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<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State aid NN 1/2010 (ex CP 371/2009) – Czech Republic
ČSA – Czech Airlines a.s. – possible State aid implications of a loan provided
by Osinek a.s.**

Dear Sir,

The Commission wishes to inform the Czech Republic that, having examined the information supplied by your authorities on the measure mentioned above, it has decided to initiate the procedure laid down in Article 108 (2) TFEU.¹

1. PROCEDURE

- (1) In May 2009 on the basis of publicly available information, the Commission learned that Osinek a. s. (a 100 % publicly owned company in liquidation and under the supervision of the Ministry of Finance of the Czech Republic) had decided to grant a loan (hereinafter: the "Osinek loan") amounting to CZK 2.5 billion (EUR ~ 94 million) to ČSA – Czech airlines a. s. On 14 May 2009 the Commission requested the Czech authorities to provide information in relation to this transaction and it also reminded the Czech authorities on their obligation pursuant to Article 108 (3) TFEU. The Czech authorities responded by letter dated 10 September 2009.
- (2) The Commission has requested additional information by letter dated 24 September 2009. At the request of the Czech authorities meetings took place on 6 November 2009 and on 13 November 2009. The Czech authorities responded by letter dated 25 November 2009. In their response the Czech authorities clarified that the Czech government decided on 26 October 2009 to free up the assets which secured the loan provided by Osinek. The Czech authorities explained that this was necessary to allow ČSA to use this collateral to secure loans to remedy serious financial

¹ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

difficulties so as to allow the company to continue in business. Thus, the Osinek loan is no longer secured by assets.

- (3) On 8 December 2009 the Czech authorities provided additional information on the situation of the airline to the Commission.

2. THE FINANCIAL SITUATION OF CZECH AIRLINES

- (4) The Czech Airlines Group (hereinafter Czech Airlines or ČSA) is made up of the following companies:
- ČSA – Czech Airlines a. s., a network air carrier founded in 1923 as the Czechoslovak flag carrier;
 - ClickforSky a. s., a ticket seller offering tickets at a single price regardless of the destination or the travelling time in order to utilise ČSA's unused capacity (a low cost subsidiary using ČSA's network);
 - Holidays Czech Airlines a. s., a travel agency;
 - ČSA Services s. r. o., a call centre (offering a help desk for Sky Team Alliance members, online booking services and handling agent) and recruitment centre;
 - ČSA Support s. r. o., a company which cleans the aircraft and premises of ČSA and other carriers to which ČSA provides handling services; and
 - Slovak Air Services s. r. o. providing passenger and cargo handling services at Bratislava Airport.
- (5) In addition, ČSA has a 65 % participation in Amadeus marketing services ČSA s. r. o., the representative of Amadeus global distribution system for the Czech and Slovak Republics.
- (6) ČSA is headquartered in Prague and operates a hub from Prague Ružyně airport. ČSA is a member of Sky Team Alliance. The fleet of ČSA comprises 50 aircraft (14 Airbuses, 21 Boeings and 12 ATR turbo-props). In addition to scheduled air transport services (104 destinations to 44 countries), ČSA provides also charter flights and cargo services. It also provides ground handling services (it handles approximately 60 % of all passengers at Prague-Ruzyně Airport), aircraft maintenance services, crew training services, it prepares for itself and other air carriers at Czech airports refreshments served on board, and it has duty free shops at Prague-Ruzyně Airport and duty free sales on board².
- (7) The current shareholders of ČSA are the Ministry of Finance of the Czech Republic (91.51 %), Česká pojišťovna a. s.³ (4.33 %), the City of Prague (2.94 %), the City of Bratislava (0.98 %) and the National Property Fund of the Slovak Republic (0.24 %).

² According to the publicly available information, in December 2009 it was decided to sell the duty free shops and the duty free sales on board ČSA aircraft to Aelia.

³ An insurance company

- (8) Over the last number of years Czech Airlines has suffered from difficulties which have weakened its position to cope with the impact of the current financial and economic crisis, which has led it to its current financially difficult situation.

Table 1: Passengers development of ČSA in the 1st Quarter and 1st Half year 2007, 2008 and 2009

Passengers transported (hereinafter: PAX)	Regular PAX	Changes in regular PAX in %	Charter PAX	Changes in charter PAX in %	Total PAX	Changes in total PAX in %
01/2007 - 03/2007	966.776		102.588		1.069.364	
01/2008 - 03/2008	970.620	0,40%	131.289	27,98%	1.101.909	3,04%
01/2009 - 03/2009	852.429	-12,18%	94.790	-27,80%	947.219	-14,04%
01/2007 - 06/2007	2.182.074		308.302		2.490.376	
01/2008 - 06/2008	2.305.673	5,66%	333.178	8,07%	2.638.851	5,96%
01/2009 - 06/2009	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

- (9) Since 2006 the number of passengers transported (scheduled and chartered flights) has stagnated at between 5.5 to 5.6 million. In the first quarter of 2009 (January – March 2009) the number of passengers transported on scheduled flights decreased by [...]* and the number of passengers transported on charter flights decreased by [...]*. This negative trend has been partially reversed by a positive development during the second quarter of 2009 (see table below). The overall passenger load factors decreased from 71.8 % in 2006 to [...]* in the first quarter of 2009 and [...]* at the end of the first half year of 2009.

Table 2: Development of the total passenger revenue of ČSA in 1st Quarter and 1st Half year 2007, 2008 and 2009

Passengers carried (hereinafter: PAX)	Regular PAX	Changes in regular PAX in %
01/2007 - 03/2007	966.776	
01/2008 - 03/2008	970.620	0,40%
01/2009 - 03/2009	[...]*	[...]*
01/2007 - 06/2007	2.182.074	
01/2008 - 06/2008	2.305.673	5,66%
01/2009 - 06/2009	[...]*	[...]*

- (10) Although the number of passengers transported stagnated between 2006 and 2008, the overall ticketing revenue started to decrease only in 2008. This negative development in passenger revenue resulted at the end of June 2009 in a decrease of approximately [...]* in comparison to the year 2008.

Table 3: Key financial indicators on the performance of ČSA in 1st Half year 2007, 2008 and 2009

According to International Financial Reporting Standards in 1 000 CZK	01/2007 - 06/2007	01/2008 - 06/2008	01/2009 - 06/2009
Operating Cash Flow	516.260	587.995	[...]*
EBIT	-621.512	196.152	[...]*
Long term debts *	8.825.960	7.744.302	[...]*
Short term debts **	8.529.858	7.375.896	[...]*
Own capital	5.465.240	7.145.207	[...]*
Short term assets ***	5.019.354	4.735.123	[...]*
Long term assets ****	17.801.704	17.530.283	[...]*
Working capital	-3.510.504	-2.640.774	[...]*

* Long-term debts include provisions for liabilities and charges, long-term liabilities, long-term finance lease obligations, long-term bank loans and deferred tax liabilities.
** Short-term debts include short-term liabilities, short-term bank loan, short-term finance lease obligations, provisions for liabilities, charges and tax and other liabilities.
*** Short-term assets include inventories, short-term receivables, current financial assets and other assets.
**** Long-term assets include fixed assets, long-term receivables and other assets.

- (11) At the same time, an increase in the operating expenses resulted in a deterioration in the EBIT (Earnings before interest and taxes) from CZK 196.2 million (01/2008 – 06/2008) to CZK [...]* (01/2009 – 06/2009) while over the same period the long term and short term debts of ČSA increased by [...]* to [...]*⁴ and the own capital of ČSA decreased by [...]* at the end of June 2009.
- (12) Thus, the debt-to-equity ratio⁵ increased from 212 % in June 2008 to [...]* in June 2009 and the equity ratio⁶ decreased from 32 % in June 2008 to [...]* in June 2009. The average risk premiums charged to ČSA increased from 0.65 % p. a. in 2007 to 0.96 % in 2008 and to [...]* in June 2009. The balance sheet also clearly shows the high asset intensity⁷ of the company ([...]* of the balance sheet sum for 01/2009 - 06/2009).
- (13) The working capital⁸ decreased by [...]* and resulted in a negative figure of CZK [...]*, a figure which considering the size of the company can be seen as critical.

* Covered by the obligation of professional secrecy.

⁴ The debt position in June 2009 already includes the Osinek loan.

⁵ Debt-to-equity ratio equals to total debt divided by shareholders' equity. It indicates the leverage used to finance the total assets; the higher the leverage, the higher the risk of bankruptcy.

⁶ The equity ratio is indicating the proportion of equity used to finance all of company's assets.

⁷ The asset intensity ratio is calculated by dividing long-term assets by the balance sheet amount (total liabilities plus own capital which equals the total assets). It shows which percentage of the capital at the disposal of the company is locked in long-term.

⁸ Working capital ratio is calculated as short-term assets minus short-term liabilities. Positive working capital means that the company is able to pay off its short-term liabilities. Negative working capital means that a company is unable to meet its short-term liabilities with its current assets (cash, accounts receivable and inventory), what mean that the company may have difficulties pay back creditors in the short term and may enter into bankruptcy in the worst case scenario.

Furthermore, the low value of the current ratio⁹ of [...] indicates that ČSA will have substantial difficulties in meeting its current obligations. In addition, the short term debts are at the same level as the amount of long term debts. Due to the on-going financial and economic crisis further negative impacts on the operational performance of Czech Airlines and its financial results during 2009 cannot be excluded.

Table 4: Development of the cash flow of ČSA

in 1 000 CZK	31 Dec 2007	30 June 2008	31 Dec 2008	31 March 2009	30 June 2009
Cash flow from operating activities	- 275.234	[...]*	- 1.762.376	[...]*	[...]*
Cash flow from investing activities	1.499.599	[...]*	1.883.704	[...]*	[...]*
<i>sale of assets</i>	1.584.115	[...]*	1.768.940	[...]*	[...]*
Cash flow from financing activities	- 1.687.852	[...]*	- 76.189	[...]*	[...]*
Increase/decrease of cash	- 463.487	[...]*	45.139	[...]*	[...]*
Cash balance	497.533	[...]*	542.672	[...]*	[...]*

- (14) An examination of the company's cash flow calculation clearly reflects the impact of the financial and operational underperformance. The cash-flow from operating activities has been decreasing since 2007 and resulted in CZK [...] at the end of June 2009. The overall negative cash flow (decrease of cash) by end of March 2009 amounted to CZK [...] (including the revenue from sales of assets amounting to CZK [...]; the overall cash flow would be even more negative without the sale of assets). Since 2007 ČSA has met its short-term financial needs through the sale of assets, mainly real estate, thus the cash income from the sale of assets has been balancing the negative operating cash flow. For the end of the year 2009 a further dramatic decrease in the liquidity is expected.

3. DESCRIPTION OF MEASURES IN RELATION TO THE OSINEK LOAN

3.1. The Osinek loan

- (15) On 30 April 2009 a loan agreement was concluded between Osinek¹⁰ and ČSA. On the basis of this agreement a loan of CZK 2.5 billion (EUR 94 million) has been granted. It has been disbursed in three tranches as following:

⁹ The "current ratio" is calculated by dividing current assets by current liabilities, a current ratio of 1.0 means that the company is able to pay its short term liabilities from its current assets.

According to International Financial Reporting Standards in 1 000 CZK	01/2007 - 06/2007	01/2008 - 06/2008	01/2009 - 06/2009
(a) Short term assets	5.019.354	4.735.123	[...]*
(b) Short term debts	8.529.858	7.375.896	[...]*
(a) / (b) Current (liquidity) ratio	0,59	0,64	[...]*

¹⁰ Osinek is a financial vehicle, which was founded in order to supervise the closure of coal mines in the Czech Republic and their revitalisation; it is 100 % owned by the Czech authorities under the supervision of the Ministry of Finance (the Ministry of Finance owns also 91.5 % of the shares in ČSA). Although Osinek should have been already liquidated due to legal disputes its liquidation is delayed. As it still has liquid funds at its disposal, Osinek was reportedly looking for different investment possibilities. These possibilities included: (i) payment of its funds into a saving account; (ii) purchase of bonds or other short-term/liquid funds; or (iii) the possibility to provide loan financing to a

- the 1st tranche was paid out on 14 May 2009 and amounted to CZK 800 million;
 - the 2nd tranche was paid out on 31 July 2009 and amounted to CZK 900 million; and
 - the 3rd tranche was paid out on 19 October 2009 and amounted to CZK 800 million.
- (16) The loan is supposed to be paid back in one single payment on 30 November 2010. The interest rate amounts to the 3 month PRIBOR¹¹ plus 300 basis points as a risk margin. In the opinion of the Czech authorities the risk margin of 300 basis points correctly reflects an appropriate risk margin for the financial situation of the company and the level of collateralisation of the loan, which amounts to 110 % of the loan amount.
- (17) As ČSA is not active on the bond market, it is not rated by a rating agency. The Czech authorities claim that the margin of 300 basis points corresponds to the rating category B ("weak" financial situation). They also point out that on 25 June 2009 UniCredit Bank¹² has increased the risk premium on a loan of CZK 200 million (granted on 26 October 2008) from 1.6 % to 3.25 %, which is in a similar range of risk margins.
- (18) The collateral used to secure the loan are the following:
- Office building no 1069, built on parcel no 2570/14 at Prague-Ruzyně Airport (hereinafter: the APC building) and parcel no 2570/14 comprising 3 132 m² and parcel no 2570/13 comprising 2 853 m² (in total 5 985 m²);
 - Hangar F, built on parcel no 2587 at Prague-Ruzyně Airport and parcel no 2587 comprising 23,542 m², parcel no 2570/4 comprising 9 633 m², parcel no 2590/25 comprising 29,675 m², parcel no 2589/1 comprising 967 m², parcel no 2588/3 comprising 5,069 m², 2586/1 comprising 5,327 m²; and
 - A flight simulator as well as inventories and spare parts.
- (19) The market value of the collateral was established by an expert as summarised in the table below.

Table 5: Value of the assets securing the Osinek loan

commercial undertaking. Because of the financial crisis and low interest rates Osinek decided to look into the third possibility (i. e. to grant a loan to an undertaking).

¹¹ PRIBOR is the Prague Interbank Offered Rate; quoted in CZK.

¹² UniCredit is a privately owned Italy based pan-European financial institution.

Collaterals	Value in million CZK	Value in million EUR	Basis for the value assessment
Office Building "APC" (including land under and around the building: 15 618m ²)	[...]*	[...]*	evaluation report dated 10 September 2009 prepared by YBN consult
Operating building "Hangar F" (including land under and around the building: 64 580 m ²)	[...]*	[...]*	evaluation report dated 5 July 2009 prepared by YBN consult s.r.o.
Flight Simulator A 320-214	[...]*	[...]*	evaluation report dated 10 September 2009 prepared by YBN consult
Inventories - rotables (spares)	[...]*	[...]*	Net asset value as of 30 September 2009 (financial statements)
Total	[2000 - 3500]*	[95 - 115]*	

(20) ČSA was also asked to provide Osinek with financial and economic information in order to allow Osinek to evaluate its risk exposure. On this basis an economic and legal evaluation has been carried out on behalf of Osinek by consultants.¹³ The consultants recommended Osinek to inform its shareholders before granting the loan.

3.2. The modifications in the collateralisation of the Osinek loan

(21) The Czech government decided on 26 October 2009 to free up the assets which secured the loan provided by Osinek in order to allow ČSA to use this collateral to secure commercial loans and continue in business. Therefore, the Osinek loan is no longer secured by assets.

4. EXISTENCE OF AID

(22) The Commission is of the opinion that the following two measures may qualify as State aid in favour of ČSA:

- the Osinek loan of CZK 2.5 billion (EUR ~94 million) committed in April 2009; and
- the de-collateralisation (removal of collateral) of the Osinek loan in October 2009;

(23) By virtue of 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 the Member States, be incompatible with the Internal market.

(24) The criteria laid down in Article 107 (1) TFEU are cumulative. Therefore, in order to determine whether the notified measures constitute State aid within the meaning of Article 107 (1) TFEU all of the following conditions need to be fulfilled. Namely, the financial support should

- be granted by the State or through State resources,
- favour certain undertakings or the production of certain goods,
- distort or threaten to distort competition, and

¹³ Evaluation report of European Business Consulting s. r. o. dated 24 April 2009 and legal analyses of Advokátní kancelář JUDr. Jiří Rybař & JUDr. Pavel Štrbík.

* Covered by the obligation of professional secrecy.

- affect trade between Member States.

4.1. Aid nature of the Osinek loan

4.1.1. State resources and imputability

- (25) The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.
- (26) Therefore, it has to be established first whether the Osinek loan must be regarded as State resources. As mentioned above Osinek is 100 % owned by the Ministry of Finance of the Czech Republic and, for this reason, irrespective of its corporate or any other legal status, it is clearly a public undertaking according to Article 2 (b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings.¹⁴ Thus the Commission considers that the Osinek loan is financed by State resources.
- (27) However, the Court has also ruled that, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the Loan Agreement in question, to be considered imputable to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of this measure. On that point, the Court indicated that 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 that measure was taken.¹⁵
- (28) Such indicators can be the integration of the undertaking into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the scope of the measure, its content or the conditions which it contains¹⁶.
- (29) The Commission first notes that it appears that the majority of the Osinek Supervisory Board members are representatives of public authorities (such as the Ministry of Finance, etc.). In addition, the Czech authorities have provided the Commission with expert opinions¹⁷ wherein it was recommended to the liquidator¹⁸ of Osinek to consult

¹⁴ OJ L 318, 17 November 2006, page 17.

¹⁵ Judgement of Court of 16 May 2002, C-482/99, France/Commission (hereinafter: "Stardust Marine Judgement"), Rec.2002, p. I-04397, par.52 and 57.

¹⁶ Stardust Marine Judgement, par. 55 and 56.

¹⁷ See footnote 133.

Osinek's shareholder before taking the decision to grant a loan to ČSA. As regards the supervision of the activities of Osinek by the State, the Commission further observes that the Czech government has also taken the later decision to de-collateralise the Osinek loan.

- (30) Based on these elements it appears that the State is capable of controlling the activities of Osinek. Therefore, at this stage the Commission cannot exclude that the decision concerning the Osinek loan is imputable to the public authorities.

4.1.2. *Economic advantage*

- (31) In order to verify whether an undertaking has benefited from an economic advantage induced by granting of a loan at privileged terms, the Commission applies the criterion of the "market economy investor principle". According to this principle, capital put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be qualified as State aid¹⁹.
- (32) In the present case, the Commission has to assess whether the conditions of the loan provided by Osinek to ČSA taking into account its financial situation confer an economic advantage to it, which the recipient undertaking would not have obtained under normal market conditions.
- (33) According to its decision practice, in order to determine whether the loan under assessment was granted on favourable conditions, the Commission checks the compliance of the interest rate on the loan in question with the Commission reference rate. The Commission reference rate is established pursuant to the methodology laid down in the *Communication from the Commission on the revision of the method for setting the reference and discount rates*²⁰ of 12 December 2007 (hereinafter: the "reference rate communication").
- (34) The Czech authorities argue in the present case that the principle of an investor in a market economy was fully respected.
- (35) The reference rate communication which entered into force as of 1 July 2008 establishes a method for setting reference and discount rates that are applied as a proxy for the market rate. The reference rates are based on one-year inter-bank offered rates (IBOR) or base rate to which margins have to be added. The margins range from 60 to 1000 basis points, depending on the creditworthiness of the company and the level of collateral offered. In normal circumstances, 100 basis points are added to the base rate, assuming loans to undertakings with satisfactory rating and high collateral or loans to undertakings with good rating and normal collateral. The Communication also mentions that for borrowers that do not have a credit history or a rating based on a balance sheet approach, the base rate should be increased by at least 400 basis points (depending on the offered collaterals).

¹⁸ The liquidator of Osinek was appointed by its (public) shareholder.

¹⁹ Communication of the Commission to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of the directive 80/723/CEE of the Commission to public undertakings in the manufacturing sector, OJ C 307 of 13.11.1993, p. 3, paragraph 11. This communication deals with the manufacturing sector, but is applicable to the other economic sectors. Cf. also Case T-16/96, Cityflyer, [1998] ECR II-757, para. 51.

²⁰ OJ C 14, 19.01.2008, p. 6.

- (36) As regards the relevant date to be taken into account with a view to comparing the interest rate of the loan in question with the Commission reference rate, the Commission is of the opinion that this should be the date of the legally binding act according to which the loan was granted, i.e. 30 April 2009 (date of the loan agreement between Osinek and the beneficiary).
- (37) The Osinek loan was granted at the 3 month PRIBOR plus 300 basis points as a risk margin. The Commission questions the relevance in this particular case to use the 3 month PRIBOR rate as the base rate to determine the interest rate of the loan. As mentioned above, the Communication envisages using the base rate calculated on the basis of one year IBOR rate. It mentions that the Commission reserves its rights to use shorter or longer maturities adapted to certain cases and, in the absence of reliable or equivalent data or in exceptional circumstances, to determine other calculation basis but the Czech authorities have not provided arguments in this respect. Indeed, as regards the methodology, the 3 month PRIBOR interest rate can be expected to be, under normal market circumstances, lower than the interest rates for longer maturities. Thus, the Commission has doubts whether the use of the 3 month PRIBOR rate can be justified in the present case.
- (38) Furthermore, the Czech authorities are of the opinion that the risk margin reflects the rating category "B" (weak) and a relatively high level of collateralisation. As ČSA is not rated by a rating agency, the Czech authorities did not provide any rating. Furthermore, Osinek did not carry out an assessment of the probability of default when it granted the loan to ČSA.
- (39) In this regard the Commission notes that the reference rate communication does not require that the ratings are obtained from a specific rating agency, ratings provided by banks in order to reflect default rates are equally acceptable. The Commission invites the Czech authorities to provide a rating of ČSA at the time the loan was granted. It would be also acceptable to provide a rating prepared by a bank in particular establishing the one year probability of default of the loan would also be acceptable.
- (40) The Czech authorities justified the rating of ČSA by providing an example of the loan agreement between ČSA and Unicredit. The Commission observes that the Unicredit loan agreement was signed in September 2008 for a loan amount of CZK 200 million (in comparison the Osinek loan amounts to CZK 2.5 billion) and is secured by a flight simulator for Boeing 724-400/500. On 25 June 2009 due to the deviation from the financial indicators agreed in the previous loan agreement Unicredit increased the risk margin for the ČSA loan from 160 basis points (agreed in 2008) to 325 basis points,²¹ this was agreed by both parties in an amendment to the previous loan agreement (hereinafter: "2009 Unicredit loan amendment"). Due to the loan history, the size of the loan and the underlying assets securing the loan the Commission has doubts whether the 2009 Unicredit loan amendment is comparable to the Osinek loan and can be used as a term of reference to fix the market rate for the latter loan.
- (41) In addition, in view of the financial situation of ČSA – decreasing revenue, increasing operating costs, negative operating cash flow, negative working capital (see Tables 1 – 4 further above) – the Commission has doubts whether the rating of the company corresponds to rating category "B" (weak) or rather to an even lower rating category.

21 The interest rate of the Unicredit loan amounts to the 1 moth PRIBOR plus risk margin.

Therefore, taking into account the financial situation of ČSA, the Commission has also doubts whether at the time the Osinek loan was granted, ČSA would have obtained comparable financing on the financial market.

- (42) The Commission observes further that the real estate collateralising of the loan is located at the Prague-Ruzyně Airport. As ČSA is one of the anchor airlines of Prague-Ruzyně Airport, the Commission has doubts if in case of default of ČSA the value of the real estate would not be diminished.
- (43) Therefore on the basis of what precedes the Commission must, at this stage of investigation express doubts as to whether the actions of Osinek can be compared to those of a private market economy investor and be therefore free of State aid to ČSA. In this regard the Commission does not exclude engaging its own expert to carry out an examination of the value of the loan collateral used and its rating. The Commission further invites the Czech authorities and third parties to submit their observations as to whether, in the present case, the loan referred to above was granted at market conditions.

4.1.3. Specificity

- (44) Article 107 (1) TFEU requires that a measure, in order to be defined as State aid, favours "*certain undertakings or the production of certain goods*". In the case at issue, the Commission notes that the Osinek loan was granted to ČSA only. Thus it is selective within the meaning of Article 107 (1) TFEU.

4.1.4. Distortion of competition and affectation of trade

- (45) Moreover the measure involved affects intra-EU trade and distorts or threatens to distort competition inside this market as it is directed at only one company which is in competition with other EU airlines, in particular since the entry into force of the third stage of liberalisation of air transport ("third package") on 1 January 1993.

4.1.5. Conclusion

- (46) Under these conditions the Commission cannot exclude that the Osinek loan amounts to State aid within the meaning of Article 107 (1) TFEU.

4.2. Aid nature of the de-collateralisation of the Osinek loan

4.2.1. State resources and imputability

- (47) With regard to State resources the same observations (as set out in section 4.1.1. above) as for the Osinek loan apply. The Commission also notes that it was the Czech government that decided by governmental decree of 26 October 2009 to free up the assets securing the Osinek loan, this measure is therefore also imputable to the State.

4.2.2. Economic advantage

- (48) Given the current financially difficult situation of the company no investor would grant such a loan to ČSA without underlying securities. Freeing up the assets allowed ČSA to dispose of them freely, and in particular to use them again as collateral. Thus

the decision to free up the assets securing the Osinek loan provided an economic advantage to ČSA.

4.2.3. *Specificity, distortion of competition and effect on trade*

(49) The same considerations as set out in Sections 4.1.3 and 4.1.4. in relation to the Osinek loan apply also to the decision to de-collateralise the loan.

4.2.4. *Conclusion*

(50) Under these conditions the Commission considers at this stage of procedure that the de-collateralisation of the Osinek loan amounts to State aid within the meaning of Article 107 (1) TFEU.

5. COMPATIBILITY OF THE OSINEK LOAN

5.1. Compatibility of the aid on the basis of the Rescue and Restructuring Guidelines

(51) Article 107 (3) (c) TFEU provides that State aid can be authorised where it is granted to promote the development of certain economic sectors and where this aid does not adversely affect trading conditions to an extent contrary to the common interest.

(52) In this respect, the applicable EU framework for deciding on compatibility or otherwise of the Osinek loan is the Community guidelines for State aid for the rescue and restructuring of undertakings in difficulty²² (hereinafter "the Guidelines") and as regards restructuring aid, the Guidelines in conjunction with the Communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector²³ (hereinafter "the Communication").

5.1.1. *Eligibility for Rescue and Restructuring Aid*

(53) Point 9 of the Guidelines states that "*the Commission regards a firm as being in difficulty when it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term*".

(54) Subsequently in point 10 the Guidelines clarify that "*a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines in the following circumstances ... (c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings*".

(55) Point 11 of the Guidelines also provides that "*even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value*."

²² OJ C244 of 1.10.2004 p.2. These Guidelines have been prolonged until 9 October 2012 (OJ C 157, 10.7.2009, p. 1).

²³ OJ C350 of 10.12.1994, p.5

- (56) In this regard the Commission notes that ČSA is a company with limited liability. The Czech Insolvency act provides that the undertaking enters into bankruptcy as a consequence of the inability to pay if the following three cumulative criteria are fulfilled: (i) the debtor has several creditors, (ii) the debtor has financial obligations that have not been met even upon the lapse of 30 days after maturity, and (iii) the debtor is unable to settle these obligations.
- (57) The Commission has doubts, whether without State intervention ČSA would be in the position to settle its financial obligations, and whether its financial situation would not result in negative liquid funds causing its insolvency. Therefore, in the view of its financial situation (see in particular table 3 and 4) the Commission currently cannot exclude that without the grant of the Osinek loan ČSA would not become insolvent.
- (58) Furthermore, and as set out above in paragraphs 11 - 14 and tables 2 – 4 ČSA shows the typical symptoms of a company in difficulty, such as increasing losses, increasingly negative operating cash flow and decline and loss of net assets.
- (59) On the basis of the information currently at its disposal the Commission cannot therefore exclude that ČSA was at the time the Osinek loan agreement was signed (i. e. 30 April 2009) a company in difficulty within the meaning of the Guidelines. The Commission invites the Czech authorities to provide further information in this regard.

5.1.2. General Conditions for the authorisation of rescue aid

- (60) Point 25 of the Guidelines lays down five cumulative conditions under which rescue aid can be granted. The Commission must determine that all these conditions have been complied with in order to consider that the Osinek loan can be considered as compatible rescue aid.
- (61) One of the conditions is that the rescue aid must “*be accompanied on notification by an undertaking given by the Member State to communicate to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated*”.
- (62) As the Osinek loan was irrevocably committed on 30 April 2009 and the Czech authorities did not notify their restructuring plan to the Commission by 30 October 2009 at the latest, nor was the company was liquidated or the loan paid back, this condition has not been satisfied in the present case.
- (63) On the basis of the information at the disposal of the Commission, it cannot establish whether the Osinek loan has adverse spill over effects on other Member States and whether the amount was restricted to the minimum needed to keep the undertaking in business for 6 months as from 30 April 2009.
- (64) Therefore as at least one of the conditions for the authorisation of rescue aid appears not to be complied with, the Commission must conclude that the Osinek loan cannot be considered to be a rescue aid loan compatible with the internal market.

5.1.3. General Conditions for the authorisation of restructuring aid

- (65) As no restructuring plan has been presented, a necessary condition for accepting restructuring aid according to the Guidelines and the Communication, the Commission

must therefore conclude at this stage that the Osinek loan cannot be considered as restructuring aid compatible with the internal market. In addition, as no restructuring plan was notified and on the basis of the information currently at its disposal, the Commission is not in the position to establish whether the long-term viability of the company will be restored within a reasonable time period, whether the aid is limited to a strict minimum of the restructuring costs necessary to enable the restructuring, whether sufficient own contribution of at least 50 % will be provided by ČSA and whether the sufficient compensatory measures will be taken in order to outweigh negative effects on the competition.

5.2. Compatibility of the aid on the basis of the Temporary Framework

- (66) In the light of the current financial and economic crisis and their impact on the overall economy of the Member States, the Commission considers that certain categories of State aid are justified, for a limited period, to remedy this crisis and they can be declared compatible with the internal market under Article 107 (3) (b) of the TFEU. Those measures have been presented in the *Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis*²⁴ (hereinafter: the "*Temporary Framework*"). Under the Temporary Framework, Member States have to show that the State aid measures are necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State and that all the compatibility conditions set out by the Temporary Framework are respected.
- (67) Section 4.4.2 of the Temporary Framework sets out the requirements for the assessment of aid in the form of subsidised interest rate. No other provisions of the Temporary Framework would appear to apply in the present case.
- (68) In line with Section 4.4.2 of the Temporary Framework the Commission has approved by decision of 6 May 2009²⁵ a temporary aid scheme for the granting of aid in the form of loans with subsidised interest rates in the Czech Republic.
- (69) According to the Commission decision of 6 May 2009, loans granted under this scheme must fulfil the following conditions:
- (70) *(a) Calculation of the State aid element:* The aid element results from the difference between the interest rate, which is at least equal to the central bank overnight rate plus a premium equal to the difference between the average one year inter-bank rate and the average of the central bank overnight rate over the period from 1 January 2007 to 30 June 2008, plus the credit risk premium corresponding to the risk profile of the recipient, as stipulated by the reference rate communication, and the reference rate defined by the reference rate communication. In the present case, as previously examined (see paragraphs (37) - (43) further above) the Commission has doubts whether ČSA's financial situation corresponds to the rating category "B" ("weak") suggested by the Czech authorities. Thus, the Commission is not in a position to establish whether the requirements for the calculation of the State aid element are fulfilled.

²⁴ OJ C 83 of 7.4.2009, p.1; as amended OJ C 303, 15.12.2009, p. 6.

²⁵ State aid case N 237/2009, OJ C 149, 1.7.2009, p. 2.

- (71) *(b) Duration of the loan agreement:* The approved Czech scheme applies to all contracts concluded on 31 December 2010 at the latest; it may cover loans of any duration; the reduced interest rates may be applied for interest payments before 31 December 2012. In the present case the Osinek loan agreement has been concluded on 30 April 2009. As the loan is supposed to be paid back on 30 November 2010, the duration of the subsidised interest rates would appear to comply with the provisions of the approved Czech scheme.
- (72) *(c) The undertaking was not in difficulty on 1 July 2008:* The approved Czech scheme applies to firms which were not in difficulty on 1 July 2008, it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis. In view of the negative operating cash flow and negative working capital, the Commission cannot exclude that ČSA was an undertaking in difficulty already on 1 July 2008.
- (73) In view of the above, the Commission has doubts whether the Osinek loan falls within the scope of above aid scheme and therefore of the Temporary Framework. The Commission invites the Czech authorities to provide further information in this regard.

6. COMPATIBILITY OF THE DE-COLLATERALISATION OF THE OSINEK LOAN

- (74) The Commission must also examine whether the decision of the Czech authorities to de-collateralise the Osinek loan can be declared to be compatible with the internal market.

6.1. Compatibility of the aid on the basis of the Rescue and Restructuring Guidelines

6.1.1. Was ČSA a company in difficulty on 26 October 2009?

- (75) It appears that without the State intervention of 26 October 2009, the financial obligations of ČSA would result in negative liquid funds causing its insolvency. Therefore, in the view of its financial situation (see in particular table 3 and 4) the Commission currently cannot exclude that without the decision to de-collateralise the Osinek loan it would not have become insolvent.
- (76) Furthermore, and as set out above in paragraphs 11 - 14 and tables 2 – 4 ČSA demonstrates the typical symptoms of a company in difficulty, such as increasing losses, increasingly negative operating cash flow and decline and loss of net assets.
- (77) On the basis of the information currently at its disposal the Commission cannot therefore exclude that ČSA was at the time of the de-collateralisation of the Osinek loan (i. e. 26 October 2009) a company in difficulty within the meaning of the Guidelines. The Commission invites the Czech authorities to provide further information in this regard.

6.1.2. General Conditions for the authorisation of rescue aid

- (78) The primary effect of the de-collateralisation of the Osinek loan is to increase the potential state aid element of the Osinek loan itself. Therefore, as the Commission has doubts on the compatibility of the Osinek loan itself, it must also have doubts as to its de-collateralisation. Even if the Osinek loan were not to constitute State aid, the

authorisation to de-collateralise the loan would be capable to change this analysis of the moment when the authorisation has been granted.

- (79) As previously stated Point 25 of the Guidelines lays down five conditions under which rescue aid can be granted.
- (80) The first condition requires that the liquidity support is granted in the form of a loan or a loan guarantee. Therefore, the Commission has doubts whether in the present case a de-collateralisation of a loan can be considered as a form of rescue aid fulfilling the first condition.
- (81) The second condition requires that, *“the aid must be warranted on the grounds of serious social difficulties and have no adverse spill over effects on other Member States”*. The Commission notes that account should be taken of the 4600 employees working for ČSA for whom the rescue of the firm would mean the possibility of keeping their jobs. In this context the Commission observes that ČSA’s personnel has a high level of specialised training which given the small size of the Czech aviation labour market, would not easily allow them to find new positions. Furthermore, the relatively small size of the Czech labour market for aviation activities is aggravated by the global financial and economic crisis and its impact on the aviation industry. Given the importance of ČSA for the operations of Prague-Ruzyně Airport, its disappearance after insolvency would have a very significant effect on the employment prospects of the staff of the airport. On the basis of information currently at its disposal, the Commission observes that given the relatively small size of ČSA and its relatively low EU overall market share the spill-over effects on other Member States appear to be small. The Commission invites the Czech authorities to provide further information in this regard.
- (82) The third condition is that the rescue aid must no later than six months after the rescue aid measure has been authorised, or in the case of non-notified aid, sixth months after the first implementation of a rescue aid measure, be followed by a restructuring plan or liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated.
- (83) However, as the original loan was granted on 30 April 2009, the Commission has doubts whether this criterion can be complied with. The Commission invites the Czech authorities to clarify whether they intend to notify a restructuring plan, whether the loan will be repaid or whether the company will be liquidated.
- (84) Fourthly, *“the aid must be restricted to the amount needed to keep the firm in business for the period during which the aid is authorised; such an amount may include aid for urgent structural measures under certain conditions. The guidelines provide that the amount necessary should be based on the liquidity needs of the company stemming from losses.”*
- (85) In this regard the guidelines provide an indicative formula for the maximum amount of rescue aid providing that *“if this limit is exceeded, the Member State should provide an explanation of how the future cash-flow needs of the company and the amount of rescue aid have been determined”*.
- (86) In the present case, due to the negative working capital of ČSA the indicative formula is not applicable.

- (87) On the basis of the information currently at its disposal, the Commission cannot establish whether the de-collateralisation of the Osinek loan amounting to CZK 2.5 billion (EUR ~94 million) is limited to the minimum amount necessary for the economic survival of ČSA. The Commission therefore invites the Czech authorities to provide detailed explanations with regard to the necessity of the amount of the Osinek loan in question (CZK 2.5 billion or EUR ~94 million).
- (88) In the view of the above the Commission is not able to establish whether all the conditions as set out in the Guidelines for the authorisation of rescue aid are satisfied in the present case.

6.1.3. General Conditions for the authorisation of restructuring aid

- (89) As no restructuring plan has been presented, a necessary condition for accepting restructuring aid according to the Guidelines and the Communication, the Commission must therefore conclude at this stage that the de-collateralisation of the Osinek loan cannot be considered as restructuring aid compatible with the internal market. In addition, as no restructuring plan was notified and on the basis of the information currently at its disposal, the Commission is not in the position to establish whether the long-term viability of the company will be restored within a reasonable time period, whether the aid is limited to a strict minimum of the restructuring costs necessary to enable the restructuring, whether sufficient own contribution of at least 50 % will be provided by ČSA and whether the sufficient compensatory measures will be taken in order to outweigh negative effects on the competition.

6.2. Compatibility of the aid on the basis of the Temporary Framework

- (90) As discussed further above (see section 5.2) the Temporary Framework provides compatibility criteria for certain categories of State aid, for a limited period, to remedy the impact of the financial and economic crisis.
- (91) For all measures the main condition of the applicability of the Temporary Framework is that the beneficiary was not in difficulty on 1 July 2008, but it entered in difficulty thereafter as a result of the current financial and economic crisis. In view of the negative operating cash flow and negative working capital, the Commission cannot exclude that ČSA was an undertaking in difficulty already on 1 July 2008.
- (92) Section 4.2 of the Temporary Framework provides compatibility conditions for limited amount of aid. The de-collateralisation of the Osinek loan appears to exceed a cash grant equivalent of EUR 500 000.
- (93) Furthermore, no other provision of the Temporary Framework would appear to apply in the present case.
- (94) In view of the above, the Commission has doubts whether the de-collateralisation of the Osinek loan falls within the scope of the Temporary Framework. The Commission invites the Czech authorities to provide further information in this regard.
- (95) Finally, no other derogations provided by Articles 107 (2) or (3) TFEU would appear to be applicable to the present case.

7. DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108 (2) TFEU, requests the Czech Republic to submit its comments and to provide all such information as may help to assess the measures at stake, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission warns the Czech Republic 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 that 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.

If this letter contains confidential information that 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 the letter. 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 2961242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President of the Commission