fresh capital in the amount of EUR 64,8 million by NRW in 2015 conferred, when considered in isolation, an advantage on WestSpiel. In this regard, the Commission noted that the profit skimming, as acknowledged by Germany, constitutes a tax within the meaning of the German Fiscal Code, while the 2015 capital injection had a different nature.

(150) In its comments on the opening decision, Germany maintains that the capital injection in the present case would not have conferred an advantage on WestSpiel, putting forward five arguments. First, the capital injection would have constituted a mere partial 'reinjection' of the profits skimmed from WestSpiel. Second, the injection would have been in line with the MEIP given that by injecting the capital NRW had acted like a private investor under comparable circumstances. Third, Germany explains that the capital injection would not have represented State aid since it only compensated WestSpiel for its structural disadvantage (consisting in its high tax burden). Fourth, Germany puts forward that the same economic result could have in any event been achieved by ways of a legislative amendment (easing WestSpiel's tax burden). Fifth, according to Germany, any theoretical aid would have extensively been repaid by obtaining a higher price from WestSpiel's sale (see Section 4.2).

6.1.2.2.3.1. Assessment of Germany's argument that the capital injection would be in line with the MEIP test

(151) As explained in recital (78), Germany is of the view that the 2015 capital injection performed by NRW.BANK corresponded to the behaviour of a private investor under comparable circumstances and would therefore be in line with the MEIP test. Germany argues that the capital injection was necessary to restore WestSpiel's profitability and thus to keep the capital already invested in the company. Germany bases its MEIP-reasoning on a 'short-term view' ([68]) and on a 'long-term view' ([69]).

– *Applicability of the MEIP test*

(152) The Commission notes that, in order to rely on the MEIP test, such test must in any event be applicable in the first place. That is to say, it must be possible to compare the behaviour of the State with that of a private investor, which does not enjoy the prerogatives and revenues of a tax authority in its relation with an enterprise. In order to satisfy the MEIP test, Member States have to establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as investor. That evidence must show clearly that, before or at the same time of conferring the economic advantage, the Member State concerned took a decision based on economic evaluations comparable to those which, in the circumstances, a rational private investor would have had carried out, before making the investment, in order to determine its future profitability.

(153) The Commission takes the view that Germany has not provided the evidence fulfilling those criteria and that therefore the MEIP test is not applicable for the capital injection as explained immediately below.

([67]) Judgment of the Court of Justice of 2 July 1974, Italy v Commission, Case C-173/73, ECLI:EU:C:1974:71, paragraph 13.
([68]) Germany explains that the capital injection was MEIP-compliant as a self-standing measure.
([69]) Germany argues that, on the basis of the *EDF* case-law, it could factor future higher tax revenues into the assessment. In addition, Germany argues that the capital injection would have been necessary to restore WestSpiel's profitability and thus to keep the capital already invested in the company.

(154) Germany alleges that an *ex ante* assessment would have been carried out with the [IBR] Report. However, neither the [IBR] Report nor any other document provided by Germany fulfils the criteria described in recital (152). Germany did not carry out any *ex ante* assessment whatsoever of the profitability of the capital injection, contrary to what a market economy investor would have done. The MEIP test is not applicable to the mere 'reinjection' of a part of a tax payment in an undertaking without any *ex ante* analysis of profitability (see, by analogy, judgment of the General Court in case T-747/15, *EDF v. Commission*, and order of the Court in case C-221/18 P, *EDF v. Commission*). Notably, the [IBR] Report does not assess whether the 2015 capital injection was a reasonable investment, nor does it assess the counterfactual scenarios (liquidation, sale or 'no action' instead of a capital injection).

(155) As explained in recital 91 of the opening decision, the Commission considers that Germany did not have elements, which could establish that through the capital injection, NRW would have generated – from an *ex ante* perspective – an additional return on capital which it would not have generated in the absence of the injection.

(156) The [IBR] Report does not contain such an analysis of the counterfactual scenarios, the situation of WestSpiel without the capital injection, in comparison with the factual scenario, the situation of WestSpiel with the capital injection. With regard to Germany's reference to page 101 of the [IBR] Report (see recital (74)), as explained in recital (121), this forecast of WestSpiel's liquidity for the years 2015 to 2023 only describes the development of the company without the planned capital injection (after the sale of the artworks and the profit skimming) but does not include the situation with the capital injection.

(157) Page 106 of the [IBR] Report provides a forecast of the liquidity development in the years 2014 to 2023 for the scenario with the capital injection. Nevertheless, the analysis of this scenario remains limited to the statements that *'through the capital injection, WestSpiel KG disposes of positive financial resources during the entire planning period'* and that liquidity would not fall below the *'minimal liquidity of EUR 5 Mio.'* and would *'slightly exceed the minimal liquidity in Q2 2020'*. Apart from these estimations, there is no other analysis, in particular no explanation on how the capital injection would concretely (positively) influence the future financial performance of WestSpiel ([70]).

(158) Furthermore, also with regard to a possible liquidation or sale of WestSpiel as counterfactual scenarios to the capital injection, the [IBR] Report does not contain any description or analysis of the hypothetical implementation of any of these scenarios.

(159) Therefore, neither a detailed business plan nor any other analysis comparing the general scenario without the capital injection, in particular the specific counterfactual scenarios of 'no action' and of a liquidation or a sale, containing accurate, full estimations of future profitability and detailed cost and profit analyses, with the factual scenario of the capital injection have been provided by Germany.

– *Conclusion on the applicability of the MEIP test*

(160) On those grounds, the Commission considers that the MEIP test is not applicable in respect of the capital injection.

– *Application of the MEIP test*

(161) Without prejudice to the assessment above, in which the Commission concludes that the MEIP test is not applicable, the Commission considers, by way of a subsidiary line of reasoning, that even if the MEIP test was applicable, the MEIP test would not be met.

(162) The Commission will deal below with the two arguments ('short-term' and 'long-term' view) put forward by Germany, as explained in recital (78).

– *Germany's 'short-term view'*

([70]) In particular, there is no mentioning of the development of the annual GGR.

(163) First, as regards Germany's 'short-term' view, as explained in recital (78), when considering the MEIP-compliance of the 2015 capital injection as a self-standing measure (i.e. without taking into account the profit skimming tax revenues), the Commission does not agree that for a private investor there would not have been any alternative option to the model involving the three steps (sale of the artworks/profit skimming/capital injection) and that the only possible alternative option would have been not to implement the measures and to therefore lose the complete value of NRW.BANK's share in WestSpiel as well as the prospect of future revenues.

(164) The Commission takes the view that, contrary to its position with regard to the counterfactual scenarios for the annual loss coverage, the liquidation or the sale of WestSpiel would have been economically more reasonable options compared to the capital injection carried out by NRW.BANK in 2015. Such capital injection, carried out to keep the business afloat, only satisfies the MEIP test when it can be expected (based on *ex ante* considerations) to lead to a result which is better than the other two options. In any event, such a test needs to be conducted *ex ante*.

(165) The Commission assessed the counterfactual scenarios (liquidation or sale of WestSpiel or 'no action') in comparison with the factual scenario (capital injection) chosen by NRW.BANK in order to determine if a private investor under comparable circumstances would have acted in the same manner.

(166) The assessment is primarily based on the annual accounts of WestSpiel and on the [XY] Reports for the years 2013 and 2014, as these documents represent the period shortly before NRW.BANK took the decision to grant the capital injection in December 2015 and are therefore most suitable to show WestSpiel's situation at the time of the capital injection ([71]). The Commission also examined the forecasts and plannings of profits and losses, balance and cashflow of WestSpiel for the years 2015 to 2023 as provided by the [IBR] Report.

– *Assessment of the counterfactual scenarios: liquidation and sale*

(167) According to WestSpiel's annual accounts and to the [XY] Reports, as shown in recital (113), the amount of liabilities exceeded WestSpiel's capital in the years 2010 to 2015, hence also in 2013 and 2014. More precisely, WestSpiel's accounts show liabilities of EUR 17,5 million and a capital of EUR 9,6 million in 2013 and liabilities of EUR 17,6 million and a capital of approximately EUR 14 million in 2014. Therefore, the Commission takes the view that in the same vein during the period preceding the capital injection in December 2015, a liquidation of WestSpiel would have only been possible at a negative value, i.e. the liabilities would have exceeded the capital of WestSpiel (see recital (109)). Also regarding a possible sale, the business would not have been very attractive at that point in time.

(168) Nevertheless, despite the high probability that NRW.BANK could not have kept its share in WestSpiel with a liquidation or a sale in 2013 or 2014, the liquidation or sale of the business or the possibility not to act at all would still have been preferable to the capital injection. Notably, WestSpiel's annual accounts have to be evaluated from a different perspective for the capital injection and for the annual loss coverage, as the situations are not comparable:

— Firstly, a reasonable private investor would not have injected additional capital in order to strengthen a business if already significant investments in the past (the annual loss coverage since 2009) have not shown any positive outcome in the financial situation of the business. As described in recital (119), the situation of WestSpiel did not improve due to the annual loss coverage; on the contrary, the annual GGR was still declining and the annual net losses continuously stayed high until the sale of the artworks in 2014. In 2014, WestSpiel realised low net profits. At the point when the decision on the capital injection was taken in 2014, a private investor would have been in the position to evaluate the effects of the annual loss coverage granted to WestSpiel during the last five years and to draw the conclusion that the situation of the business was still declining. A reasonable investor would therefore not have injected additional capital by taking the risk of even higher financial losses and would have instead immediately proceeded with the liquidation or the sale of the business.

([71]) The [IBR] Report is also based on the business information of WestSpiel for the years 2013 and 2014, see page 114 of the [IBR] Report.

— Secondly, the annual loss coverage constituted a purely passive behaviour by a shareholder which required no specific action or active decision, as the process whereby shareholders of a limited partnership offset losses from the equity capital follows from an obligation under German company law (see recitals (103) and (104)). On the contrary, the decision to inject new capital is an active decision and not due to a pure legal automatism. Therefore, the threshold for an investor is much higher before he takes the decision to grant a capital injection and hence this measure has to be scrutinised more strictly than the 'no action' situation of the annual loss coverage.

— Thirdly, even if the Commission argues for the loss coverage that it can be understandable for a shareholder who has undertaken a significant investment (the initial capital contribution) and accepted losses in a business over a long time to refrain from the liquidation or sale of the company (see recitals (107) to (125)), this does not apply to the capital injection. The Commission takes the view that this argument cannot apply for an unlimited time and to an unlimited amount of losses made by a business, as this would lead to the possibility for an investor to make an initial investment in a business and to then accept losses or undertake additional payments without being obliged to assess the profitability and rationality of the continuous investment ever again.

— Fourthly, the Commission takes note of the rather positive forecast of WestSpiel's financial situation for the period from 2021 to 2023 when a change from a negative to a positive payment balance was expected (see recitals (74) and (121)). Nevertheless, it would not have been acceptable for a comparable private investor to refrain from a liquidation or sale in 2015 (when the capital injection took place) and to wait until the forecasted improvement of the company's financial situation. The time span between 2015 and 2021 is still very long and it would not be reasonable to ask a shareholder to defer an urgent and necessary decision for six more years. In particular, the additional losses that the shareholder would have probably incurred during these years have to be taken into account as well as the economic and financial uncertainty, seen that the forecast still predicts a negative payment balance of WestSpiel until the final turning point in 2021. In any case, the reasonable alternative to a sale or liquidation in 2015 would not have been the capital injection, for the reasons presented above, but just the mere possibility for a shareholder not to act at all and to accept additional annual loss coverage under the automatism in the HGB, as already practised in the years beforehand.

– *Conclusion on the assessment of the counterfactual scenarios*

(169) Therefore, on the basis of the arguments presented in the assessment of the specific counterfactual scenarios, the Commission concludes that a comparable private investor would have chosen to liquidate or sell the business or not to act at all instead of taking another investment by even injecting additional capital into an overall loss-making undertaking, risking to lose, in addition to the remaining capital at stake, also the newly injected amounts.

– *Germany's 'long-term view'*

(170) As regards Germany's 'long-term' view, as explained in recital (78), the Commission holds that, in view of the EDF case-law ([72]), the State's action in its capacity as an investor on the one hand (under which role it carried out the capital injection) and its action in its capacity as a public authority (under which role it received the profit skimming) have to be distinguished.

([72]) Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, Case C-124/10 P, ECLI:EU:C:2012:318.

(171) As the Court has stated, in order to assess whether the same measure would have been adopted in normal market conditions by a private operator in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as a private operator, to the exclusion of those linked to its situation as a public authority, are to be taken into account ([73]).

(172) As regards Germany's argument that WestSpiel's additional ([74]) taxes should be included in the revenues when assessing the MEIP-conformity of the capital injection, the Commission notes that such consideration is not among the elements that a market economy investor would take into account.

(173) The case-law does not allow to conclude that an advantage in the form of a capital investment in an undertaking can be neutralised by the payment of taxes on the profits of the undertaking. In this sense, even if the capital injection was necessary to keep the business afloat and to avoid an insolvency procedure, as explained in recitals (152) to (159), there was no sufficient *ex ante* evidence that the investment was expected to produce profits or to avoid additional losses (compared to the counterfactual scenarios, namely the liquidation or sale of WestSpiel).

– *Conclusion on the application of the MEIP test*

(174) In light of the assessment of the counterfactual scenarios on the basis of the information available to the Commission about WestSpiel's financial situation at the time of the decision on the capital injection in 2015 (see recital (167)) and of the Commission's conclusion that the payment of taxes cannot neutralise an advantage (see recital (173)), the Commission takes the view that the measure is not in line with the MEIP test.

(175) The Commission assumes that, as WestSpiel was loss-making, a rational private investor would not decide to inject additional capital into it without conducting any evaluations, even general ones, that show that there are reasonable probabilities of future profit and that include, if necessary, the possible sale or liquidation of the company ([75]).

6.1.2.2.3.2. Alleged compensation for structural disadvantage

(176) Germany argues (see recital (79)) that the 2015 capital injection would not have provided an advantage to WestSpiel and therefore would not have been State aid because it would have compensated the latter for its structural disadvantage of being taxed higher than its private competitors (in line with the *Combus* case-law ([76]). Article 14 SpielbG NRW (old version) in particular would have prevented WestSpiel from using the proceeds of the assets it had sold (i.e. its extraordinary income from the sale of the artworks).

(177) However, the Commission disagrees with Germany. In the more recent *Orange* judgment ([77]), the Court of Justice clarified that while the compensation for a structural disadvantage can be compatible with the internal market, in certain circumstances, it still represents State aid. More specifically, the Court clarified in paragraph 44 of the judgment that, except for cases of services of general economic interest falling under the *Altmark* criteria ([78]), an economic advantage granted through State resources is to be considered as State aid if all the other conditions of existence of aid are fulfilled.

([73]) Judgment of the Court of Justice of 6 March 2018, *Commission v FIH Holding and FIH Erhversbank*, Case C-579/16 P, EU:C:2018:159, paragraph 55; judgment of the Court of Justice of 5 June 2012, *Commission v EDF,* Case C-124/10 P, EU:C:2012:318, paragraph 79 and the case-law cited therein; judgment of the Court of Justice of 24 October 2013, *Land Burgenland and others v Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 52.

([74]) Taxes generated from the capital injection from the NRW State budget.

([75]) Judgment of the General Court of 25 June 2015, *SACE and SACE BT v Commission*, Case T-305/13, ECLI:EU:T:2015:435, paragraphs 178 to 180.

([76]) Judgment of the General Court of 16 March 2004, *Danske Busvognmænd v Commission*, Case T-157/01, ECLI:EU:T:2004:76, paragraph 57.

([77]) Judgment of the Court of Justice of 26 October 2016, *Orange v Commission, Case* C-211/15 P, ECLI:EU:C:2016:798, paragraphs 22 to 34.

([78]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, Case C-280/00, ECLI:EU:C:2003:415.

(178) Furthermore, the Commission notes that both the judgments in *Combus* and *Orange* referred to compensation measures aiming at covering abnormal costs compared to those of private competitors. However, in the case at hand, the measure does not tackle a 'structural' disadvantage but is rather a one-off divestment of assets, allowing an undertaking to continue operating despite it having an unprofitable business model.

(179) In view of the above, the Commission concludes that the 2015 capital injection cannot be seen as not entailing State aid on the grounds that it represents a compensation for WestSpiel's structural disadvantage.

6.1.2.2.3.3. Alleged lack of advantage as the same economic result could have been achieved via legislative amendments

(180) Germany also explains (see recital (80)) that the same economic result of the capital injection could have been achieved by legislative amendments, i.e. by modifying the tax regime applicable to WestSpiel.

(181) The Commission considers this argument not relevant for the question whether the capital injection by NRW.Bank in 2015 conferred an advantage on WestSpiel. The Commission notes that this argument is merely a hypothetical one which did not materialise in practice. Indeed, despite the theoretical possibility, the State has *de facto* not made use of this avenue but instead opted to maintain the tax regime applicable to WestSpiel and resorted to conducting a capital injection. To this end, the Commission cannot further assess whether an advantage would have existed for WestSpiel in the theoretical scenario of legislative amendments, for the simple reason that the legislative amendments did not actually occur in practice.

6.1.2.2.3.4. The alleged repayment of the book value of NRW's silent participation would amount to an extensive repayment of the (alleged) State aid

(182) Germany also puts forward (see recital (81)) that the repayment of the book value of NRW's silent participation from WestSpiel to NRW would have been equivalent to a repayment of the (alleged) State aid, in the case that such aid existed. In this sense, according to Germany, the (higher) price that the successful bidder would pay in the (at the time) on-going tender process would reflect the higher value that the company had, because it had received State aid.

(183) The Commission notes that the theoretical possibility (contemplated prior to WestSpiel's sale in September 2021) of obtaining a higher price in a tender process is not enough to rule out the existence of an advantage derived from the 2015 capital injection or prevent the beneficiary from continuing to have the actual benefit of the advantage derived from it ([79]). This is so because the advantage has to be assessed at the moment when the aid is granted so that the theoretical hypothesis of an increased value of the undertaking in the future might be relevant, but the fact that the silent participation has been repaid later is not.

(184) In any event, the Commission concludes that this argument does not deal with the existence of State aid itself but rather with the remaining amount of aid to be recovered after the sale of WestSpiel was concluded and the sales price was paid.

– *Conclusion on the advantage*

(185) Therefore, the Commission concludes that the capital injection confers an advantage within the meaning of Article 107(1) TFEU to WestSpiel.

([79]) Judgment of the Court of Justice of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, Case C-357/14 P, ECLI:EU:C:2015:642, paragraph 116.

6.1.2.2.4. Selectivity

(186) As regards the selectivity criterion, there is a presumption that the measures under assessment are selective, since the sole beneficiary was WestSpiel. Since, in the present case, there is no element that can rebut this presumption, the Commission concludes that the measures under assessment are selective. This is also not contested by Germany.

6.1.2.2.5. Distortion of competition and effect on trade

(187) In relation to the criterion of distortion of competition, the Commission notes that a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. For all practical purposes, a distortion of competition within the meaning of Article 107(1) TFEU is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ([80]). As regards the criterion of affectation of intra-Union trade, it is common ground that it is not necessary to establish that the aid has an actual effect on trade between Member States but only whether the aid is liable to affect such trade. In particular, the Union Courts have ruled that *'where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid'* ([81]).

(188) As explained in recital 57 of the opening decision, the Commission does not share Germany's views that the measures under assessment could not have distorted competition and affected trade between Member States in view of WestSpiel's alleged legal monopoly position in NRW. While Germany argues that the casino market would have been closed to competition pursuant to Articles 1 and 3 SpielbG NRW (old version) in the relevant period (2009 to 2015), it appears that WestSpiel was in competition with gambling halls of private operators (notably the members of FSH), in particular with regard to machine-based gambling activities. In addition, there is no indication that there was a legal monopoly in NRW that excluded competition in the market and for the market. Finally, despite Germany's comment as regards the alleged illegal activity of online suppliers, and as also stated in recital 57 of the opening decision, non-gambling related activities of WestSpiel (such as for example the operation of bars and restaurants in the casinos) were, in any event, not subject to a potential legal monopoly and were exercised in competition with other companies.

(189) Therefore, the Commission concludes that the 2015 capital injection is likely to affect intra-Union trade and distort or threaten to distort competition.

– *Conclusion on the capital injection*

(190) Therefore, as regards the capital injection to WestSpiel, the Commission concludes from the foregoing assessment that the cumulative criteria for the existence of State aid within the meaning of Article 107(1) TFEU are fulfilled and that the measure constitutes State aid.

([80]) Judgment of the Court of Justice of 15 June 2000, *Alzetta and Others v Commission*, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 , ECLI:EU:T:2000:151, paragraphs 141 to 147; judgment of the Court of Justice of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, Case C-280/00, ECLI:EU:C:2003:415.

([81]) Judgment of the Court of Justice of 14 January 2015, *Eventech*, Case C-518/13, ECLI:EU:C:2015:9, paragraph 66; judgment of the Court of Justice of 8 May 2013, *Libert and Others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77; judgment of the General Court of 4 April 2001, *Regione autonoma* Friuli-Venezia Giulia v Commission, Case T-288/97, ECLI:EU:T:2001:115, paragraph 41.

6.1.3. *Conclusion on the existence of aid*

(191) As regards the annual loss coverage, the Commission concludes that it does not constitute State aid in the sense of Article 107(1) TFEU, since the cumulative criteria of that Article are already not present for the reasons stated in Section 6.1.1 (no advantage, no State resources and no imputability), making it superfluous to analyse the remaining criteria of Article 107(1) TFEU.

(192) As regards the 2015 alleged capital injection, the Commission concludes that it constitutes State aid in the sense of Article 107(1) TFEU, since the cumulative criteria of that Article are met for the reasons stated in Section 6.1.2.

6.2. **Lawfulness of the aid**

(193) The 2015 capital injection constitutes State aid within the meaning of Article 107(1) TFEU and, since it has been disbursed in violation of Article 108(3) TFEU, it constitutes unlawful State aid.

6.3. **Compatibility**

(194) As the 2015 capital injection constitutes State aid, it is necessary to examine whether this aid measure could be considered compatible with the internal market. State aid measures can be considered compatible with the internal market on the basis of the exceptions listed in Articles 107(2) and 107(3) TFEU.

(195) Germany brought forward two possible compatibility bases, namely (a) Article 107(3), point (c) TFEU – aid for the liberalisation of the market (see recital (84)); and (b) the R&R Guidelines (see recital (85)).

(196) As regards Article 107(3), point (c) TFEU, the reasoning of compensation for market liberalisation brought forward by Germany cannot be accepted by the Commission. Indeed, first, the Commission has no indications that the (alleged) market opening was the reason behind the capital injection. Second, the Commission concludes that the market has in any event not been liberalised – indeed, the legal set-up with one operator holding a monopoly licence (previously a public but now a private one following WestSpiel's purchase) for casinos on one side and private slot machines operators on the other side, remains the same.

(197) As regards the compatibility pursuant to the State aid rules applicable to rescue and restructuring aid, despite Germany's allegation that a possible aid recovery would render WestSpiel an undertaking in difficulty, Germany did not provide any information showing that at the moment the measures were granted the company qualified as an undertaking in difficulty and that the requirements of the R&R Guidelines were complied with. The Commission's doubts expressed in recital 104 of the opening decision, that those requirements were complied with, have not been eliminated; indeed the Commission received no information showing that the capital injection was granted on a non-permanent basis, on the basis of a previously approved restructuring plan, and with an adequate own contribution to the costs of the restructuring from the own resources of the aid beneficiary.

(198) In view of the above, the Commission concludes that unlawful State aid granted by Germany in the form of the 2015 capital injection is not compatible with the internal market.

7. RECOVERY

(199) In accordance with the TFEU and the established case-law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market ([82]). The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([83]).

(200) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored ([84]).

(201) In line with the case-law, Article 16(1), first sentence, of Council Regulation (EU) 2015/1589 ([85]) states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.

(202) Thus, given that the 2015 capital injection in question was implemented in breach of Article 108(3) TFEU, and is to be considered as unlawful and incompatible aid, it shall be recovered in order to re-establish the situation that existed on the internal market prior to its granting.

(203) The nominal recovery amount corresponds to the amount of the capital injection (i.e. EUR 64,8 million). The amounts already paid back by WestSpiel in two instalments following the 8 January 2021 dissolution of the silent partnership agreement (see footnote 36), that is to say (a) the first instalment of EUR 35 million (repaid on 19 January 2021, see recital (90)); and (b) the second instalment of EUR 11 516 909 (repaid on 26 July 2021, see recital (81)), in total an amount of EUR 46 516 909, cannot be qualified as partial recovery, contrary to Germany's arguments (see recital (83)). This is so because, even by repaying this amount, WestSpiel has not in fact forfeited the actual advantage received with the capital injection over its competitors.

(204) The Commission notes that the dissolution of the silent partnership in the case at hand cannot be qualified as a recovery and does not have any effect on the amount of aid to be recovered, since this amount in principle does not depend on events which occur after the granting of the aid.

(205) The advantage results from an injection of capital, which would not take place in normal market conditions. The whole injection of capital constitutes the amount of the advantage. If it appears later that, thanks to further developments, the investment was eventually profitable, it does not modify the existence of the advantage, nor its amount. For instance, when a Member State carries out that investment by buying shares of a company (which would not be bought by a private investor) and later sells these shares (even if their price has increased in the meantime), this sale does not constitute a reimbursement of the aid. In the same vein, the distribution of dividends does not constitute a recovery either. The same analysis would remain valid for the reimbursement of a participation.

(206) In other terms, the concrete further developments that occur in connection to the equity or the 'participation' are distinct phenomena, having no bearing on the recovery of the unlawfully granted aid. The Commission hence concludes that the repayment has not (even partially) restored the situation which existed in the internal market before the aid was paid.

([82]) Judgment of the Court of Justice of 12 July 1973, *Commission v Germany*, Case 70-72, ECLI:EU:C:1973:87, paragraph 13.
([83]) Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission*, Case C-142/87, ECLI:EU:C:1990:125, paragraph 66.
([84]) Judgment of the Court of Justice of 17 June 1999, *Belgium v Commission*, Case C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.
([85]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9, ELI: http://data.europa.eu/eli/reg/2015/1589/oj).

(207) As mentioned in recital (29), due to the reorganisation of the WestSpiel group, WestSpiel merged with WestSpiel GmbH. Following the sale to the Gauselmann Group, WestSpiel was renamed and operates now under the name 'Merkur Spielbanken GmbH' (see recital (30)). In case of a merger or other form of business reorganisation, the legal successor of the original aid beneficiary must be identified and the Member State must recover the aid from the surviving entity ([86]). WestSpiel GmbH is the legal successor of WestSpiel, which is now named 'Merkur Spielbanken GmbH'. The term 'WestSpiel' refers to this merged, and then sold entity (see footnote 7), from which the aid must be recovered.

(208) Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiary, i.e. from 15 December 2015 (see recital (130)) to effective recovery. The amount to be recovered shall bear interest until effective recovery.

8. INDEMNITY CLAUSE

(209) The Commission observes that WestSpiel's Sale and Purchase Agreement entails provisions which amount to an indemnity clause against State aid recovery claims that is capped at EUR 30 million (see point (D) of the preamble, Articles 7, 17.2, 19, 24, 28.3 to 28.5 and 29 of WestSpiel's Sale and Purchase Agreement). The Commission recalls that it is settled case-law that such clauses may be qualified as separate State aid measures *per se*, and the exercise of such clauses may be qualified as a circumvention of the recovery of unlawful and incompatible State aid. The Commission highlights that the beneficiary of the clause is also the beneficiary of the aid.

(210) The Court of Justice has consistently held that the aim of obliging the State concerned to abolish aid, which is found by the Commission to be incompatible with the internal market, is to restore the previous situation. That objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient. By repaying the aid, the aid recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored. Allowing a Member State to grant aid equivalent to that of the unlawful aid, intended to neutralise the impact of the recovery which the beneficiaries are obliged to make, would clearly amount to thwarting the effectiveness of decisions taken by the Commission ([87]).

(211) The indemnity clause, if applied, will have the result to compensate WestSpiel for the illegal and incompatible aid it received. More specifically, WestSpiel will be obliged, by virtue of the present Decision, to repay the incompatible aid to the State. This event will trigger, after the present Decision becomes final, the indemnity clause, obliging the State to pay to WestSpiel the same amount it has recovered capped at EUR 30 million. The implementation of such a clause would constitute a circumvention of the recovery of unlawful and incompatible State aid as found by the present Decision because it will not lead to effective recovery in form of the restitution of the situation which existed on the market before the aid was paid, which is contrary to its purpose ([88]).

9. CONCLUSION

(212) The Commission finds that Germany has unlawfully implemented the aid in breach of Article 108(3) TFEU.

(213) The Commission concludes that the aid is incompatible with the internal market and must be recovered from WestSpiel together with recovery interest,

([86]) To that effect, see Judgment of the Court of Justice of 7 March 2018, SNCF Mobilités v Commission, C-127/16 P, ECLI:EU:C:2018:165.
([87]) Judgment of the Court of Justice of 29 June 2004, *Commission v Council,* Case C-110/02, ECLI:EU:C:2004:395, paragraphs 42 and 43 and the case-law cited.
([88]) Judgment of the Court of Justice of 11 December 2012, *Commission* v *Spain*, Case C-610/10, ECLI:EU:C:2012:781, paragraph 105.

HAS ADOPTED THIS DECISION:

Article 1

The alleged measure concerning annual loss coverage, which Germany has implemented, does not constitute aid within the meaning of Article 107(1) TFEU.

Article 2

The 2015 capital injection of EUR 64,8 million, unlawfully put into effect by Germany, in breach of Article 108(3) TFEU, is incompatible with the internal market.

Article 3

1. Germany shall recover the incompatible aid referred to in Article 2 from WestSpiel, which merged with WestSpiel GmbH and is now named 'Merkur Spielbanken NRW GmbH'.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of WestSpiel until their effective recovery.

3. Germany shall ensure that WestSpiel does not receive any compensation for the amounts subject to this Decision. In particular, WestSpiel shall not receive, directly or indirectly, from Germany any amounts due to the application of the indemnity clause of WestSpiel's Sale and Purchase Agreement.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([89]).

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.

2. Germany shall ensure that this Decision is implemented within four months following the date of its notification.

Article 5

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:

(a) the total amount (principal and recovery interest) to be recovered from WestSpiel;

(b) a detailed description of the measures already taken and those planned to comply with this Decision;

(c) documents demonstrating that WestSpiel has been ordered to repay the aid referred to in Article 2.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. Upon a simple request by the Commission, Germany shall immediately submit information on the measures already taken and those planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from WestSpiel. Germany shall also report to the Commission on whether and in which way the indemnity clause referred to in recital (209) has been applied.

([89]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1, ELI: http://data.europa.eu/eli/reg/2004/794/oj).

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 22 November 2024.

For the Commission
Margrethe VESTAGER
Executive Vice-President