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(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – NIEMCY

Pomoc państwa nr SA.29338 (2013/C-30) (ex 2013N-504) – Zwiększenie gwarancji przy drugiej stracie na rzecz HSH Nordbank AG

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(2013/C 315/04)

Pismem z dnia 21 czerwca 2013 r., zamieszczonym w języku autentycznym na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Niemcy o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

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Otrzymane uwagi zostaną przekazane władzom niemieckim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

I. PROCEDURA

- (1) W dniu 20 września 2011 r. Komisja zatwierdziła gwarancję przy drugiej stracie w wysokości 10 mld EUR na rzecz HSH Nordbank AG („HSH”), aby chronić określony portfel referencyjny o wartości księgowej około 185 mld EUR wobec ryzyka kredytowego. W 2011 r. HSH ma częściowo anulował gwarancję, obniżając pułap z kwoty 10 mld EUR do 7 mld EUR.
- (2) W dniu 22 maja 2013 r. Niemcy zgłosiły podniesienie pułapu gwarancji z powrotem z kwoty 7 mld EUR do 10 mld EUR, twierdząc, że nie była to nowa pomoc, ale pomoc już zatwierdzona w decyzji z 2011 r. Niemcy wyjaśniły, że zgoda na ten środek przed lipcem 2013 r. byłaby tak czy inaczej konieczna ze względu na stabilność finansową, gdyż zwiększenie kwoty jest konieczne do

zapewnienia kapitalizacji papierów wartościowych na kapitał podstawowy pierwszej kategorii EBA w wysokości 9 % kapitału.

II. POMOC, W ODNIESIENIU DO KTÓREJ KOMISJA WSZCZYNA POSTĘPOWANIE

- (3) Przedstawiciele Niemiec twierdzą, że przyczyną zwiększenia gwarancji jest utrzymująca się napięta sytuacja rynkowa, w szczególności w sektorze żegluga morskiej, a także spadek wartości euro w stosunku do dolara amerykańskiego. Czynniki te spowodowały zwiększenie się wagi ryzyka transzy gwarancji przy drugiej stracie, stawiając tym samym pod znakiem zapytania fakt, czy gwarancja przy drugiej stracie może nadal zapewnić transfer ryzyka i neutralność kapitału portfela.

- (4) Wynagrodzenie związane ze środkiem wynosi 4 % rocznie od wartości nominalnej powiększonej o płatność ryczałtową w wysokości ok. 275 mln EUR, stawiając tym samym gwaranta i beneficjenta w tej samej sytuacji gospodarczej, która występowałaby w przypadku, gdyby częściowe anulacje nigdy nie nastąpiły.

III. OCENA WSTĘPNA

- (5) Komisja uważa zwiększenie za nową pomoc państwa. W związku z tym dana pomoc byłaby dodatkową pomocą państwa, w kontekście której należy ponownie ocenić cały plan restrukturyzacji. Należy ponownie ocenić to, czy pomoc na restrukturyzację jest w stanie przywrócić beneficjentowi rentowność, biorąc pod uwagę zmienione warunki rynkowe. Z drugiej strony, wzięwszy pod uwagę ocenę podziału obciążenia i ograniczenie zakłócenia konkurencji, istniejące środki wydają się nadal odpowiednie w kontekście zapewnienia zgodności z rynkiem wewnętrznym.
- (6) Co się tyczy rentowności, Komisja odnotowuje fakt, że HSH nadal zakłada ożywienie na rynkach transportu morskiego począwszy od 2014 r., podczas gdy prognozy

innych podmiotów działających na rynku są w tej kwestii bardziej pesymistyczne. Komisja zauważa również, że podwyższenie gwarancji będzie się wiązało z dodatkowymi opłatami gwarancyjnymi, które znacząco wpływają na przyszłą rentowność HSH. HSH włączył te koszty do nowego planu biznesowego, ale nie przedstawił zaktualizowanego scenariusza warunków skrajnych. Należy sprawdzić, czy poziom wynagrodzenia odpowiada możliwościom finansowym HSH, w szczególności w przypadku przedłużania się kryzysu; Komisja ma w związku z tym wątpliwości co do tego, czy plan biznesowy jest wystarczająco ostrożny.

IV. TYMCZASOWE ZATWIERDZENIE

- (7) Z uwagi na powyższe wątpliwości Komisja musi wszcząć formalne postępowanie wyjaśniające, lecz jednocześnie zgadza się tymczasowo uznać środek pomocy za zgodny z rynkiem wewnętrznym.

Zgodnie z art. 14 rozporządzenia Rady (WE) nr 659/1999 wszelka pomoc przyznana niezgodnie z prawem może podlegać odzyskaniu jej od beneficjenta.

TEKST PISMA

„The Commission wishes to inform the German authorities that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter "TFEU").

I. PROCEDURE

- (1) On 20 September 2011, the Commission adopted a Decision (hereinafter the "2011 restructuring decision")⁽¹⁾ in relation to several State aid measures in favour of HSH Nordbank AG (hereinafter "HSH"), including a second-loss guarantee in the nominal amount of EUR 10 billion.
- (2) On 9 March, 18 June, and 6 September 2011, HSH had cancelled parts of the second-loss guarantee, ultimately reducing the ceiling amount of the second-loss guarantee to EUR 7 billion.
- (3) In September 2012, Germany informed the Commission about the potential need to increase the ceiling amount of that second-loss guarantee.
- (4) On 3 May 2013, Germany informed the Commission about the course of negotiations with J.C. Flowers & Co. LLC (hereinafter "J.C. Flowers") on a third-loss guarantee for HSH. Those negotiations had ultimately failed.
- (5) On 22 May 2013, Germany notified to the Commission that the State of Schleswig-Holstein (hereinafter "Schleswig-Holstein") and the City State of Hamburg (hereinafter "Hamburg") intend to increase the ceiling amount of the second-loss guarantee from EUR 7 billion back to EUR 10 billion.
- (6) Along with the notification of 22 May 2013, Germany submitted an updated medium-term business plan of HSH for the period from 2013 to 2015 (hereinafter "new business plan").
- (7) On 4 June 2013, Germany submitted a letter by the German banking regulator Bundesanstalt für Finanzdienstleistungsaufsicht (hereinafter "BaFin").
- (8) Germany has exceptionally agreed that the authentic language for this decision should be English.

II. FACTS

HSH Nordbank AG

- (9) HSH is the fifth-largest German Landesbank, with head offices in Hamburg and Kiel. It is a private joint stock company, established on 2 June 2003 as the result of the merger between Hamburgische Landesbank and Landesbank Schleswig-Holstein. Its core business region is Northern Germany and its main focus is on merchant and private banking. The merchant banking activities are focused on shipping, corporate banking, real estate, renewable energy and infrastructure projects. On 31 December 2012, HSH had a balance sheet showing total assets of EUR 131 billion.

- (10) HSH has the following shareholder structure: Hamburg and Schleswig-Holstein together hold 85.38 % of the shares, either directly or via HSH Finanzfonds AöR (hereinafter "Finanzfonds"), an institution established under public law and controlled by Hamburg and Schleswig-Holstein; the Savings Banks Association of Schleswig-Holstein holds 5.31 %; and a group of nine trusts which are advised by J.C. Flowers holds 9.31 %.

Previous aid measures, including the second-loss guarantee

- (11) In May 2009, Finanzfonds granted two State aid measures to HSH, the EUR 10 billion second-loss guarantee and EUR 3 billion in capital. In addition, the German Financial Market Stabilisation Fund (hereinafter "SoFFin") granted to HSH guarantees covering new issuances of debt of up to EUR 17 billion.
- (12) The second-loss guarantee had an effective date of 1 April 2009. It was definitively approved in the 2011 restructuring decision, together with the capital increase and the SoFFin guarantees.
- (13) The second-loss guarantee protects a defined reference portfolio with an initial book value of approximately EUR 185 billion against credit defaults (EUR 82 billion as at year-end 2012). That reference portfolio represented approximately 75 % of the bank's total balance sheet in 2009. Loans to customers comprise the majority of the assets in the reference portfolio (initially EUR 115 billion), but the portfolio also includes fixed income securities (initially EUR 27 billion), bonded loans (initially EUR 15 billion), guarantees on payments (initially EUR 5 billion), and assets-backed securities (initially EUR 9 billion). The assets in the reference portfolio are mainly denominated in US dollars, Euros and British Pounds.
- (14) The ceiling amount of the second-loss guarantee was originally set at EUR 10 billion. The second-loss guarantee only intervenes if losses are posted to the reference portfolio that exceed the first-loss tranche of EUR 3.2 billion which is to be borne by HSH. The second-loss guarantee was hence initially designed to compensate for losses in the reference portfolio of between EUR 3.2 and EUR 13.2 billion.

- (15) In 2011, the ceiling amount of that second-loss guarantee was, on the initiative of HSH, reduced to EUR 7 billion. In March, June, and September 2011 HSH partially repealed the guarantee, in each case by an amount of EUR 1 billion. Those cancellations were noted in the restructuring plan that served as a basis for the 2011 restructuring decision.

- (16) According to the contractual terms and conditions of the second-loss guarantee, HSH pays an annual fee of 4 % of the ceiling amount to Finanzfonds. The partial cancellations of the second-loss guarantee hence reduced the fees that HSH had to pay to Finanzfonds.

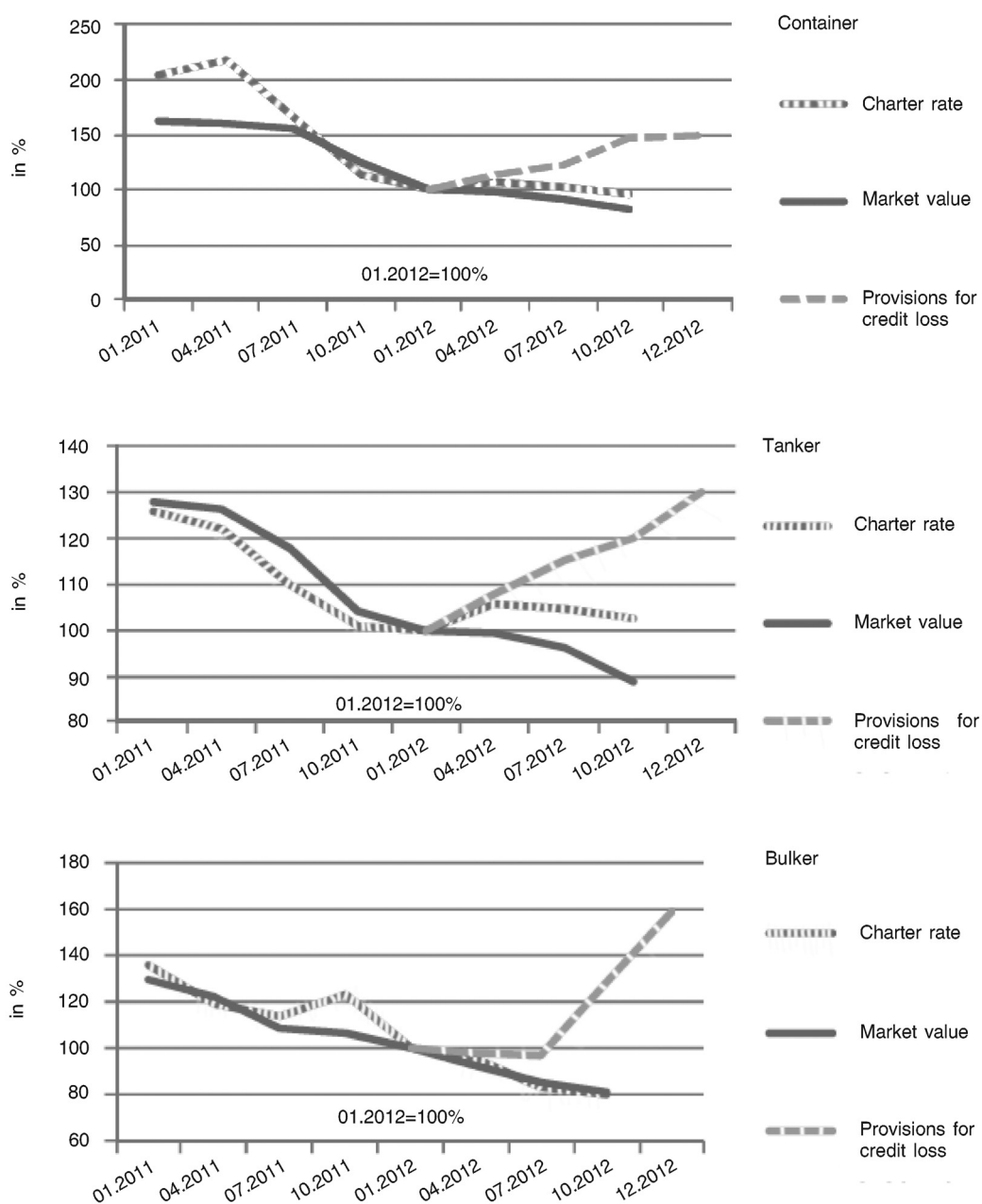
⁽¹⁾ OJ L 225, 21.08.2012, p. 1.

Financial performance of HSH since the 2011 restructuring decision, economic developments in the shipping market and the new business plan

(17) As explained in recital 79 of the 2011 restructuring decision, the focus of HSH was to remain on shipping despite the considerable reductions to which HSH committed itself in that segment ⁽¹⁾. Since the 2011 restructuring decision the situation of the shipping market has significantly deteriorated. As illustrated in Figure 1, both charter rates and the market price of ships continuously declined over the years 2011 and 2012. Together with the EUR/USD exchange rate, they are the main drivers of the probability of default of the shipping portfolio of HSH. They are thereby the main drivers of the loan loss provisions. In particular, for container ships charter rates declined by around one-third over one year following the 2011 restructuring decision, whereas the restructuring plan of 2011 was based on the assumption of a recovery in the charter rates.

Figure 1

Evolution of charter rates and market value of ships over 2011 and 2012 and the impact on HSH provisions



⁽¹⁾ See recital 52 of the 2011 restructuring decision.

- (18) The shipping charter rate assumptions have been revised in the new business plan, as the current level of charter rates is significantly lower than in 2011. The new business plan relies to a certain extent on a recovery of the shipping market, albeit one which would take place later and be weaker than foreseen in the 2011 restructuring plan. Although container rates are projected to remain at below pre-crisis levels (as illustrated in Figure 3), they are projected to [...] (*) by 2015 compared to the level at the end of 2012 (as illustrated in Figure 2).
- (19) HSH has also modified its EUR/USD projections in the new business plan. The exchange rate was projected to remain stable at 1: [1.35 - 1.45] over the restructuring period: in the new business plan the rate is projected to remain stable at 1: [1.25 - 1.40]. That assumption is less favourable to HSH but corresponds to recently observed levels.

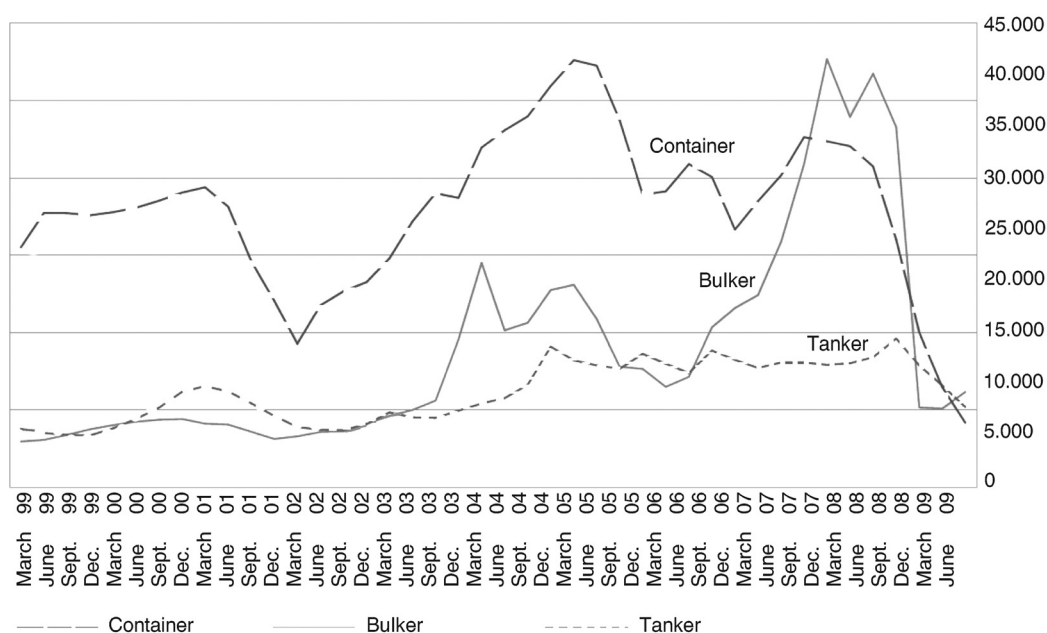
Figure 2

New business plan charter rate assumptions

Charter rates (USD/day)	E2012 expected	E2013 expected	E2014 expected	E2015 expected
Container	[...]	[...]	[...]	[...]
Bulker	[...]	[...]	[...]	[...]
Tanker	[...]	[...]	[...]	[...]

Figure 3

Pre-crisis levels of charter rates in USD/day



- (20) Against that background, HSH has failed to achieve its base case financial projections of the 2011 restructuring decision as illustrated in Figure 4. While the realised figures in 2011 and in 2012 for cost-cutting is above the targets of HSH ⁽¹⁾, its total income is significantly lower than that foreseen in the 2011 restructuring plan ⁽²⁾. The overall result is also significantly below the projections of

(*) Business secret

⁽¹⁾ If the 2012 3Q figure is annualised, the costs of HSH would be EUR [...] million compared to the 2012 target of EUR [...] million.

⁽²⁾ Although the interest income for 2012 was above the targeted level, the total income of HSH was significantly below target mainly because of a low fee income and valuation losses in trading positions.

the 2011 restructuring plan following significantly higher loan loss provisions charged compared to the 2011 projections. That increase in provisions for risk and charges affects both the core bank ⁽¹⁾ and the restructuring unit.

- (21) While the increase of the loan loss provisions is driven to a large extent by the deteriorated situation of the shipping market, the resulting negative effect on the regulatory capital quotas is exacerbated by the mechanics of the applicable regulatory formulae: In view of the smaller remaining guarantee amount (EUR 7 billion as opposed to the initial EUR 10 billion), the decline in the credit ratings led to a disproportionate increase in the regulatory risk weighting of the “senior tranche”, i.e. the part of the shielded portfolio, in which losses would no longer be covered by the (partly cancelled) guarantee. The latter gives rise in turn to an increase in RWA and, as a consequence, to a proportionately lower level of regulatory capital.

Changes in the regulatory environment and market expectations

- (22) Following the 2011 restructuring decision there has been a change in the applicable capital adequacy requirements for banks. In particular, a core equity ratio (hereinafter “CE-ratio”) of 9 %, which was first called for in an EU-wide stress test commenced by the European Banking Authority in 2011, has become a key figure which is now considered to be the essential evidence for a bank’s overall solvency and strength. Today, regulatory authorities as well as market participants such as rating agencies therefore expect banks to constantly hold a 9 % CE-ratio.

Figure 4

Main indicators of the financial performance of HSH comparing the 2011 restructuring plan projections to realized figures and to the projections in the new business plan

(for 2010 actual: Financial performance of HSH according to its restated annual financial statement 2010 as approved by HSH’s auditor)

Group	2008 actual	2009 actual	2010 actual restated	2011 actual	2012 actual	2012 in 2011 plan	2013 in 2011 plan	2014 in 2011 plan	2013 new plan	2014 new plan	2015 new plan
Interest income	2,051	2,121	1,502	1,350	1,520	[...]	[...]	[...]	[...]	[...]	[...]
Total income	157	2,876	1,791	1,324	1,446	[...]	[...]	[...]	[...]	[...]	[...]
Loan loss provisions	(1,888)	(2,794)	(317)	389	(656)	[...]	[...]	[...]	[...]	[...]	[...]
Costs (other than guarantee remuneration)	(899)	(830)	(867)	(837)	(821)	[...]	[...]	[...]	[...]	[...]	[...]
Pre-tax result	(2,968)	(1,325)	73	(206)	(185)	[...]	[...]	[...]	[...]	[...]	[...]
Result	(3,195)	(902)	104	(265)	(124)	[...]	[...]	[...]	[...]	[...]	[...]

Core bank	2008 actual	2009 actual	2010 actual restated	2011 actual	2012 actual	2012 in 2011 plan	2013 in 2011 plan	2014 in 2011 plan	2013 new plan	2014 new plan	2015 new plan
Interest income	1,210	1,401	791	812	1,113	[...]	[...]	[...]	[...]	[...]	[...]
Total income	1,582	1,756	930	871	1,131	[...]	[...]	[...]	[...]	[...]	[...]
Loan loss provisions	(590)	(853)	93	(35)	(312)	[...]	[...]	[...]	[...]	[...]	[...]
Costs (other than guarantee remuneration)	(611)	(557)	(525)	(529)	(467)	[...]	[...]	[...]	[...]	[...]	[...]
Pre-tax result	295	18	330	(115)	509	[...]	[...]	[...]	[...]	[...]	[...]
Final Take (EUR billion)	32,6	3	4	5	7	[...]	[...]	[...]	[...]	[...]	[...]

⁽¹⁾ Core bank is defined in recital 50 of the 2011 restructuring decision.

(23) In addition, new business at the level of the core bank measured by the final take ⁽¹⁾ has been, at EUR [5-10] billion, only close to but below the EUR [6-12] billion projected for the full year in the 2011 restructuring plan.

The notified aid: Increase of the ceiling amount of the second-loss guarantee

(24) Schleswig-Holstein and Hamburg intend to increase the ceiling amount of the second-loss guarantee back to the initial threshold of EUR 10 billion. To that end, HSH and Finanzfonds intend to amend the existing guarantee commitment agreement so as to create the economic position which would have existed if the partial cancellations on the second loss guarantee had never occurred. Even though their existing state laws allow for the increase to be authorised, both Schleswig-Holstein and Hamburg have made the increase dependent on a resolution by their parliaments because of the significance of the measure.

(25) The remuneration for the increased part of the guarantee is based on the existing provisions of the guarantee agreement, that is a base annual fee of 4 % on the nominal amount. It will result in additional payments to Finanzfonds of approximately EUR 120 million per year after the second-loss guarantee is increased by EUR 3 billion.

(26) The parties furthermore intend to agree that HSH will pay a lump sum of approximately EUR 275 million to Finanzfonds as remuneration for the guarantee fees lost through the prior partial cancellations. Thus, Finanzfonds would be put into the economic position which would have existed if the partial cancellations on the second-loss guarantee had never occurred.

(27) HSH has updated its previous restructuring plan and presented a new business plan. The new business plan assumes that the second-loss guarantee is increased to EUR 10 billion.

(28) In detail, in the new business plan HSH expects to see a recovery of the shipping markets and freight charters as of 2014 which has a major impact on the expected financial results both in a base case and a stress case.

III. POSITION OF GERMANY

(29) Germany requests urgent temporary approval of the increase of the ceiling amount of the second-loss guarantee to EUR 10 billion.

(30) Germany does not contest that the second-loss guarantee constitutes aid but doubts that reinstating a ceiling amount of EUR 10 billion constitutes new aid. Germany argues that exactly the same upper threshold was already approved in the 2011 restructuring decision.

⁽¹⁾ See Figure 4.

(31) Moreover, Germany argues that even if the measure was new aid, it was already found compatible under the 2011 restructuring decision.

(32) If the increase of the second-loss guarantee is not covered by a Commission decision at the moment, Germany requests it to be approved before 30 June 2013 for reasons of financial stability. To that end, Germany recalls that HSH is a systemic bank whose insolvency could lead to serious disruption of the financial system and seriously compromise trust in German banks in general.

(33) Germany points out that BaFin called for appropriate measures to ensure that it has a continued risk transfer effect, ⁽²⁾ so as to ensure a sufficient minimum capitalisation of 9 %.

(34) Germany argues in particular that the persistently strained market environment, especially in the area of shipping, and the decline in the Euro's value against the US dollar has caused an increase in the relevant risk parameters. As a result, there has been a significant increase in the risk weight of the second-loss guarantee tranche. In the opinion of BaFin a material risk transfer is achieved when the first-loss tranche, covered by HSH, and the second-loss tranche, covered by the second-loss guarantee, are jointly sufficient to offset the sum of the multiyear expected losses and of at least 50 % of the multiyear unexpected losses. Under the current market situation, however, BaFin questions whether the second-loss guarantee with a ceiling amount of EUR 7 billion is still apt to ensure the risk transfer. There is an eminent risk that [...]. If that were to happen [...].

(35) The measure is therefore necessary to ensure that HSH can continuously meet the applicable capital requirements. In that context Germany argues that since the 2011 restructuring decision was adopted on 20 September 2011, the applicable capital requirements have increased. BaFin applies the minimum standards defined by the European Banking Authority, requiring that all institutions of systemic relevance maintain a minimum CE-ratio of 9 %. That approach is also in line with a resolution on capital requirements that the European Council reached on 26 October 2011.

(36) Germany argues that the increase of the second-loss guarantee must take place before 30 June 2013 in order to satisfy the demands and expectations HSH's external auditor and rating institutions. Given that point, BaFin considers it as necessary to take that measure at

⁽²⁾ The risk shield provided by Hamburg and Schleswig-Holstein reduces the economic capital requirement for default risk, as there has been no economic capital requirement for default risks for positions covered by the guarantee. The associated risk is, up to the ceiling amount, transferred to Hamburg and Schleswig-Holstein. HSH manages both the guaranteed and unguaranteed portfolio in accordance with regulatory and economic principles in order to keep any claim against Hamburg and Schleswig-Holstein under the risk shield as small as possible.

that time. Without that, HSH would in particular be at risk of further downgrades by rating agencies which would subsequently jeopardize the bank's refinancing capacities.

- (37) Finally, Germany points out that there was no suitable private investor solution. For several months, Schleswig-Holstein and Hamburg negotiated with J.C. Flowers about entering into an alternative legal arrangement for a third-loss guarantee of EUR 3 billion. Germany claims that for various reasons it was not possible to positively conclude those negotiations; the reasons were described in detail in a letter that Germany sent to the Commission on 3 May 2013. ⁽¹⁾

IV. ASSESSMENT

A. Existence of State aid under Article 107(1) TFEU

- (38) The increase of the second-loss guarantee is granted by Finanzfonds, which is owned by Hamburg and Schleswig Holstein, and it thus stems from State resources.
- (39) Furthermore, the Commission notes HSH's cross-border and international activities, so that any advantage from State resources would affect competition in the banking sector and have an impact on intra-Union trade.
- (40) When a guarantee is provided by public authorities, it is necessary to assess whether, in similar circumstances, a private investor operating in normal conditions of a market economy ('a private investor') would have offered a similar coverage under the same terms and conditions and in return for the same remuneration. The fact that no private alternative solution to the increase of the second-loss guarantee could be presented is taken by the Commission to support its assessment that the guarantee would not have been provided at such conditions by a private investor and that the measure therefore provides an advantage to HSH that constitutes State aid within the meaning of Article 107(1) of the TFEU. In conclusion, the increase of the second-loss guarantee by Finanzfonds is therefore a measure that constitutes State aid within the meaning of Article 107(1) TFEU.
- (41) Germany does not contest that the measure constitutes aid. However, Germany argues that the measure should not be considered as new State aid since a second-loss guarantee with a ceiling amount of EUR 10 billion was already approved as State aid by the 2011 restructuring decision. However, the terms and conditions of a guarantee must always be agreed in advance, based on the perceptions of both the guarantor and the guarantee holder of the likelihood that the guarantee will be drawn. If the holder of a guarantee could at any time unilaterally cancel and later reinstall (parts of) the guarantee, it would be in a free rider position and could benefit from coverage without paying for related costs. Such an arrangement would allow holders to opportunistically reinstate a cancelled guarantee once the risk covered by the guarantee became more likely to materialise. Consequently,

a cancellation of a guarantee has a binding character, and any re-installment of a previously cancelled tranche of coverage under a guarantee should be considered as a new agreement between the guarantor and the guarantee holder, based on a distinct and new economic assessment of the risk factors that may have changed over time. In the case at hand, an increase of the ceiling amount of the guarantee was not provided for in the terms and conditions of the guarantee that was approved in the 2011 restructuring decision. The increase of the ceiling therefore requires a change of the previous terms and conditions, and must consequently be considered as granting a new guarantee. Moreover, the fact that the governments of Schleswig-Holstein and Hamburg have to agree anew to the measure underlines that there is a new obligation in budgetary terms.

- (42) The Commission therefore does not accept the position of Germany that the increase does not constitute a genuinely new State aid measure.
- (43) Based on the requirements set out in section 5.5 of the Impaired Assets Communication ⁽²⁾, and in line with its previous assessment in recital 157 of the 2011 restructuring decision, the Commission at this stage assumes that the aid amount of the EUR 3 billion increase of the second-loss guarantee is equal to its nominal amount of EUR 3 billion. That amount is derived from the difference between the transfer price and the market value of the assets in the defined reference portfolio but capped at the notional amount of the guarantee increase.

B. Compatibility of the aid

1. Legal basis for the compatibility assessment

- (44) Article 107(3)(b) TFEU provides that State aid may be considered to be compatible with the internal market where it is intended to "remedy a serious disturbance in the economy of a Member State".
- (45) In light of the currently still fragile situation of the financial markets, the Commission continues to base its assessment of State aid measures in the banking sector on Article 107(3)(b) TFEU, as it has explained in the 2011 Prolongation Communication ⁽³⁾. In accordance with its previous assessment in recital 161 of the 2011 restructuring decision, the Commission acknowledges that the breakdown of HSH could directly affect the financial markets and thus the entire economy of Germany.
- (46) The general principles applicable for State aid granted to financial institutions are set out in point 15 of the Banking Communication ⁽⁴⁾. Those principles have been further

⁽²⁾ Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.3.2009, p. 1.

⁽³⁾ Commission Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 356, 6.12.2011, p. 7.

⁽⁴⁾ Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8.

⁽¹⁾ [...].

elaborated in the Recapitalisation Communication ⁽¹⁾. Both Communications were subsequently amended by the 2010 Prolongation Communication ⁽²⁾ and the 2011 Prolongation Communication.

2. *Compatibility of the aid under the 2011 restructuring decision*

(47) Germany claims that, even if the Commission were to consider the measure to be new aid, it has already been found compatible under the 2011 restructuring decision. Germany argues that, since the Commission already found a ceiling amount of EUR 10 billion compatible in the 2011 restructuring decision, it would now be bound by that assessment and could not come to a different conclusion.

(48) The Commission indeed decided that a EUR 10 billion ceiling amount was compatible with the internal market in the 2011 restructuring decision. However, that assessment was based on the Commission's evaluation of the second-loss guarantee notified by Germany on 30 April 2009 in light of the economic situation at the moment it adopted that decision and of the financial projections that HSH presented in the business plan examined in that decision. In particular, the restructuring plan was based on the assumption that HSH would pay guarantee fees only for a EUR 7 billion guarantee ⁽³⁾.

(49) However, as the proposed grant of new aid has been notified, the Commission has to assess its compatibility. That examination will need to focus on factors that were relevant for Commission's previous assessment but in their current form. In particular, when assessing the viability of HSH, the Commission must consider the current economic situation as well as the revised financial projections presented in the new business plan.

(50) In that respect the Commission notes in particular that the economic situation in the shipping sector has deteriorated since the 2011 restructuring decision was taken. The importance of shipping activities was already identified as problematic for the viability of HSH in the 2011 restructuring decision ⁽⁴⁾. In fact, the current shipping crisis has proved to be deeper and longer than was initially expected by the markets and by HSH ⁽⁵⁾. That situation has affected the creditworthiness of ship financing in general, resulted in poorer credit ratings, and led to an increase of risk-weighted assets held by HSH. Notwithstanding the current situation, Germany still assumes that shipping markets will start to recover

as of 2014. However, the Commission notes that other market actors have taken a more pessimistic view, considering that the additional capacity of new large container vessels to be launched in 2013 and 2014 will put further pressure on freight rates. ⁽⁶⁾ At this stage the Commission therefore has doubts that the economic outlook, in particular for the shipping markets, has been sufficiently prudently taken into account in HSH's new business plan.

(51) The 2011 restructuring decision identified the exposure of HSH to the EUR/USD exchange rate as another risk factor for it ⁽⁷⁾. The weakening of the EUR since 2011 ⁽⁸⁾ has further contributed to the negative results of HSH and increased its risk weighted assets compared to the projections in the 2011 restructuring plan.

(52) The Commission also notes that the increase of the guarantee will result in higher guarantee fees compared to those HSH previously planned to pay. In total the costs for the additional guarantee fees will add up to approximately EUR [0.7 – 1.2] billion. The increase of the ceiling amount of the guarantee will hence lead to additional costs that significantly affect HSH's future profitability. Although the level of remuneration is presumably adequate for the amount and kind of aid received, it has to be reviewed whether it is compatible with HSH's financial capacities, in particular if the financial crisis should continue.

(53) HSH has incorporated the additional guarantee fees in its new business plan, but has not provided an updated stress scenario.

(54) The Commission also doubts the robustness of the assumptions made in the new business plan. To date, the volume of new business has not developed to the extent expected ⁽⁹⁾. The Commission therefore questions whether HSH needs to adjust its business strategy and consider alternative actions in order to restore its long-term viability.

(55) Finally, the negative financial results recorded since the 2011 restructuring decision have further weakened the capital position of HSH whereas its weak capitalisation had been identified as a main viability issue in the 2011 restructuring decision ⁽¹⁰⁾. The increased probability of default assumptions due to the worsened shipping market ⁽¹¹⁾ results in significantly increased risk weights of the shipping portfolio of HSH, which in turn drives down the solvency ratios. That effect has been limited until now by the State guarantee on the legacy portfolio.

(56) In sum, the Commission currently has doubts that HSH will return to viability as assumed in the 2011 restructuring decision on the basis of the new business plan

⁽¹⁾ Commission Communication on the Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2.

⁽²⁾ Commission Communication on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 329, 7.12.2010, p. 7.

⁽³⁾ See recital 43 and Table 11 of the 2011 restructuring decision.

⁽⁴⁾ See recital 223 of the 2011 restructuring decision.

⁽⁵⁾ See recitals 17 and 18.

⁽⁶⁾ Cf. for example the publication "global ship operators scramble for liquidity to stay afloat", published by Standard & Poor's on 3 April 2013, p. 5.

⁽⁷⁾ See recital 221 of the 2011 restructuring decision.

⁽⁸⁾ EUR/USD at 30 June 2011 closed at 1:1.45 compared to 1:1.32 on 1 January 2013.

⁽⁹⁾ See recital 21.

⁽¹⁰⁾ See recitals 229 to 232 of the 2011 restructuring decision.

⁽¹¹⁾ See recital 17.

and requests HSH to submit detailed information that corroborates all assumptions made in the new business plan. In addition, the German authorities are invited to provide further evidence that the outlook for the shipping markets in the new business plan is based on sufficiently prudent estimates, as well as further evidence that the additional guarantee fees will not unduly overstretch HSH's financial capacities, even in a stress scenario.

- (57) As regards burden-sharing and competition measures, the Commission notes that it already considered those criteria for a second-loss guarantee covering an amount of EUR 10 billion. In recital 263 of the 2011 restructuring decision the Commission already concluded that the proposed restructuring plan resulted in an adequate own contribution and burden-sharing, and in recital 270 of that decision the Commission concluded that the proposed competition measures could be viewed as appropriate and sufficient. Even though the Commission considers that the increase of the second-loss guarantee from the current ceiling amount of EUR 7 billion to EUR 10 billion constitutes a new State aid measure, as stated in recital (31), it notes that the new measure stays within the boundaries of the measure approved in the 2011 restructuring decision. The Commission notes that the new business plan offers the same burden-sharing measures and competition measures as the previous restructuring plan; as the new aid stays within the boundaries already approved in the 2011 restructuring decision, the Commission at this stage has no doubts that those measures are still adequate.

3. *Temporary approval of the aid*

- (58) Germany requests a temporary approval of the aid even if the Commission has doubts as regards the compatibility of the aid.
- (59) First, the Commission notes that the planned increase of the ceiling amount is from a regulatory perspective apt to ensure that the second-loss guarantee has a continued risk transfer effect.⁽¹⁾
- (60) Second, the Commission accepts that the increase of the second-loss guarantee to the amount of EUR 10 billion is necessary in order to prevent that a further deterioration of the relevant macroeconomic factors jeopardizes the risk transfer that was achieved by protecting the reference portfolio with the second-loss guarantee. That situation would significantly lower the capital ratios of HSH below the applicable capital requirement of 9%. Without an increase of the second-loss guarantee, the consequences of a further deterioration of the relevant macroeconomic could fundamentally put the viability prospects of HSH into question.

⁽¹⁾ As already previously assessed in recital 43 of its temporary approval decision of 29 May 2009, the Commission considers that the secondary-loss guarantee is in principle an appropriate instrument to address HSH's problems, serving as a risk shield that in its design and in its effects allows HSH to avoid considerable write-downs and effectively releases the bank from regulatory capital requirements.

- (61) Third, the Commission considers the aid to be adequately remunerated. The specific features of the second-loss guarantee provided by Finanzfonds have already been assessed in the 2011 restructuring decision. In recital 153 of that decision the Commission confirmed that the nature of the second-loss guarantee is similar to an asset relief measure which has to be assessed under the Impaired Asset Communication. Hence, the second-loss guarantee should in principle be remunerated at the same level as a capital injection⁽²⁾, which is not the case as the basic fee of 400 basis points on the outstanding nominal amount of the guarantee is lower than the remuneration level of a capital injection. However, in recital 212 of the 2011 restructuring decision the Commission concluded that a basic fee of 400 basis points on the outstanding nominal amount fulfilled the remuneration requirements as set out in point 41 of the Impaired Asset Communication and that it was in line with of the Commission's decisional practice, as the total fee structure included at least a partial claw-back and was combined with a far-reaching restructuring of HSH. The fact that the Commission found the remuneration level of 400 basis points acceptable in the 2011 restructuring decision, however, does not require the Commission to now come to the same conclusion as the increase of the second-loss guarantee will take place in a different economic situation. As set out in recital (38), any increase of a guarantee must be considered as a genuinely new agreement between the guarantor and the guarantee holder. The assessment of that new measure must be based on a distinct and new economic assessment of the risk factors that may have changed over time. The Commission notes in that context that certain relevant risk parameters have deteriorated since the 2011 restructuring decision was taken, due to a persistently strained market environment, especially in the area of shipping, and the decline in the Euro's value against the US dollar.

- (62) From an economic point of view the deterioration of relevant risk parameters is, however, mitigated by two elements: First, the lump sum payment of approximately EUR 275 million de facto increases the level of remuneration for the risk that Finanzfonds has assumed, since the calculation of the remuneration level refers to the period in which the risk is actually taken by Finanzfonds, starting when the guarantee is increased. Second, HSH and Finanzfonds had initially agreed on a basic fee of 400 basis points on the total outstanding nominal amount of the guarantee, without any further differentiation. However, in theory the risk that the guarantee will actually be drawn is not equally distributed across the whole nominal amount of the guarantee; it is much more likely that the first Euro of the guarantee would be consumed than the last Euro. Finanzfonds will nevertheless receive the same basic fee for the EUR 3 billion increase as for the current contracted volume of EUR 7 billion, although in comparison the inherent risk of the increased part is lower. Taking those two elements into consideration, the Commission agrees

⁽²⁾ This is also the rationale of Annex 4 II. Of the Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.03.2009, p. 1 and has been applied as such in the decision of the Commission of 31 March in case ING.

with Germany's position that in the case at hand the remuneration level of 400 basis points can be considered as an adequate remuneration.

- (63) In sum, the Commission concludes that the aid is temporarily compatible with the internal market.
- (64) For the above reasons, the Commission concludes that the State aid in favour of HSH, consisting of an increase of the second-loss guarantee from EUR 7 billion to EUR 10 billion, is temporarily compatible with the internal market pursuant to Article 107(3)(b) TFEU.
- (65) The Commission considers that the increase of the second-loss guarantee from EUR 7 billion to EUR 10 billion constitutes new State aid within the meaning of Article 107(1) TFEU. On the basis of the foregoing assessment, the Commission doubts that the aid can be found to be compatible with the internal market.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Germany to submit its comments and to provide all such information as may help to assess the aid, within one month of the date of receipt of this letter. In particular, it requests Germany to provide detailed information corroborating all assumptions made in the new business plan, further evidence that the outlook for the shipping markets was based on suffi-

ciently prudent estimates, and further evidence that the additional guarantee fees will not unduly overstretch HSH's financial capacities, even in a stress scenario. The Commission requests Germany to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to draw the attention of Germany to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Germany that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

For reasons of financial stability, however, the Commission approves the aid temporarily for six months or, if Germany submits all required information, until the Commission has adopted a final decision.

Germany accepts exceptionally that the adoption of the decision be in the English language."
