EUROPEAN COMMISSION

Brussels, 29.5.2009
C(2009) 4297 final

Subject: **State aid N 264/2009 (ex-PN 59/2009) – Germany**
Rescue aid (recapitalisation and risk shield) to HSH Nordbank AG

Sir,

I. PROCEDURE

(1) On 18 March 2009 Germany informed the Commission of its plan to implement a rescue measure for HSH Nordbank AG (hereinafter “HSH”). On 30 April 2009 Germany notified the rescue measure. Complementary information was submitted by Germany on 15, 21, 22 and 26 May 2009.

II. DESCRIPTION OF THE MEASURE

1. Beneficiary

(2) HSH, established on 2 June 2003 as the result of the merger between Hamburgische Landesbank and Landesbank Schleswig-Holstein is the fifth biggest German Landesbank. On 31 December 2008 the HSH balance sheet amounted to € 205 billion, risk-weighted-assets (hereinafter "RWA") to € 112 billion and employees to ca. 4,900.

(3) HSH is a private joint stock company with its head offices in Hamburg. It is owned by the City State of Hamburg (Freie- und Hansestadt Hamburg, 30.41%), the State of Schleswig-Holstein (Land Schleswig-Holstein, 29.10%), the savings banks Sparkassen- und Giroverband für Schleswig-Holstein 13,20%, the Schleswig-Holsteinische Sparkassen-Vermögensverwaltungs- und Beteiligungs GmbH & Co. KG, Kiel (1,62%) and nine trusts advised by J.C. Flowers & Co. LLC (25,67%).

Seiner Exzellenz Herrn Frank-Walter STEINMEIER
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(4) HSH acts as principal bank for Hamburg and Schleswig-Holstein and its municipalities and as central bank to the savings banks. HSH is a commercial bank in its core region of Northern Germany with main focus on retail (private banking) and merchant banking. The merchant banking activities are focused on the sectors shipping, transportation, real estate and renewable energy projects. HSH is the world's biggest provider of ship finance and a leading provider of financial services in the transportation sector. The bank is represented at 20 foreign locations in Europe, Asia and America.

(5) As a HSH is one of the German public banks which until 18 July 2005 still profited from the unlimited State guarantees "Anstaltslast" and "Gewährträgerhaftung", which had to be abolished following a number of understandings between Germany and the Commission and the decision adopted by the Commission on this issue[1]. According to the decision all liabilities arisen in the transitional period from 2001 to 2005 with maturity until 2015 are still covered by the guarantee. New liabilities arisen after 2005 are not covered. HSH's liabilities still guaranteed by the Freie- und Hansestadt Hamburg and Land Schleswig-Holstein amounted as of 31 December 2008 for € [50-80]* billion.

(6) In 2005 following the 20 October 2004 recovery decision[2] HSH received a capital injection by its public shareholders. The Commission declared that this capital injection did not constitute State aid by decision of 6 September 2005.[3] In 2008 HSH received a further capital injection by its owners, including the nine trusts.[4] Neither HSH nor Hamburgische Landesbank and Landesbank Schleswig-Holstein have received rescue or restructuring aid in the last ten years.

2. EVENTS LEADING TO THE DIFFICULTIES OF THE BANK

(7) The financial crisis led already in 2007 to € [1-2] billion depreciations in HSH's structured credit portfolio (CIP). The contagion effect of the real economy adversely affected the traditional loan portfolio and had severe impact on the quality of the bank's claims related to its shipping, transportation, real estate and renewable energy project financing. These developments lead to an increase of the risk provisions to € [1-2] billion on the loan portfolio in 2008 in addition to the difficulties experienced with the CIP. The bankruptcy of Lehman brothers further intensified the refinancing difficulties of HSH. As a consequence, HSH's financing situation became so strained that on 6 November 2008 the

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[1] Anstaltslast conferred rights to the financial institutions vis-à-vis its owners, whereas Gewährträgerhaftung provided for rights of the creditors of the financial institutions vis-à-vis the owners. Following the first of the Understandings dated 17 July 2001, in the transitional period between 19 July 2001 and 18 July 2005 new liabilities could still be covered by Gewährträgerhaftung - so-called "Grandfathering" -, provided their maturity did not go beyond 31 December 2015. See for details case State aid E 10/2000, OJ C 146, 19.6.2002, p. 6 and C 150, 22.6.2002, p.7.

[2] See Commission Decision of 20 October 2004, C 71/2002 Landesbanken capital transfer: Hamburgische Landesbank, OJ L 307 of 7.11.2006 and Commission Decision of 20 October 2004, C 72/2002 Landesbanken capital transfer: Landesbank Schleswig-Holstein, OJ L 307 of 7.11.2006.

[3] Commission Decision of 6 September 2005, NN 71/2005 *HSH Recapitalisation*, OJ C 241of 6.10.2006.

[*] Confidential information.

[4] The Commission was informed by Germany that the nine trusts participated sufficiently in the capital injection at the same conditions than the public shareholders. The Commission has not followed up this measure.

bank applied for and was granted by Sonderfonds Finanzmarktstabilisierung (hereinafter "SoFFin") guarantees covering new issuances of debt up to an amount of € 30 billion in the framework of a rescue scheme[5] approved by the Commission. SoFFin activated a first tranche of € 10 billion in the beginning of December 2008. The remaining € 20 billions were supposed to be activated after the submission of a restructuring plan with an appropriate capital ratio of 7 %. HSH submitted the restructuring concept to SoFFin on 7 March 2009.[6] Following the approval of the plan, SoFFin activated the second tranche of € 20 billion. HSH closed the financial year 2008 with losses of € 2.8 billion.

(8) On 6 May 2009 Standard&Poor's downgraded HSH credit rating by two notches to BBB+ with a negative outlook.

3. THE FINANCIAL SUPPORT MEASURES

(9) The notified measures consist of (i) a € 3 billion recapitalisation as well as (ii) a € 10 billion risk shield covering about € [150-200] billion of assets provided by two major shareholders of HSH, Freie- und Hansestadt Hamburg and Land Schleswig-Holstein (hereinafter "the Länder owners", with a combined share of 59.51%). After the implementation of the recapitalisation and the risk shield the tier 1 ratio of HSH will increase to [9-10] % and is projected to remain above [7-8] % ratio during the period 2010 –2012. The equity ratio (Gesamtkennziffer) will increase to [14-15] % and is projected to remain above [10-11] % until 2012.

3.1 The capital injection

(10) The recapitalisation will take place in the form of ordinary shares with voting rights (Core tier 1 capital). The total return on the investment depends on the projected dividend payments and the share value increase.

(11) The Länder owners of HSH had reached an agreement to inject € 3 billion into HSH (Freie- und Hansestadt Hamburg and Land Schleswig-Holstein € 1.5 billion respectively). This amount is needed in order to fill in the reserves which have been released in the 2008 account statement.

(12) The capital increase is to be carried out by an institution under public law (Anstalt des öffentlichen Rechts, "the Anstalt") specially established for this purpose by the Länder owners. The Anstalt is to obtain the financial means needed for the cash capital increase by issuing bonds on the capital markets. The institution's liabilities which result from the bond issues are to be guaranteed by the Länder owner as partial debtors and to equal extent by means of guarantees to the bond holders. The Anstalt's bonds are only to serve the financing of the notified measures to support HSH. The Anstalt is to operate exclusively as a refinancing vehicle for the Länder owners and will not pursue any other purpose.

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[5] Commission Decision of 12 December 2008, N 625/2008 *Rettungspaket für Finanzistitute in Deutschland*, not yet published.

[6] The Commission has not yet received the restructuring concept submitted to SoFFin.

(13) The share price is based on a valuation of HSH, which was established by PricewaterhouseCoopers and arrived at a value in a range between € [1.5-3.5] billion and € [2-4] billion (€ [18-28] per share). The average value of HSH based on the valuation amounts to € [1-3] (€ [19-27] per share). The valuation was established before the rating downgrading of HSH. The impact of the downgrading on the value of HSH has not been taken into account in the valuation. It is based on the assumption that an upgrade to the previous A rating will be achieved in 2013. The objective of HSH and the Länder owners is to achieve a yearly 10% remuneration for the € 3 billion newly injected capital (€ 300 million per year). Given the fact that the business plan of HSH does not project sufficient profits for the period 2009-2012 to pay a 10% dividend on all ordinary shares, the issue price of the new ordinary shares will be reduced by a discounted 10% dividend payment for the period 2009-2012. The present value[7] of the 10% dividend payment for the period 2009-2012 amounts to € [500-700] million (€ [3-6] per share). After 2012 it is foreseen to pay a 10% dividend out of the underlying profits. The price per share to be paid by the Länder owners was therefore fixed at € 19 and the Länder owners will acquire [100-200] million new ordinary shares.

(14) After the capital increase the shareholding of the Länder owners will increase from 59.51% to [80-87] %. The shareholdings of the savings banks in Schleswig-Holstein and Hamburg and the nine trusts advised by J.C. Flowers & Co. LLC will be reduced to [4-6] % and [8-10] % respectively.

3.2 The risk shield

(15) The risk shield measure consists of a guarantee by the Länder owners on total assets of about € [150-200] billion. A first-loss-tranche of € [2-4] billion will be covered by HSH. The second-loss-tranche of up to € 10 billion will be covered by the Länder owners (50% each). Losses beyond € [12-14] billion are covered by HSH. According to the submitted information the first-loss-tranche of € [2-4] billion covers all expected losses of the € [150-200] billion portfolio. The probability that the second-loss-tranche of € 10 billion will be drawn down at all is estimated by Germany at [20-60] %.

(16) In total € [150-200] billion of assets are included in the risk shield, which represents about [65-80] % of the bank's total balance sheet. Toxic assets like assets-backed securities (hereinafter "ABS") represent less than [2-8] % (€ [5-10] billion) of the overall portfolio. The majority of the assets consist of loans to customers, the core activity of the bank (€ [100-150] billion – [60-80] %). Other assets included in the portfolio are fixed income securities with € [15-30] billion ([20-30] %), specific German financial products as secured tradable loans (Schuldscheindarlehen: € [10-20] billion, [5-10] %) and guarantees on payments (€ [4-10] billion, [2-5] %). Each element of this portfolio is denominated in various currencies including USD, EUR and GBP. The valuation of the ABS portfolio has been confirmed by external experts (Blackrock und Cambridge Place).

(17) The guarantee fee is fixed at [3.5-4.5] % of the total amount of the guarantee (€ 10 billion).

[7] Assuming a discount factor of 10%

3.3 State involvement after the implementation of the measures

(18) After the implementation of the measures [80-87] % of the HSH shares will be publicly hold. In addition about [65-80] % of HSH's assets will be covered by a € 10 billion guarantee provided by the public owners and about € [80-90] billion ([40-50] %) of the banks liabilities will be guaranteed either by the Länder (€ [50-80] billion Gewährträgerhaftung) owners or SoFFin (€ 30 billion) representing the federal state.

III. POSITION OF GERMANY

(19) Germany requests urgent temporary approval of the rescue measures in order to prevent insolvency of HSH and Germany asserts that HSH is a bank in serious difficulty. If the notified measures were not approved at short notice this could lead to a situation of technical insolvency of HSH and the forced winding up under the German insolvency law.

(20) Germany argues that HSH is a systemic bank and its insolvency could lead to serious disruptions of the financial system and seriously compromise the trust in German banks in general. It would also have serious negative impact on the financial situation of the shareholders which are still guarantors of liabilities covered by Gewährträgerhaftung amounting to € [50-80] billion. An insolvency of HSH could also affect the stability of the savings banks in Hamburg and Schleswig-Holstein.

(21) Germany does not contest that the measures constitute aid. However, in view of the risk that HSH failure would entail for Germany's financial system, Germany argues that the measures are compatible with the common market under Article 87(3) (b) of the Treaty since HSH is a systemic bank and its insolvency would cause a serious disturbance in the German economy. The measure was also appropriate, necessary and proportionate. Germany argues that the German banking regulator BaFin is informed about the measures and is in favour of a quick implementation.

(22) Germany and the Länder owners committed to notify an in-depth restructuring plan in accordance with the principles laid down in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty[8] and the Banking Communication[9] on 29 August 2009 at the latest. The in-depth restructuring plan for HSH will focus on selective core business areas and include a significant reduction of the balance sheet and RWA. Furthermore in order to avoid disproportional distortion of competition Germany will ensure during the rescue phase that (i) the state measure is not used for marketing purposes as a commercial advantage, (ii) bonus payments are limited, (iii) lending to the real economy is sufficiently provided, (iii) the balance sheet growth restricted, (iv) no aggressive expansion conducted and (v) pricing leadership in markets with a market share of more than 5% excluded.

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8 OJ C 244 of 1.10.2004, p. 2.

9 Banking Communication - Application of the 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.

IV. ASSESSMENT

1. Existence of state aid under Article 87(1) of the EC Treaty

(23) As set out in Article 87(1) of the EC Treaty, 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 common market.

(24) Both the recapitalisation in the amount of € 3 billion and the risk shield in the amount of € 10 billion are granted by the Länder owners of HSH, thus from state resources. Therefore, the resources are State resources within the meaning of Article 87 (1) of the Treaty.

(25) 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-community trade.

(26) When public authorities make capital injections into a company, the Commission examines in principle whether the State’s behaviour in making the investments under consideration was in conformity with the market economy investor principle. That implies according to the Court of First Instance in its WestLB judgment[10] that it is necessary to assess whether, in similar circumstances, a private investor operating in normal conditions of a market economy ('a private investor') of a comparable size to that of the bodies operating in the public sector could have been prompted to make the capital contribution in question”.

(27) The Commission understands that the portfolio of assets in the amount of € [150-200] billion should be covered by a guarantee and that the risk of unexpected losses on this portfolio up to € 10 billion is shifted to the Länder owners. In addition € 3 billion of new capital is injected to restore the capital basis in view of the first loss tranche. The Commission does not consider that a market economy investor in the place of the Länder owners of HSH would have accepted to carry an additional risk of € 13 billion. This is first confirmed by the non-participation in the rescue measures of the existing private shareholders, the nine trusts advised by J.C. Flowers & Co. LLC.

(28) Second this follows from the fact that the shareholders' involvement is not based on equal terms. Instead the disproportionate distribution of burdens on the Länder owners indicates that the measure was driven by the Länder owners with the public policy objective of preserving HSH as an important employer in Hamburg and Schleswig-Holstein. Moreover, the Commission understands that the savings banks and the nine trusts advised by J.C. Flowers were reluctant to provide support to the bank, after considerable injections made in 2005 and 2008, on the basis of a business plan which has already

[10] Cf. joined cases T-228/99 and T-233/99 *Westdeutsche Landesbank GZ v Commission* (WestLB) [2003] ECR II-435, paragraph 245. Based on Cases C-142/87 *Belgium v Commission* [1990] ECR I-959, paragraph 29, and, Case C-305/89 Italy v Commission (Alfa Romeo) [1991] ECR I-1603, paragraphs 18 and 19.

failed. The negotiations between the shareholders thus resulted in a non participation of the savings banks and the nine trusts which also demonstrates that the Länder owner's behaviour was not driven by private investor considerations.

(29) In sum the Commission agrees with Germany that the measures in favour of HSH constitute aid in the sense of Article 87(1) of the EC Treaty.

(30) The Commission considers that the aid element involved in a capital injection into a bank in difficulty is in principle its nominal value. Moreover a risk shield may also be as high as the amount of the guarantee.

(31) In addition the Commission at this stage also notes that the capital injection will be made at a price of € 19 per share. The Commission considers this price very high in view of the fact that the bank is in serious difficulty. This could therefore constitute an advantage for remaining shareholders whose shareholding is possibly diluted less than a market economy investor would have required and does not appear to provide any reasonable prospect of remuneration of 10%, as claimed. However, the Commission has at this stage not enough information to assess this issue and will reconsider it in the restructuring phase[11].

3. Compatibility of the aid

3.1 Application of Article 87 (3) b of the EC Treaty

(32) Germany argues that the rescue measures are compatible with the common market on the basis of Article 87(3) b) of the EC Treaty under which state aid may be found compatible with the common market if it is intended "to remedy a serious disturbance in the economy of a Member State".

(33) The Commission has acknowledged in its three Communications[12] and in its approval of the German Rescue package[13] that there is a threat of serious disturbance in the German economy and that measures supporting banks are apt to remedy serious disturbance in the German economy. This may be even the case for a bank of a size of HSH, in particular when it is the world's biggest provider of ship finance and a leading provider of financial services in the transportation sector.

(34) The Commission therefore accepts that the failure of HSH would have entailed a serious disturbance of the German economy. The aid must therefore be assessed under Article 87(3) (b) of the EC Treaty. As set out in the Banking Communication, the principles of

[11] Cf. Commission Decision of 18 December 2008 in case N 615/2008 *BayernLB*, OJ C 80/4 of 3.4.2009, point 40.

[12] Communication from the Commission - Application of the 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. Communication from the Commission - Recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2. Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.03.2009, p. 1.

[13] Commission Decision of 12 December 2008, N 625/2008 *Rettungspaket für Finanzistitute in Deutschland*.

the Rescue and Restructuring Guidelines remain of particular importance for the compatibility assessment.

3.2 Principles for assessing the compatibility of the measure

(35) In line with the Banking Communication, in order for such aid to be compatible, any aid or aid scheme must comply with general criteria for compatibility under Article 87 (3) of the Treaty, viewed in the light of the general objectives of the Treaty and in particular Articles 3 (1) a) and 4 (2) thereof, which imply compliance with the following conditions[14]:

a. *Appropriateness*: The aid has to be well targeted to its objective, i.e. in this case to remedy a serious disturbance in the entire economy. This would not be the case if the disturbance would also disappear in the absence of the measure or if the measure is not appropriate to remedy the disturbance.

b. *Necessity*: The aid measure must, in its amount and form, be necessary to achieve the objective. That implies that it must be of the minimum amount necessary to reach the objective, and take the form most appropriate to remedy the disturbance. In other words, if a lesser amount of aid or a measure in a less distortive form were sufficient to remedy a serious disturbance in the entire economy, the measures in question would not be necessary. This is confirmed by settled case law of the Court of Justice[15].

c. *Proportionality*: The positive effects of the measures must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measures' objectives. This follows from 3 (1) g) of the Treaty and Article 4 (1) and (2) of the Treaty, which provide that the Community shall ensure the proper functioning of an internal market with free competition. Therefore, Article 87 (1) of the Treaty prohibits all selective public measures that are capable of distorting trade between Member States. Any derogation under Article 87 (3) (b) of the Treaty which authorises State aid must ensure that such aid must be limited to that necessary to achieve its stated objective, limiting to a minimum consequential distortions of competition.

(36) The three banking Communications[16] translate these general principles into specific compatibility conditions depending on the instrument chosen to support the bank. To this end the nature and the effect of the measures needs to be clarified.

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14 Cf. Commission decision of 10 October 2008 in case NN 51/2008 *Guarantee scheme for banks in Denmark*, not yet published, at point 41.

15 Cf. Case 730/79, *Philip Morris* [1980] ECR 2671. This line of authority has recently been reaffirmed by the Court of Justice in. Case C-390/06, *Nuova Agricast v Ministero delle Attività Produttive* of 15 April 2008, where the Court held that, "As is clear from Case 730/79 […], aid which improves the financial situation of the recipient undertaking without being necessary for the attainment of the objectives specified in Article 87(3) EC cannot be considered compatible with the common market […]."

16 Communication from the Commission - Application of the 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. Communication from the Commission - Recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition,

(37) There is no doubt that the capital injection is a recapitalisation that needs to be assessed under the Commission's communication on recapitalisation[17].

(38) The risk shield has however some specific features requiring a more detailed analysis. Although consisting of a guarantee for all assets, it is not a guarantee on debt ensuring funding and thus, a guarantee on the liability side of the balance sheet. Instead the guarantee in question is a guarantee on the asset side. This makes it appear similar to an asset relief measure under the impaired asset communication[18].

(39) However, the scope of the application of the impaired asset communication is narrower and does not concern the entire or a major part of the assets on the balance sheet but is focused on selected impaired assets. Importantly, measures that fall under the impaired assets communication aim at providing a lasting solution through removal of risks related to specific, impaired assets, whereas the risk shield at hand covering almost the total balance sheet of the bank aims at providing a rescue in order for the bank to meet the regulatory prudential requirements – which it does not at the moment - and provides it with some time to devise a lasting solution. Moreover, unlike an asset relief measure this guarantee covering the asset side is not so much concerned with overcoming the difficulties consequent on the market value of assets being below their real economic value, but aims at releasing the bank from maintaining capital for unexpected losses of the assets. Consequently this risk shield is in its immediate and temporary effect more similar to a short term recapitalisation corresponding to the amount of capital from which the bank is relieved due to the guarantee. Nevertheless, the risk exposure is equal to the nominal value of the guarantee.

(40) As regards the remuneration of the capital relief effect, the Commission considers that the remuneration should follow the lines of the recapitalisation communication, i.e. 10% p.a. on the capital equivalent of the risk shield in case of an unsound bank. The disadvantage of this risk shield vis-à-vis a recapitalisation for the guarantor is that the guarantor bears the full risk but does not participate in any upside should the bank return to sustainable profitability. Hence this risk shield should in principle have to be remunerated at least at the level of a capital injection[19].

(41) In addition the Commission expects the beneficiary and its shareholders to contribute to the rescue measure as much as possible by way of burden sharing. This would typically imply to write down the portfolio to the real economic value and to guarantee the assets only up to this real economic value. If this is not possible as it would mean the insolvency

OJ C 10, 15.1.2009, p. 2. Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.03.2009, p. 1.

[17] Communication from the Commission - Recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2.

[18] Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.03.2009, p. 1.

[19] This is also the ration ale 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.

of the bank a lower up-front contribution is possible but would result in a higher contribution in the restructuring phase.

(42) In particular where the need for an immediate intervention for reasons of financial stability leaves no room for a proper prior-evaluation an in-depth assessment must be made in the restructuring phase[20]. This restructuring phase should be initiated the latest after three months from the date of the decision and be followed up by a decision after six months. Consequently any rescue decision must be limited to six months.[21]

3.3 Temporary compatibility of the measure

(43) In order to be temporarily compatible the aid must first be appropriate. The aim of the aid – both the recapitalisation and the risk shield – must be to eliminate the threat to the stability of the German economy stemming from the insolvency of HSH. The Commission considers that the aid instruments chosen by the German authorities, i.e. the immediate provision of core tier 1 capital via a recapitalisation and the decrease of the RWA via a risk shield was an appropriate means to address HSH's solvency problems. The risk shield will have a capital liberating effect and improve the capital ratio of the bank. The aid is consequently designed to prevent an insolvency of HSH by moving the capital ratios of HSH above the required regulatory minimum.

(44) The Commission secondly considers that the recapitalisation and the risk shield provided by the Länder owners are necessary to prevent the insolvency of HSH. The capital ratios of HSH would have otherwise not been sufficient to prevent restrictive measures (with a moratorium in the worst case) which the supervising authority, the German BaFin, might have taken according to German bank law. Given the current economic circumstances the capital ratio can to this end be well above the regulatory minimum requirements required by law. Moreover, HSH has taken over a first-loss-tranche of € [2-4] billion. Although it could not yet be established whether this is sufficient, the Commission acknowledges that HSH has already done some initial burden sharing. Given that the Commission did not have sufficient time and means to assess the submitted valuations by external experts a final conclusion in this respect will be left for the restructuring assessment. The conclusion that the measures were necessary to keep HSH afloat is however without prejudice to the question whether the price paid by the shareholders subscribing to the capital increase appropriately reflects the value of the bank.

(45) Finally, in order to be proportionate the Commission must assess whether the remuneration for the aid was adequate to limit the distortions of competition to the minimum. In this respect, as discussed above the Commission considers that the recapitalisation communication provides the appropriate framework for assessment, which implies remuneration of around 10% p.a. [22] The Commission recalls that point 15 of that Communication accepts that for distressed banks a market oriented pricing is not

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[20] Cf. to this end Commission decision of 30. April 2008 in case NN 25/2008, *Rettungsbeihilfe für die WestLB*, OJ C 189 of 26.7.2008, p. 3.

[21] Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.03.2009, p. 1., Annex 5..

[22] Commission Decision of 18 December 2008 in case N 615/2008 *BayernLB*, OJ C 80/4 of 3.4.2009.

required in the short term. The Commission has at that stage not been provided with sufficient information to assess whether the remuneration in the case at hand complies with the benchmark of 10% for capital. However, the Commission first notes that the beneficiary is apparently not able to pay such a level of remuneration at this stage. Second, the Commission recalls that it has in the past accepted a remuneration of a risk shield at a level below what it considered adequate before the background that the Member State and the beneficiary itself had committed to in-depth restructuring[23]. This is also at present the case where Germany provided several commitments such as to conduct an in-depth restructuring which will include abandoning non-viable, loss-making or structurally weak areas of business, resulting in a significant reduction of the scope of activities of the bank and of the balance sheet. In view of the fact that at least in the short term, keeping HSH afloat is necessary for financial stability, that HSH is currently in any event not able to provide a higher remuneration, and that it committed itself to carry out an in-depth restructuring, the Commission can at this stage temporarily accept remuneration below the above benchmark[24]. A final conclusion in this respect will be left for the restructuring assessment.

(46) It is however clear that any additional advantage inherent to remuneration below that indicated by Recapitalisation Communication will need to be taken into account in the restructuring phase which must entail an in-depth restructuring and that if viability cannot be restored if HSH is required to pay an adequate remuneration, then the result must be an orderly winding up of the bank.

(47) In sum, the Commission concludes that the state aid is appropriate to rescue HSH in the short term and will for the time being not entail an undue distortion of competition. The Commission however reiterates that it needs to be provided with an in-depth restructuring plan the latest three months from the date of the decision and that the rescue aid is limited to six months.

V. CONCLUSION

(48) For the above reasons, the Commission concludes that the state aid in favour of HSH, consisting of recapitalisation in the amount of € 3 billion and the risk shield of € 10 billion is temporarily, i.e. for a six months period, compatible with the common market pursuant to Article 87 (3) b) of the Treaty.

(49) However, the Commission underscores that this decision concerns the aid measures by the Länder owners to HSH and is without prejudice to the question whether any indirect aid has been granted to the other shareholders.[25].

[23] Commission Decision of 18 December 2008 in case N 615/2008 *BayernLB*, OJ C 80/4 of 3.4.2009.

[24] This is also in line with the rationale of point 23 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.

[25] Cf. Commission Decision of 18 December 2008 in case N 615/2008 *BayernLB*, OJ C 80/4 of 3.4.2009, point 40.

VI. DECISION

The Commission finds that the state aid in favour of HSH is temporarily compatible with the common market and has accordingly decided not to raise objections.

The state aid in favour of HSH is approved for six months. The restructuring plan shall be submitted on 29 August 2009 at the latest.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site. http://ec.europa.eu/community_law/state_aids/index.htm.

Your request should be sent by registered letter or fax to:

- European Commission
  Directorate-General for Competition
  State aid Greffe
  B-1049 Brussels
  Fax No: (+32)-2-296.12.42

Yours faithfully,
For the Commission

Neelie KROES
Member of the Commission