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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 WORKING LANGUAGE</p> <p style="text-align: center;">This document is made available for information purposes only.</p>
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**Subject: State aid SA.31550 (2012/C) (ex 2012/NN) – Germany
Nürburgring**

Dear Sir,

The Commission wishes to inform the Federal Republic of Germany 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 (hereafter: "TFEU").

1. PROCEDURE

- (1) By letters of 27 July 2010 and of 19 January 2011 an owner of a leisure park in the German Eifel region, and by letters of 6 April 2011, of 3 August 2011, of 17 October 2011 and of 16 November 2011 a German automotive association, provided information concerning alleged State aid involved in the financing of leisure facilities at the German Nürburgring race track. On 18 October 2011, the Commission met the representatives of the association.

Seiner Exzellenz Herrn Guido WESTERWELLE
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- (2) By letters dated 3 February 2011 and 3 May 2011 the Commission forwarded the complaints to Germany and requested further information on the alleged State aid measures. After various prolongations of the deadline to reply, the German authorities provided information to the information requests by letters dated 27 May 2011 and 16 June 2011.
- (3) The replies of the German authorities of 27 May 2011 and 16 June 2011 were incomplete. Therefore, by letter dated 26 July 2011 the Commission requested further information on the alleged State aid measures. By letter dated 28 July 2011 the German authorities requested a prolongation of deadline until 30 September 2011, which was granted.
- (4) Following additional information provided by the association referred to in paragraph (1), the Commission sent to the German authorities another request for information on 2 September 2011. By letter dated 23 September 2011 the German authorities requested a prolongation of deadline regarding the requests for information of 26 July 2011 and of 2 September 2011 until 17 October 2011, which was granted. Following a meeting with the German authorities on 12 October 2011, the Commission granted upon further request by Germany a prolongation of deadline concerning the two information requests until 15 November 2011. The German authorities responded by letter dated 15 November 2011, completed by letter dated 8 February 2012.

2. DESCRIPTION OF THE MEASURES

- (5) The current investigation concerns the financing of several aspects of the investment and operation of the i) Nürburgring race tracks and ii) various leisure attractions around it as well as iii) the organisation of the Formula 1 races on it¹.
- (6) The leisure attractions, but also further elements of the race track itself (mainly a tribune), were developed under the "Nürburgring 2009" project. Based on currently available information, the funding for the race tracks and the leisure facilities involves an amount of approximately EUR [...] million, which mainly results from bank and shareholder loans and payments in capital reserves.² However, the precise amount of all the funding measures will have to be established during the investigation, as some information is still missing.

2.1. General information about Nürburgring race tracks and leisure park

- (7) Nürburgring is a motor race track located in the German Land Rhineland Palatinate ("the Land"). It features a modern Grand Prix race track built in 1984, and a much longer old North loop track which was built in 1927. It includes a leisure park called ring°werk (the previous park was called "Erlebniswelt"). It is used as a Grand Prix circuit for Formula 1 races (more than 68 000 visitors during four days in July 2011).³ Apart from motor sport,

¹ The two complaints address various of these aspects.

² This amount of approximately EUR [...] million includes the measures of approximately EUR [...] million introduced before the launch of the "Nürburgring 2009" project (see paragraph (34)).

³ Until 2007, the Formula 1 races took place at Nürburgring every year. Since 2007, the Grand Prix race is organised every second year at Nürburgring whereas that race takes place at Hockenheimring in Germany in the remaining years. Thus, no Formula 1 races were organised at Nürburgring in 2008 and 2010.

several sport and cultural activities are carried out there (altogether more than [...] visitors for all events organised by Nürburgring GmbH or other companies in 2009), in particular a famous rock concert "Rock am Ring" each summer (more than 80 000 visitors during a weekend in 2009). The Nürburgring is located approximately 174 kilometres west of the city of Frankfurt am Main and approximately 141 kilometres northeast of the city of Luxemburg.

- (8) The catchment area of Nürburgring race track could be served by other race tracks of which Spa-Francorchamps is the closest (circa 107 kilometres distance from Nürburgring race circuit).⁴ The catchment area of the Nürburgring leisure park could be served by other leisure parks of which the Eifelpark Gondorf leisure park is the closest (circa 64 kilometres distance from the Nürburgring leisure park).⁵
- (9) The 2012 calendar provides that seven Formula 1 Grand Prix will take place on race tracks located in the Union. In particular, besides Germany (Nürburgring and Hockenheimring), the race tracks concerned are Circuit de Spa-Francorchamps in Belgium, Silverstone circuit in the UK, Hungaroring in Hungary, Autodromo di Monza in Italy, Circuit de Catalunya in Spain and Valencia Street Circuit in Spain.
- (10) The Nürburgring race circuit is currently one of the largest race circuits in Germany. Between 1995 and 2009, the number of visitors at the race circuit reached between [...] in 1998 and [...] in 2001. Between 2001 and 2006, the number of visitors of the leisure park reached between [...] in 2001 and [...] in 2006.
- (11) Until April 2010, the ring was owned and managed by Nürburgring GmbH ("NG") whose business objective is the support of the car sector and motor sport as well as promotion of tourism in the Eifel region. NG is 90% owned by the Land and 10 % by the district ("Landkreis") of Ahrweiler. NG has had various subsidiaries, responsible for different activities related to the race track.

2.2. The "Nürburgring 2009" project

- (12) In order to increase its attractiveness over the whole year, the project "Nürburgring 2009" intended to provide the race track with various attractions. The project was formally approved by the Land and on 19 November 2007, by the supervisory board of NG.⁶ The "Nürburgring 2009" project consists of part I and part II:
- (13) Part I ("tribune and entertainment") was developed and financed by NG. It includes:
 - o Part IA ("tribune"): *tribune, welcome°center, ring°arena* (for up to 5.100 visitors) and *access facilities*

⁴ In particular, the Zolder race circuit (ca. 197 km distance from the Nürburgring race circuit), the Hockenheim race circuit (ca. 212 km distance), the Valkenswaard race circuit (ca. 239 km distance) and the Mettet race circuit (ca. 239 km distance).

⁵ In particular, the Phantasieland Brühl leisure park (ca. 70 km distance from the Nürburgring leisure park), Freizeitpark Lochmühle leisure park (ca. 150 km distance), the Le Labyrinth Durbuy leisure park (ca. 149 km distance) and the Durbuy Adventure leisure park (ca. 151 km distance).

⁶ The Commission has received neither the approval by the supervisory board of NG of 19 November 2007 nor the approval of the project by the Land, and it is not aware of the date of the latter approval.

- Part IB ("entertainment"): *ring°boulevard* (shopping mall with the largest multitouch-video-wall in the world), the *WARSTEINER event-centre* (for up to 1.500 visitors), *Autoworld* ("Autowelten", sale spaces for car producers), *ring°werk* (indoor attractions such as a multi-media-theatre, historical exhibition, interactive applications and *ring°racer*, the fastest roller coaster in the world) as well as *ring°kartbahn* (an indoor kart track).
- (14) The amount of costs of the measures of part I⁷ is shown in the table below:

Table 1: Construction costs of tribune and entertainment (part I)

	Amount (in EUR)
Tribune	[...] million
Multi-function halls	[...] million
Inner & external development measures	[...] million
ring°werk	[...] million
Autoworld	[...] million
Parking house	[...] million
Equipment	[...] million
Total	215 million

- (15) NG sought a long-term financing of the part I in the market. On 4 August 2006, NG and IPC International Cooperation Project SA ("IPC") concluded a project financing and development agreement. Under this contract, an exclusive assignment of IPC by NG for the search of an investor for the project "Nürburgring 2009" was agreed. The business objective of IPC is the purchase, sale and management of real property and project development.⁸ By contracts of 17 September 2008 and 27 October 2008, Pinebeck S.A.⁹ ("Pinebeck") as well as its 100% subsidiaries, Pinebeck Nürburgring GmbH ("PNG") and Pinebeck GmbH entered into the existing contractual relations between NG and IPC. The business objective of Pinebeck is the purchase, sale and management of real property and project development.
- (16) Part II ("hotels") includes two hotels (including one casino), 100 vacation houses, five restaurants, discotheque and a merchandising-shop.¹⁰ This investment of EUR 115 million was considered necessary to cater for expected higher numbers of visitors. Part II was developed by the private company Mediinvest GmbH as well as by Motorsport Resort Nürburgring GmbH and Congress-und Motorsport Hotel Nürburgring GmbH.

⁷ For part I, it was initially estimated that the costs would reach EUR 135 million. However, the final costs of the part I facilities have reached EUR 215 million.

⁸ Mr Michael Merten holds 100% of the shares. IPC-Eifel-Projekt GmbH i.L. ("IPC EP") and IPC Gesellschaft für internationale Projekt Coordination mbH i.L. are 100% subsidiaries of IPC.

⁹ Mr Michael Merten and Mr Normann Böhm each hold 50% of the shares.

¹⁰ For part II, it was initially estimated that the costs would reach EUR 80 million. However, the final costs of the part I facilities have reached EUR 115 million, mainly because of the four stars hotel which was initially not planned.

- (17) The business objective of Mediinvest GmbH ("Mediinvest") is mediation of conclusion of contracts regarding land and buildings, project development as well as the construction of real property, vacation facilities and resorts. Mediinvest is 100% owned by Mr Kai Richter. Mediinvest has had various subsidiaries, responsible for different activities related mainly to accommodation facilities.
- (18) The business objective of Motorsport Resort Nürburgring GmbH ("MSR") is the project development or the construction of real property, vacation facilities, hotels and resorts as well as the participation in undertakings which are in connection with the project development of Nürburgring. Since 25 March 2010 MSR is 93.3% owned by NG and 6.7% owned by Rheinland-Pfälzische Gesellschaft für Immobilien und Projektmanagement GmbH ("RIM").¹¹ The business objective of Congress- und Motorsport Hotel Nürburgring GmbH ("CMHN") is the construction and operation of hotels, vacation real property and resorts. CMHN is 100% owned by MSR. The construction of the part II of the project was carried out by Geisler & Trimmel General Contractor GmbH ("Geisler & Trimmel") and Weber Projektierungs- und Realisierungs GmbH ("Weber").
- (19) The Commission has no information about the financial situation of Mediinvest, MSR and CMHN. Therefore, it invites Germany to submit the key financial indicators included in table 2 regarding these companies for the period between 2006 and 2011 as well as for January and February 2012.
- (20) Germany states that it was impossible to find a private investor for part I or part II¹².

2.3. Restructuring of ownership and operation in 2010

- (21) Until 30 April 2010 the race track (including part I, the tribune) was operated by NG, who was also the legal owner of the race tracks and the leisure park. The leisure park was operated by Erlebnispark Nürburgring GmbH & Co. KG. The hotels (part II) were owned by MSR and CMHN and operated by Lindner Hotels AG.
- (22) On 1 May 2010, a restructuring of the ownership and management of the ring and the facilities took place. The idea behind the restructuring was that the operation of part I and part II should be carried out by one entity and that ownership and operation should be split. NG remained the owner of part I and acquired ownership of part II via the 93.3% ownership of MSR and became indirectly the 93.3 % owner of CMHN. The operation of both part I and part II was granted to Nürburgring Automotive GmbH ("NAG").¹³ Its business objective is the operation of the race tracks, hotels, safety driving centre, driving school, multifunctional halls, *ring^owerk* as well as all the other destinations at Nürburgring. Mediinvest and Lindner Unternehmensgruppe GmbH & Co Hotel KG held each 50 % shares of NAG. Part II is still operated by Lindner Hotels AG. The Commission has no information about the financial situation of NAG. Therefore, it invites Germany to submit the key financial indicators

¹¹ Until 25 March 2010 the shareholders of MSR were Mediinvest GmbH (49.5 %), Geisler & Trimmel General Contractor GmbH (33.8%), NG (10 %) and Weber Projektierungs- und Realisierungs GmbH (6.7%).

¹² Letter of the German authorities dated 15 November 2011, paragraphs 57, 76 and 77.

¹³ Until 2010, Grundkapital Management GmbH.

included in table 2 regarding this company for the period between 2006 and 2011 as well as for January and February 2012.

2.4. Further information on NG

Financial information

- (23) Between 2006 and 2008 NG suffered from difficulties which have weakened its ability to fund the "Nürburgring 2009" project and the Formula 1 races in 2007, 2009 and 2011.

Table 2: Key financial indicators of NG between 2001 and 2008 (in thousand EUR)

	2001	2002	2003	2004	2005	2006	2007	2008
Year result	241	-503	528	-9 581	-9 672	-40 202	-961	-3 045
Turnover	[...]	[...]	[...]	[...]	[...]	[...]	29 925	22 014
Operating cash flow	-	-	[...]	[...]	[...]	[...]	[...]	[...]
Liabilities towards shareholders and credit institutions	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
All liabilities	-	[...]	[...]	[...]	[...]	[...]	46 773	99 074
Interest paid	[...]	[...]	[...]	[...]	[...]	783	1 237	2 385
Own capital	15 228	18 602	19 130	37 275	27 603	-12 599	-10 227	-9 939

- (24) An examination of the company's annual results' calculation reflects the impact of the financial and operational underperformance. Table 2 shows that the turnover increased slightly from 2006 to 2007. The lack of Formula 1 races resulted in a deterioration in the turnover from EUR 29.925 million in 2007 to EUR 22.014 million in 2008 while over the same period the liabilities of NG towards its shareholders and credit institutions increased by EUR [...] million to EUR [...] million.¹⁴ The project "Nürburgring 2009" resulted in increasing liabilities of NG and increasing costs of interests. Due to reserves for likely losses on Formula 1 races,¹⁵ the own capital was negative.¹⁶ However, the cash flow from operating activities has been increasing between 2006 and 2008.¹⁷
- (25) The Commission has only limited information about the financial situation of NG in 2009 to 2012. The Commission therefore invites the German authorities to provide an overview of the key financial indicators of NG included in table 2 for 2009 to 2011 as well as for January and February 2012.

¹⁴ In 2009, when the Formula 1 race took place, the turnover amounted to EUR 33.322 million.

¹⁵ Letter of the German authorities dated 15 November 2011, paragraph 351.

¹⁶ In 2009, the own capital was EUR -15.827 million.

¹⁷ In 2009, NG resulted in a negative cash flow of EUR [...] million.

Participation of NG in other companies before the "Nürburgring 2009" project

- (26) Before the launch of the "Nürburgring 2009" project, NG had various holding and contractual relations with other companies. The following companies received loans or other support from NG.
- (27) The business objective of Erlebnispark Nürburgring GmbH & Co. KG ("EWN") was the operation of the "Erlebniswelt" with motor sport related attractions at Nürburgring. The company was renamed to ring°werk GmbH & Co. KG on 31 March 2011 and it was 100 % owned by NG until 24 August 2011 when its property accrued to NG and its elimination without formal liquidation was registered in the German trade register.
- (28) The business objective of Fahrsicherheitszentrum am Nürburgring GmbH & Co. KG ("FSZ") is the construction, the ownership and operation of a driving safety centre. It is 41% owned by NG.
- (29) The business objective of Motorsport Akademie Nürburgring GmbH & Co. KG ("MAN") is the support of the German motor sport through the operation of an educational facility. NG is the only owner.
- (30) The business objective of Test & Training International GmbH i.L ("TTI") is the support, launch, construction and operation of driving safety centres. NG owns 35% of the company.
- (31) The business objective of BikeWorld Nürburgring GmbH ("BWN") was trade with new and used motor bikes and the promotion of motor bike tourism in the region. NG sold its 49% of the shares in 2007.
- (32) The business objective of Camp 4 Fun GmbH & Co. KG ("Camp4Fun") was the operation of an off-road-park. The company was 100% owned by NG until 18 October 2010 when its property accrued to NG and its elimination without formal liquidation was registered in the German trade register.

2.5. The aid donors

- (33) In the case at hand, five entities have granted funding: (1) the Land, particularly the liquidity pool administrated by its Finance Ministry, (2) a publicly owned bank, Investitions- und Strukturbank Rheinland-Pfalz GmbH ("ISB"), fully owned by the Land, (3) a public undertaking, RIM, fully owned by ISB, (4) the district of Ahrweiler and (5) NG.

2.6. General information about the measures

Aid amount

- (34) Based on the available information, the measures seem to involve an amount of at least EUR 485 787 149.14 in total. This amount is calculated as the nominal amount of a bank loan (EUR 330 million)¹⁸, a shareholder loan and a subsidy of the Land to NG for Formule 1 race

¹⁸ This amount relates to the "Nürburgring 2009" project and corresponds to measure 8 below.

events (EUR [...])¹⁹, payments in the capital reserve and capital increases by shareholders (EUR [...])²⁰, shareholder loans for the "Nürburgring 2009" project (EUR [...] million)²¹, shareholder loans granted by NG to its subsidiaries before the "Nürburgring 2009" project (EUR [...])²² and revenues from a tax on gambling (EUR 8 million)^{23,24}. The above total amount is not final, as in particular the aid measures may go beyond 2011. Germany is requested to provide the Commission with the information about aid to be granted in the context of the Nürburgring complex in the future (including 2012).

Aid measures

- (35) In the following, the various measures are presented in three broad categories: (1) the facilities and operation of the race ring, (2) the measures for the promotion of tourism, and (3) the organization of Formula 1 racing. Within each category, the measures are presented in a chronological order.

2.6.1. Facilities and operation of the ring

- (36) The first category includes the facilities and operation of the race ring (part I: "tribune"). Measure 1 (the payments in the capital reserve and the increases of own capital), measure 2 (the shareholder loans of NG before the "Nürburgring 2009" project) and partially measure 3 (the liquidity pool of the Land) concern financing before the launch of the "Nürburgring 2009" project in 2007.
- (37) Measure 1 (the payments in the capital reserve and the increases of own capital): Aid in the form of payments in the capital reserve ("*Einzahlungen in die Kapitalrücklage*")²⁵ was

¹⁹ This amount relates to the shareholder loan for the organization of Formula 1 races provided in January 2011 (EUR [...]) as well as financial means for the organization of Formula 1 races in 2011 (EUR 13.5 million), see measures 14 and 16 below.

²⁰ This amount relates to the strengthening of the own capital of NG before the launch of the "Nürburgring 2009" project. It corresponds to measure 1 below.

²¹ This amount (EUR [...] million plus EUR [...] million for 2011) corresponds to measure 14 below.

²² Measure 2 below.

²³ This measure corresponds to measure 13 below. It was introduced in 2009. However, it is not formally linked to the "Nürburgring 2009" project.

²⁴ In order to prevent double counting of aid, neither aid granted from the liquidity pool of the Land (measure 3 below) for the "Nürburgring 2009" project and from the silent participations of RIM in Mediinvest (measure 11 below), i.e. before the restructuring of the project in 2010 (materialised mainly by the provision of the ISB loan of EUR 330 million), nor the loans by NG to MSR (measure 4 below), the loans, letter of comfort and subordination of claims by NG to Cash Settlement and Ticketing GmbH (measure 5 below), the payments to Pinebeck/IPC (measure 6), the cession of claims of MI-Beteiligungs- und Verwaltungs GmbH (measure 7 below) are on a preliminary basis calculated in the total aid amount. As the Commission is not aware of the aid amount received from the guarantee of the Land to the ISB loan (measure 9 below), from the guarantee of the Land to the silent participations of RIM in Mediinvest (measure 12 below), from the lease of the Nürburgring complex (measure 10 below), from the debt subordination (measure 14 below) and from the transfer of shares of MSR (measure 15 below) at this stage, this aid is not calculated in the amount of EUR [...], either.

²⁵ Capital reserve (capital surplus) is a deposit of a shareholder which is not subscribed capital. This term frequently appears as a balance sheet item as a component of shareholders' equity. Capital reserve is used to account for the amount that a firm raises in excess of the par value (nominal value) of the shares (common stock). Taken together, common stock issued and paid plus capital reserve represent the total amount actually paid by investors for shares when issued.

granted by the Land to NG in the amounts of EUR [...] on 1 May 2002 and EUR [...] ²⁶ on 21 December 2004. In addition, the increases of own capital ("*Kapitalerhöhung*") of NG of EUR [...] ²⁷ and of EUR [...] were carried out by the Land and the district of Ahrweiler on 31 August 2004 and 4 September 2007, respectively. The total amount of these sub-measures equals EUR [...].

- (38) Measure 2 (the shareholder loans of NG before the "Nürburgring 2009" project): Independently from the "Nürburgring 2009" project, NG granted to its subsidiaries the shareholder loans listed in the table below. The interest rate was agreed at [...] % and no collaterals were provided.

Table 3: Shareholder loans of NG to its subsidiaries for the "Nürburgring 2009" project

Beneficiary	Duration/Date	Amount (in EUR)	Interest rate
EWN	[...]	[...]	[...]
FSZ	[...]	[...]	[...]
MAN	[...]	[...]	[...]
TTI	[...]	[...]	[...]
BWN and BWNB	[...]	[...]	[...]
Camp4Fun	[...]	[...]	[...]
TOTAL		[...]	

- (39) Measure 3 (the liquidity pool or cash pool(ing) of the Land): These sub-measures consist of loans from a so-called liquidity pool of the Land. In connection with the Formula 1 races and the "Nürburgring 2009" project, NG is included in the cash pooling of the Land since 2003 and 2008, respectively. ²⁸ ISB is also included in that liquidity pool. The aim of the cash pooling is to optimise the use of liquidity within the different holdings, foundations and public undertakings of the Land. The participation of the different undertakings and foundations in the cash pooling is based on a memorandum of understanding between the undertaking/foundation concerned and the Ministry of Finance of the Land. In the event that within the cash pooling, the liquidity demand exceed the available funds, the liquidity gap is financed on short term basis on the capital market. From 23 June 2008 to 30 June 2010 NG used EUR [...] million of its credit line for the "Nürburgring 2009" project. In the context of the "Nürburgring 2009" project ISB used a credit line of EUR 285 million in August 2009. ²⁹

²⁶ Payment in the capital reserve through a waiver of claims from a loan ("*Altdarlehen Bund*").

²⁷ Contribution by the Land through a waiver of claims from a loan ("*Altdarlehen Bund*") of EUR [...] and contribution by the district of Ahrweiler through liquidity of EUR [...].

²⁸ For problems in the management and financing of the liquidity pool, see the 2011 annual report of the Court of Auditors of the Land, part II, pages 7 to 15, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>.

²⁹ The 2011 annual report of the Court of Auditors of the Land, part II, page 11, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>.

- (40) The liquidity pool of the Land was used for financing all three categories – the facilities and operation of the ring, the measures for promotion of tourism and the organisation of Formula 1 races. Currently, there is no credit line for NG in the cash pool of the Land.

Table 4: Use of the liquidity pool by NG for the Formula 1 races and the "Nürburgring 2009" project (30 June 2003 - 13 January 2011)

Year	Amount	Average interest rate per year
2003	[...]	[...]
2004	[...]	[...]
2005	[...]	[...]
2006	[...]	[...]
2007	[...]	[...]
2008	[...]	[...]
2009	195 405 370	[...]
2010	[...]	[...]
2011	[...]	[...]

- (41) Measure 4 (the loan by NG to MSR): In the context of the "Nürburgring 2009" project, NG granted a loan of EUR [...] to MSR with the interest rate of [...] % on 27 December 2007.³⁰ No collaterals were provided.
- (42) Measure 5 (the loans, letter of comfort and subordination of claims by NG to Cash Settlement and Ticketing GmbH ("CST")): From 27 August 2008 to 18 April 2011, NG provided to CST³¹ loans of the total amount of EUR [...] with an interest of [...] %.³² In order to prevent the insolvency of CST, on 23 December 2009, NG provided a letter of comfort ("Patronatserklärung") to CST committing itself until 31 December 2011 to take measures that are necessary for preventing insolvency of CST. The letter of comfort was acted upon.³³ On 13 December 2010 NG declared subordination of its claims ("Rangrücktritt") against CST.
- (43) Measure 6 (the payments to Pinebeck/IPC and the loan to PNG): Between 2006 and 2008, Pinebeck and IPC received a total amount of EUR [...] from NG as consideration for its

³⁰ Neither shareholder loans of EUR [...] granted by MSR to CMHN between 27 May 2008 and 10 June 2009 nor loans of EUR [...] granted by MSR to Grüne Hölle Betriebsgesellschaft mbH between December 2008 and January 2010 are subject of this decision as no State resources seem to be involved.

³¹ The business objective of CST is the operation of a cash free payment system allowing the customers to pay for their visit to any attraction of the complex with a card (ring°card). CST is 50% owned by NG and 50% owned by MI-Beteiligungs- und Verwaltungs GmbH.

³² For problems in the management and financing of the CST, see the 2011 annual report of the Court of Auditors of the Land, part II, pages 16 to 21, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>.

³³ NG was held liable under the letter of comfort with loans of EUR [...] which are already included in the total amount of EUR [...].

services in searching for private investors. In addition, NG granted a loan of EUR 3 million to PNG with the interest rate of [...] % on 15 October 2008. PNG used this loan for granting a loan of EUR [...] to MSR whereas PNG kept EUR [...]. Both loans had collaterals in favour of NG in the value of EUR 3 million.

- (44) Measure 7 (the cession of claims of MI-Beteiligungs- und Verwaltungs GmbH ("MIB")): On 17 April 2009 MIB³⁴ ceded its claims from loans taken by CST of EUR [...] ³⁵ to NG.
- (45) Measure 8 (the ISB loan): In order to save financing costs and to safeguard a long-term financing, a full restructuring of funding arrangements took place on 28 July 2010. The liabilities regarding the liquidity pool of the Land (measure 3), a loan of EUR [...] of Bank für Tirol und Vorarlberg AG to CMHN,³⁶ a loan of EUR [...] of Kreissparkasse Ahrweiler to MSR³⁷ and the silent participations of RIM in Mediinvest worth EUR [...] (measure 11) were restructured in one loan of EUR 330 million given by ISB to NG, MSR and CMHN, upon an instruction by the Land.³⁸ The loan is given in four tranches: tranche 1 of EUR [...] for infrastructure, tranches 2 to 4 of EUR [...] for other investments.³⁹ Tranche 1 relating to the facilities of the ring does not bear interest. Tranches 2 to 4 relate to the measures for promotion of tourism (for the interest rate see table 5 below). Furthermore, the level of the collateralisation of the ISB loan in the form of mortgages equals EUR [...] whereas the collateralisation of tranches 2 to 4 has priority over the collateralisation of tranche 1.
- (46) The following table summarises the conditions of the ISB loan and the at that time applicable base lending rate.

Table 5: Financing conditions of the ISB loan

<i>Tranche No</i>	<i>Loan amount in EUR</i>	<i>Duration</i>	<i>Interest rate</i> ⁴⁰	<i>Commission base reference rate</i> ⁴¹
1	[...]	28.07.2010 – 30.04.2030	[...] %	1.24%
2	[...]	28.07.2010 – 30.04.2030	until 31.12.2012: EONIA plus [...] % = [...] % from 1.1.2013: Commission reference rate	1.24%
3	[...]	28.07.2010 – 30.04.2030	until 31.12.2012: EONIA plus [...] % = [...] % from 1.1.2013: Commission	1.24%

³⁴ The business objective of MIB is the participation in other undertakings and the take over of their business management. MIB is 80% owned by Mr Kai Richter and 20% owned by Mr Klaus König.

³⁵ EUR [...] plus interests of EUR [...].

³⁶ On 25 May 2008, Bank für Tirol und Vorarlberg AG granted a loan of EUR [...] to CMHN.

³⁷ On 18 January 2010, Kreissparkasse Ahrweiler provided a loan of EUR [...] million to MSR.

³⁸ Based on the loan request by the Land, ISB did not carry out usual checks of the loan.

³⁹ Tranche 1 of EUR [...] and tranche 2 of EUR [...] were granted in favour of NG. Tranche 3 of EUR [...] million was granted in favour of NG and MSR for the financing of investments of MSR whereas tranche 4 of EUR [...] million was provided in favour of NG and CMHN for the financing of investments of CMHN.

⁴⁰ For the average EONIA rate as of 28 July 2010, see <http://www.global-rates.com/interest-rates/eonia/2010.aspx>.

⁴¹ For the reference rate, see http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html.

			reference rate	
4	[...]	28.07.2010 – 30.04.2030	until 31.12.2012: EONIA plus [...] % = [...] % from 1.1.2013: Commission reference rate	1.24%

- (47) Measure 9 (the guarantee of the Land to the ISB loan): The Land provided an unconditional and irrevocable guarantee and indemnification statement towards ISB for the NG's fulfilment of all the liabilities from the ISB loan (100 % coverage of liabilities). The Commission does not yet have information to establish whether NG paid any fee for the guarantee. Similarly to the ISB loan, the guarantee relates both to the facilities of the ring and the measures for promotion of tourism.
- (48) Measure 10 (the lease of the Nürburgring complex): As part of the 2010 restructuring process, from 1 May 2010, NG let the race circuit, the leisure park and other facilities to NAG⁴² for the period of 20 years⁴³, without organising an open selection procedure.⁴⁴ The lease related to the facilities and operation of the ring and the measures for the promotion of tourism. However, the organization of Formula 1 races was the subject of a separate concession agreement (measure 17) and it was thus excluded from the lease. On 7 February 2012, NG terminated this lease contract with an immediate effect because NAG did not pay the rent.⁴⁵

2.6.2. Measures for the promotion of tourism

- (49) The measures for the promotion of tourism consist of part IB of the "Nürburgring 2009" project, the entertainment measures, as well as of the entire part II of the project, the construction of hotels. Until July 2010, when the ISB loan was granted, the measures for the promotion of tourism were financed mainly by loans from the liquidity pool of the Land (measure 3) (part IB: entertainment) and by the silent participations of RIM in Mediinvest, guaranteed by the Land (part II: hotels).
- (50) Measure 11 (the silent participations of RIM in Mediinvest): Between 29 May 2008 and 7 July 2009, RIM granted to Mediinvest eleven loans in the total amount of EUR [...] in the form of silent participations ("*stille Beteiligungen*") to finance part II (hotels) of the

⁴² The rent was agreed as follows: from 1 May 2010 to 30 April 2011 90% of EBITDA of the lessee, from 1 May 2011 to 30 April 2012 90% of EBITDA of the lessee, but at least EUR [...] million, from 1 May 2012 to 30 April 2013 85% of EBITDA of the lessee, but at least EUR [...] million, if deficiencies in construction defects have been removed until 30 April 2012, or otherwise 90% of EBITDA of the lessee, but at least EUR [...] million, and as from 1 May 2013 annually 85% of EBITDA of the lessee, but at least EUR 15 million. For a critical analysis of the level of the rent, see the 2012 annual report of the Court of Auditors of the Land, pages 98 to 102, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>.

⁴³ With a unilateral option of NAG to extend the duration of the lease contract [...] by [...] years.

⁴⁴ According to the German authorities, the State aid and procurement relevant elements of the lease of the Nürburgring complex to NAG are subject to court proceedings at national level.

⁴⁵ It cannot be excluded that this termination of the lease contract will be contested in court. Along with the lease contract of the Nürburgring complex (measure 10), the concession agreement for Formula 1 races of 13 December 2010 (measure 17), the lease contract of 17 December 2010 between NAG and CST (operation of ringocard) as well as the lease contract of 17 December 2010 between NAG and Grüne Hölle Betriebsgesellschaft mbH (operation of "Grüne Hölle" vacation resort) were terminated by the Land on 7 February 2012. However, the two latter agreements are not subject of this decision as no State resources seem to be involved.

"Nürburgring 2009" project.⁴⁶ During the same period of time, Mediinvest used these funds to provide loans to MSR with an increased interest.⁴⁷ The silent participations were provided with a fixed remuneration plus a variable remuneration of [...] % which would in principle depend either on the sale of Mediinvest's share of MSR or on the profits made by Mediinvest in 2009. These silent partnerships are summarized hereunder:

Table 6: Silent participations of RIM in Mediinvest

	Date of contract	Amount (EUR)	Duration (until)	Fixed commission/due date	Commission base reference rate⁴⁸	Commission base reference rate plus risk margin applied by Germany
1	[...]	[...]	[...]	[...] % / quarterly	5.19%	5.19%
2	[...]	[...]	[...]	[...] % / quarterly	4.59%	5.59%
3	[...]	[...]	[...]	[...] % / quarterly	5.36%	6.36%
4	[...]	[...]	[...]	[...] % / quarterly	5.36%	6.36%
5	[...]	[...]	[...]	[...] % / quarterly	2.74%	3.74%
6	[...]	[...]	[...]	[...] % / quarterly	2.22%	3.22%
7	[...]	[...]	[...]	[...] % / quarterly	2.22%	3.22%
8	[...]	[...]	[...]	[...] % / quarterly	2.22%	3.22%
9	[...]	[...]	[...]	[...] % / quarterly	2.22%	3.22%
10	[...]	[...]	[...]	[...] % / quarterly	2.22%	3.22%
11	[...]	[...]	[...]	[...] % / quarterly	1.77%	2.77%
TOTAL		[...]				

- (51) Measure 12 (the guarantee of the Land to the silent participations of RIM in Mediinvest): In the above context of loans granted by RIM to Mediinvest, the Land provided vis-à-vis ISB a guarantee for liabilities up to EUR [...] million (100 % coverage of liabilities). The Commission has not received any information whether a guarantee fee was paid.
- (52) As indicated in paragraph (45), in July 2010, the liabilities from the liquidity pool (measure 3) regarding the measures for the promotion of tourism as well as regarding the silent participations of RIM in Mediinvest (measure 11) were all refinanced by tranches 2 to 4 of the ISB loan (measure 8).
- (53) Measure 13 (the revenues from a tax on gambling): In February 2009, an amendment to the Gambling Act of the Land was adopted, enabling the transfer of revenues from a tax on

⁴⁶ Mediinvest did not always pay the interests due to RIM in time.

⁴⁷ The advantages from the increased interests in favour of Mediinvest equal EUR [...] (Opinion of the Court of Auditors of the Land of 15 June 2010, part II, page 20). The Mediinvest's nine loans to MSR in the total amount of EUR [...] million contained the interest rate of [...] % (or [...] % backdated as from [...]) and no collaterals were provided. In addition, Mediinvest granted one loan of EUR [...] million to Pinebeck with the interest rate of [...] % whereas the latter company granted a loan of [...] to MSR.

⁴⁸ See http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html.

gambling to NG.⁴⁹ The transferred tax proceeds were intended to be used to promote tourism. The amount was EUR 1.6 million in 2009 and EUR 3.2 million per year in 2010 and 2011. For future, the amount of [...] million per year is planned.

- (54) Measure 14 (the shareholder loans by the Land to NG and debt subordination for the "Nürburgring 2009" project): For the preparation and implementation of the "Nürburgring 2009" project, NG received from the Land [...] loans [...] of EUR [...] million on 21 August 2007, EUR [...] million on 22 December 2009, EUR [...] million on [...] and EUR [...] million on [...].⁵⁰ The total amount of these four loans equals EUR 37.85 million. In addition, in 2011, the Land provided a loan of EUR 4.95 million. Moreover, the Land declared debt subordination ("*Rangrücktritt*") in relation to the afore-mentioned loan of EUR 20 million on 29 August 2007 in order to avoid insolvency of NG.
- (55) Measure 15 (the transfer of shares of MSR): With the share purchase agreement dated 25 March 2010, the shares of MSR held by Mediinvest (49.5 %) and Geisler & Trimmel (33.8%) were transferred to NG which already held 10% of these shares. The shares of MSR held by Weber (6.7%) were transmitted with the same agreement to RIM. The purchase price amounted to EUR [...] per transaction (i.e. EUR [...] in total).⁵¹

2.6.3. Organisation of Formula 1 races

- (56) In relation to the losses linked to the organisation of Formula 1 racing, the Land provided to NG loans from the liquidity pool (measure 3) equal to EUR [...] ⁵² from 30 June 2003 to 30 June 2009. Measure 3 (the liquidity pool of the Land) thus concerns partially financing before the launch of the "Nürburgring 2009" project.
- (57) Measure 16 (the shareholder loan and subsidy by the Land to NG for Formula 1 races): Furthermore, an [...] loan [...] of the Land to NG of EUR [...] for the offsetting of liabilities related to Formula 1 under the liquidity pool was provided on 11 January 2011. In addition, the Commission has learned from the press and the 2012 report of the Court of Auditors of the Land that the Land additionally provided financial means of at least EUR 13.5 million for the organization of Formula 1 races in 2011.⁵³
- (58) Measure 17 (the Formula 1 concession): On 13 December 2010, a concession agreement regarding the organisation of Formula 1 race events was concluded between NG and NAG.⁵⁴ In this concession agreement, NG asked NAG to organise the Formula 1 races and

⁴⁹ Please note that the same amendment referred also to Entwicklungsgesellschaft Hahn mbH, c.f. Commission decision of 13 July 2011 in case SA.32833 *Alleged State aid to Frankfurt Hahn airport*.

⁵⁰ The declared purpose of the loans of 28 December 2010 and 26 April 2011 is the coverage of negative cash flow for the mid-term planning of NG for the period of 2010 to 2030 as indicated in the report by Ernst & Young of 9 September 2010.

⁵¹ NG and RIM therefore currently hold 93.3% and 6.7% of shares in the MSR, respectively.

⁵² Loans of EUR [...] until the end of 2007 plus an additional loan of EUR [...] on 30 June 2009.

⁵³ See the 2012 annual report of the Court of Auditors of the Land, page 104, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>.

⁵⁴ For a critical analysis of the level of the compensation, see the 2012 annual report of the Court of Auditors of the Land, pages 103 to 107, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>.

committed itself to provide compensation.⁵⁵ On the basis of this agreement, NAG received financial means which were not taken into account for the calculation of the rent under the lease contract concluded between NG and NAG. On 7 February 2012, this concession contract was terminated by the Land along with the termination of the lease contract (measure 10) with an immediate effect.

2.6.4. *Aid by the district of Ahrweiler*

(59) Furthermore, the German authorities are requested to clarify whether there was any aid granted by the district of Ahrweiler in the context of the Nürburgring complex between 2002 and 2011 (date, type of aid, amount, justification), except for the increases of own capital of NG through liquidity of EUR 488 700. Germany is also requested to indicate the amount of aid provided by the district of Ahrweiler in connection with the capital increase of EUR 10 million of 4 September 2007.

2.6.5. *(Re)payments of liabilities*

(60) Also, the Commission invites Germany to submit information about the (re)payments of all liabilities under the measures covered by this decision (including the payments of interests) which occurred between 2002 and 2011 (legal basis, amount, maturity date, payment date, justification) and specifically about any deferrals in these (re)payments.

3. THE POSITION OF GERMANY

(61) The German authorities do not acknowledge the presence of illegal State aid. Their arguments are summarized below following the three categories of measures.

Facilities and operation of the race ring

(62) The first category includes the race ring and its facilities. These measures have been financed mainly by loans from the liquidity pool of the Land that were replaced in 2010 by tranche 1 of the ISB loan which is interest free.

(63) Germany argues that these measures concern the financing of general infrastructure which is not State aid.⁵⁶ Germany states that the support for the race track fulfils all the conditions for general infrastructure funding which is not liable to entail State aid⁵⁷ as

⁵⁵ The compensation received by NAG includes a flat fee from the sold tickets of EUR [...] million, 35% of revenues from the sale of those tickets which are sold after the first [...] tickets, and the revenue from 9.000 tickets sold in 2011 or from [...] tickets sold in the following years. For the Formula 1 races in 2011, the compensation is at least EUR [...] million; if the ticket revenues are below EUR [...] million, the compensation is reduced by EUR 100 000 for each EUR 100 000 of decrease of the revenues below EUR [...] million (e.g. if the ticket revenues are EUR [...] million, the compensation is EUR [...] million); however, the minimum compensation is EUR [...] million. The fees to Formula 1 organisers and drivers as well as the maintenance of the track under the FIA grade 1 licencing are paid fully by NG and they do not fall under the commitments of NAG.

⁵⁶ Referring to Commission decision in N 86/2000 *Zuwendungen für Naturerlebnissräume*, Germany states that infrastructure support is basically no illegal aid. Referring to the Commission staff working document *The EU*

- it is in the public interest. Germany argues that it is not only motor sports, but also other events of general interest to the public which are conducted here, e.g. rock concerts.
 - there is no market. Germany argues that there is no privately constructed, maintained and operated race track which could be compared to Nürburgring and that in general, Formula 1 racing is not profit making (similarly to football world championships).
 - there is non discriminatory access to the ring, which is used also for cultural events. All users are welcome.
- (64) For all measures prior to the launch of the Nürburgring project in 2007⁵⁸ as well as for some facilities of part I of the "Nürburgring 2009" project (tribune, ring^oarena, access facilities, some equipment), Germany argues that all support measures can be considered assigned to general infrastructure (and hence not involving State aid). The *tribune* is considered as an integral part of the race track, as this is the place where the audience watches the race. Thus, Germany considers this facility, in line with the above, to be general infrastructure just as the race track is. The event hall *ring^oarena* is a multifunctional facility which can be used by different users. Also the *access facilities* ("Erschließungsmaßnahmen") such as the *welcome^ocenter* are considered by Germany to constitute elements of general infrastructure.⁵⁹
- (65) Furthermore, Germany indicates that the Nürburgring complex has been let by NG to NAG under market conditions⁶⁰ and that this has been proven by an expert assessment.⁶¹

Measures for the promotion of tourism

- (66) The measures for the promotion of tourism have been financed mainly by loans from the liquidity pool of the Land (part I edutainment) and by the silent participations of RIM in Mediinvest (part II) that were all replaced in 2010 by tranches 2 to 4 of the ISB loan.
- (67) The *ring^owerk* which offers education and entertainment ("edutainment") through a multi media theatre, interactive offers and a historic exposition, the event hall *WARSTEINER*

and sport: background and context, Accompanying document to the White Paper on Sport, 11.7.2007, SEC(2007) 935, section 3.2.2., Germany indicates that infrastructure facilities such as football stadiums or swimming pools can basically be regarded as general infrastructure.

⁵⁷ Germany indicates that the Commission confirmed these three elements in the Commission staff working document *The EU and sport: background and context*, Accompanying document to the White Paper on Sport, 11.7.2007, SEC(2007) 935, section 3.2.2., footnote 73.

⁵⁸ Between 2001 and 2007, aid in the form of payments in the capital reserve ("Einzahlungen in die Kapitalrücklage") and the increase of own capital ("Kapitalerhöhungen") of NG of EUR [...] by the Land and the district of Ahrweiler and aid in the form of a shareholder loan by the Land to NG of EUR [...] million were granted. In addition, NG provided loans to its daughter companies of EUR [...].

⁵⁹ Germany refers to Commission decisions in cases N 60/2006 *Project Mainportontwikkeling Rotterdam*, C 42/2001 *Parc "Terra Mítica"*, N 644/A/B/2002 *Ausbau der kommunalen wirtschaftsnahen Infrastruktur* and C 53/2002 *Space Park Bremen*.

⁶⁰ Germany refers to the judgments in cases T-318/00 *Freistaat Thüringen/Kommission*, 19.10.2005, II-04179, paragraph 330; C-390/98, *Banks*, 20.9.2001, I-6117, paragraphs 77 to 78 and joint cases C-74/00 P and C-75/00 P, *Falck*, 24.9.2002, I-7869, paragraphs 180 and 181.

⁶¹ Germany refers to Commission decision C 4/2008 *Ahoy complex*, paragraphs 46 to 63.

eventcenter,⁶² *Autoworld*, the *parking house* and some equipment are considered by Germany to be a service of general economic interest ("SGEI").⁶³ The State aid element according to Germany is the difference between the normal interest rate for loans and the interest rates on loans from the liquidity pool.⁶⁴ For this aid element, Germany invokes the SGEI decision of 2005, by stating that NG had no turnover in excess of EUR 100 million.

- (68) As regards part II of the project (hotels), Germany argues that the financing was done without State aid in compliance with the market economy investor principle. Germany however also clearly states that the investment of RIM into Mediinvest was done because Mediinvest did *not* manage to organise private financing. Still, it considers that no State aid is involved as market rates have been agreed for all of the loans and that the rates are higher than the rates in the Commission's reference rate communication and the Commission's reference rate notice.⁶⁵
- (69) Moreover, tranches 2 to 4 of the ISB loan bear interest, and Germany admits that the interest rates are lower than market rates, but argues that this is covered by the Commission decision in case N38/2009 *Federal Framework for low interest loans*⁶⁶ ("the Temporary Framework"). Germany in particular argues that NG was not a firm in difficulty on 1 July 2008. In this respect, the German authorities stated that on that date, NG did not fulfill the criteria indicated in points 9 and 10 of the *Community guidelines on State aid for rescuing and restructuring firms in difficulty*⁶⁷ ("the Guidelines"). In addition, Germany checked six elements that are contained in point 11 of the Guidelines. It concluded that there is no clear-cut result for three elements (increasing losses, mounting debt, rising interest charges), that two elements are not present (diminishing turnover, declining cash flow) and that one usual sign of a firm being in difficulty is present (falling or nil net asset value).

⁶² Referring to the judgment of the Court in joined cases C 223/99 and C 260/99 *Agora v. Ente Autonomo Fiera Internazionale de Milano*, 10.5.2001, I-03605, paragraph 13, Germany states that the organisation of congresses, trade fairs and conferences is in general interest.

⁶³ Referring to the judgements in cases T-17/02 *Fred Olsen*, 15.6.2005, II-2031, paragraph 216, T-289/03 *BUPA vs Commission*, 12.2.2008, II-81, paragraphs 165 to 169, and T-309/04 *TV2*, 22.10.2008, II-2935, paragraphs 113 seq., Germany indicates that the Member States have a broad discretion regarding the definition of a SGEI and that the Commission's role is limited to the control of a manifest error. Moreover, Germany states that the entrustment acts are the statutes of NG, as precised by the approval of the project "Nürburgring 2009" by the supervisory board of NG covered by a government decision of the Land (referring to Commission decision in case N 37/2003 *BBC Digital Curriculum*, Germany points out that the Commission accepts that based on a general authorisation clause, a detailed description of a public service obligation can be specified subsequently), and that the parameters for the calculation of the compensation can be found in the updated business plans. Germany admits that it would be more transparent to include all relevant aspects of the entrustment in one document. According to Germany, such a formal act is not needed anymore, since NG is not present on the market anymore and therefore any possible aid is lacking any distortive effect on competition.

⁶⁴ According to Germany, *ring°werk*, *Autoworld* and the *parking house* are subject to a market failure and they are potentially structurally loss making.

⁶⁵ *Communication from the Commission on the revision of the method for setting the reference and discount rates*, OJ C 14, 19.01.2008, p. 6. As for the first silent participation of 29 May 2008, *the Commission notice on technical adaptations to the method for setting the reference and discount rates*, OJ C241, 26.8.1999, p. 9.

⁶⁶ Commission decision of 19.02.2009 in case C 38/2009 *Federal Framework for low interest loans*: http://ec.europa.eu/eu_law/state_aids/comp-2009/n038-09-en.pdf

⁶⁷ OJ 244/2 of 1.10.2004.

Organisation of Formula 1 races

(70) As regards the concession agreement regarding the organisation of Formula 1 race events, the government of the Land sees some value for the region in offering these events. However, Germany clearly admits that Formula 1 races are structurally loss making. Germany points out that all Formula 1 races result in a deficit. Germany again invokes the SGEI decision of 2005 to find that the measure is compatible with the internal market.

4. ASSESSMENT

(71) The Commission is of the view that the following measures may qualify as State aid in favour of one or more aid beneficiaries.⁶⁸

1. Facilities and operation of the ring

- The payments in the capital reserve and the increases of own capital (measure 1);
- The shareholder loans of NG before the "Nürburgring 2009" project (measure 2);
- The short-term financing of NG and ISB through the cash pooling between undertakings of the Land (measure 3);
- The loan by NG to MSR (measure 4);
- The loans, letter of comfort and subordination of claims by NG to CST (measure 5);
- The payments to Pinebeck/IPC (measure 6);
- The long-term re-financing of NG, MSR and CMHN through the ISB loan (measure 8) and the underlying guarantee provided by the Land (measure 9); and
- The lease of the Nürburgring complex by NG to NAG (measure 10).

2. Measures for the promotion of tourism

- The shareholder loans of NG before the "Nürburgring 2009" project (measure 2);
- The short-term financing of NG and ISB through the cash pooling between undertakings of the Land (measure 3);
- The loan by NG to MSR (measure 4);
- The loans, letter of comfort and subordination of claims by NG to CST (measure 5);
- The loan to PNG (measure 6);
- The cession of claims of MIB (measure 7);
- The lease of the Nürburgring complex by NG to NAG (measure 10);
- The silent partnerships of RIM in Mediinvest (measure 11) and the underlying guarantee provided by the Land (measure 12);
- The revenues of NG from a tax on gambling (measure 13);

⁶⁸ A measure is listed under more than one category, if it relates to one, two or all three categories.

- The long-term re-financing of NG, MSR and CMHN through the ISB loan (measure 8) and the underlying guarantee provided by the Land (measure 9);
- The shareholder loans by the Land to NG and debt subordination for the "Nürburgring 2009" project (measure 14); and
- The transfer of shares of MSR held by Mediinvest and Geisler & Trimmel to NG and RIM (measure 15).

3. Organisation of Formula 1 races

- The short-term financing of NG and ISB through the cash pooling between undertakings of the Land (measure 3);
- The shareholder loans by the Land to NG for Formula 1 races (measure 16); and
- The concession regarding the organisation of Formula 1 race events granted by NG to NAG (measure 17).

4.1. Existence of State aid

(72) 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 Member States, be incompatible with the internal market."

(73) The criteria laid down in Article 107 (1) TFEU are cumulative. Therefore, in order to determine whether the 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 threatens to distort competition, and affect trade between Member States.

4.1.1. Economic activity and notion of undertaking

(74) As regards the existence of State aid, it is necessary to determine whether the potential beneficiaries are engaged in an economic activity.⁶⁹

(75) Commercial motor sport racing including Formula 1 racing, leisure activities, accommodation as well as tourism are provided against remuneration on markets all across the EU and can be considered economic activities. Consequently, those who own, operate, build or design race circuits, leisure parks or hotels engage in economic activities, regardless of their legal status or the way in which they are financed. They are therefore undertakings within the meaning of Article 107 (1) TFEU, and the rules on State aid apply to them.⁷⁰

(76) In relation to the construction of the ring tribune and other ring related infrastructure, it should be pointed out that already the construction of an infrastructure with a view to its

⁶⁹ Case C-35/96 *Commission v Italy* [1998] ECR I-3851 and joined cases C-180/98 to 184/98 *Pavlov* [2000] ECR I-6451.

⁷⁰ Cases C-159/91 and C-160/91, *Poucet v AGV* and *Pistre v Cancave* [1993] ECR I-637.

later commercial exploitation⁷¹, to which it is intrinsically linked, which seems to be the case here, will constitute an economic activity, which can be analysed under Article 107 (1) TFEU.

- (77) The argument that the race ring was also used for other activities, like rock concerts and similar events, does not appear relevant. Apart from the fact that the focus of the race ring is indeed on racing, it seems hard to see why the multifunctional use of an infrastructure facility should speak against classifying public support as State aid to the company running the facility (here NG until April 2010, which at that time was also the owner, and NAG from May 2010). Also the related argument that all users have non-discriminatory access is without relevance for possible aid to the *operator*.
- (78) For the above reasons, the Commission does not agree with the German position that the financing of Nürburgring race track facilities between 2002 and 2007 is not subject to State aid rules.
- (79) With regard to the financing of the tribune, the multifunctional hall *ring*°arena and the access structures (through the loans from the liquidity pool and shareholders loans, or later through the ISB loan), the same prima facie reasons apply to consider that this infrastructure is intended to be used commercially, i.e. in the provision of goods or services on the market.
- (80) In addition, the Commission notes that the race circuit and leisure park which are the subject of the present decision were developed by NG on a commercial basis. NAG as the manager of the Nürburgring facilities has charged users rates for their use. Hotels were developed by Mediinvest and owned by MSR and CMHN on a commercial basis and are now owned by NG and RIM on the same basis. As a development bank of the Land, ISB is present on the German financial market. Geisler & Trimmel and Weber are companies active in construction business. NG, ISB, NAG, Mediinvest, MSR, CMHN, Geisler & Trimmel and Weber are therefore undertakings in the sense of EU State aid rules.

4.1.2. *State resources and imputability to the State*

- (81) For the measures to be qualified as State aid in the sense of Article 107 (1) TFEU, (a) they have to derive from the State's resources, either indirectly or directly by any intermediary body acting by virtue of powers conferred on it and (b) they have to be imputable to the State.⁷²
- (82) Some of the measures are not financed directly out of the public budget of the Land or the district of Ahrweiler, but they are supported indirectly, for instance, through the cash pooling facility of the Land. Nevertheless, for the reasons set out below, the Commission preliminary view is that at all material times the State exercised direct or indirect control on the resources under consideration.

⁷¹ Joined cases T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt v European Commission* and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission*, not yet published, paragraphs 94 seq., in particular paragraph 100.

⁷² See case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397.

- (83) The Court has 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, but that the imputability to the State of the actions of that undertaking has to be established. The Court indicated that such imputability might be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken.⁷³ 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 compass of the measure, its content or the conditions which it contains⁷⁴.

Facilities and operation of the race ring

- (84) The payments in the capital reserve and the increases of own capital of NG were granted by the Land and the district of Ahrweiler. They thus stem from State resources and are imputable to the State.
- (85) As for the participation in the cash pooling, a memorandum of understanding is concluded between the undertaking concerned and the Land. The Land is the majority owner of all undertakings participating in the cash pooling, for this reason they are clearly public undertakings according to Article 2 (b) of *Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings*.⁷⁵ And, in the event of a liquidity gap in the cash pooling the Land, the provider of the cash pooling facility obtains short-term financing on the money market and passes these funds to the undertakings participating in the cash pooling facility.⁷⁶ Thus, the Commission considers that the funding provided by the cash pooling facility entails a transfer of State resources. In this context the Commission invites the German authorities to provide all memoranda of understanding relating to the Nürburgring complex.
- (86) Concerning the imputability to the State, first, a memorandum of understanding for participation in the cash pooling facility is concluded between the Land and undertakings involved. The Land appears to manage the cash pooling facility and provides funding from the market, if needed. These fundings appear to be obtained by the Land at the money market and passed through to the cash pooling. Therefore, the public authorities appear to be present when the conditions of the use of the cash pooling facility are decided.

⁷³ Judgment *Stardust Marine*, cited above, paragraphs 52 and 57.

⁷⁴ Judgment *Stardust Marine*, cited above, paragraphs 55 and 56.

⁷⁵ Directive of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings, OJ L 318, 17 November 2006, page 17.

⁷⁶ Commission decision of 13 July 2011 in case SA.32833 *Alleged State aid to Frankfurt Hahn airport*, paragraph 29.

- (87) Second, as regards the supervision of the activities of the undertakings participating in the cash pooling facility, the Land as their majority shareholder is represented in the supervisory board.
- (88) Third, according to the Court of Auditors of the Land, the provision of funds from the liquidity pool falls under the fiscal interest of the Land safeguarded by its Finance Ministry.
- (89) Based on these elements it appears that the State is in a position to control the activities of the cash pooling facility and it is unlikely that it was not involved in the decisions concerning the management of this facility. Therefore, at this stage the Commission takes the preliminary view that the decisions concerning the financing by the cash pooling facility are imputable to the public authorities.
- (90) At this stage the Commission has however no information on how the financing conditions of the cash pooling facility are set, except the average annual interests.
- (91) The Commission observes in this regard that it appears likely that the Land, when borrowing money on the wholesale market, obtains more favourable conditions than the undertakings in question, for instance NG and ISB, would obtain, as its default risk is much lower than that of the undertakings making use of the cash pool.
- (92) It has further to be established whether the loan provided by ISB to NG, MSR and CMHN must be regarded as State resources. In this respect, it is to be recalled that Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Land, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources. In the present case, ISB is a 100 % owned by the Land, for this reason it is a public undertaking according to Article 2 (b) of Commission Directive 2006/111/EC.⁷⁷
- (93) As regards the imputability to the State, the Commission first notes that ISB is the development bank of the Land and plays a fundamental role in regional development policy. In the present case ISB provided financing for a race circuit and leisure park complex that in view of the Land plays a fundamental role in the regional economic development.
- (94) Second, as regards the supervision of the activities of ISB by the State, the Commission observes that ISB's supervisory board ("Verwaltungsrat") consists of five representatives of public authorities (e. g. Secretary of State in the Ministry of Finance of the Land and Secretary of State in the Ministry of Economy, Climate Protection, Energy and Urban Planning of the Land) and two representatives of public bodies (Chamber of Crafts and Chamber of Industry and Commerce).

⁷⁷ OJ L 318, 17 November 2006, page 17.

- (95) Third, the ISB loan includes an explicit provision indicating that the Land, represented by its Finance Ministry, instructed ISB by letter of 28 July 2010 to make long-term funding available to NG, MSR and CMHN.
- (96) Based on these elements it appears that the State is in a position to control the activities of ISB and it is unlikely that it was not involved in important decisions concerning the financing of the economic exploitation of the race track and leisure park. Therefore, at this stage the Commission takes the preliminary view that the decision to refinance the loans to NG from the liquidity pool by the ISB loan is imputable to the public authorities.
- (97) The Commission also observes that ISB is a special credit institution in the sense of Commission decision in case E 10/2000.⁷⁸ Special credit institutions are particularly closely linked to the State, because they enjoy the benefits of *Anstaltshaftung* and/or *Gewährträgerlast*. Their activities are limited to promotional tasks, which support the structural, economic and social policies and the public tasks of their public owners in accordance with their public mission. Due to this particular structural set-up, the Commission takes the preliminary view that any decision by such a special credit institution is imputable to the State.
- (98) The guarantee to the ISB loan was granted by the Land. It thus stems from State resources and is imputable to the State. The guarantee must be assessed when the guarantee is given, not when it is invoked.
- (99) The lease of the Nürburgring complex by NG to NAG also involves State resources. The only shareholders of NG, the owner of the Nürburgring complex, are the Land and the district of Ahrweiler. For this reason NG is a public undertaking according to Article 2 (b) of Commission Directive 2006/111/EC⁷⁹.
- (100) An indication of the imputability to the Land of the lease of the Nürburgring complex is the Ernst and Young's assessment of the business plan of 11 December 2009 presenting the said lease as a significant part of the planned separation of the ownership and operation of that complex. This assessment was commissioned by the Ministry of Economy, Transport, Agriculture and Wine of the Land. The Commission invites Germany and third parties to comment on the imputability of this measure. The Commission also requests Germany to submit all information and documents (e.g. instructions by the Land, its government or its officials) necessary to assess the issue of imputability in accordance with the criteria mentioned in paragraph (83).
- (101) As regards actions by NG in general, on various occasions NG's supervisory board, which represents the Land and the district of Ahrweiler as the shareholders, has intervened in the process. In the meeting of the supervisory board of 28 August 2005 its vice-president declared that the award of the project to private investors can take place only if the risk for the Land is small.⁸⁰ In a workshop of the supervisory board on 20 December 2005 the vice-president of the supervisory board also stated that a decision about an investment of NG

⁷⁸ OJ C 150/2002.

⁷⁹ OJ L 318, 17 November 2006, page 17.

⁸⁰ Opinion of the Court of Auditors of the Land of 15 June 2010, part I, page 14.

must be taken in the new cabinet after the elections in the parliament of the Land.⁸¹ Moreover, the government of the Land informed about the investment Erlebnisregion Nürburgring in the government declaration of 30 May 2006 and the Council of Ministers took note on 19 September 2006 of the intention of the supervisory board of NG to implement the project under substantial participation of a private third party.⁸² In addition, the Ministry of Economy, Transport, Agriculture and Wine of the Land as well as the Finance Ministry of the Land provided on a continuous basis opinions, comments or instructions regarding the project.⁸³ Finally, the project "Nürburgring 2009" was presented by the Land to the members of the public on 2 December 2009.

- (102) As regards the shareholder loans of NG both before the "Nürburgring 2009" project and to MSR, the loans, letter of comfort and subordination of claims by NG to CST, the payments to Pinebeck/IPC and the loan to PNG and the cession of claims of MIB, the Commission cannot exclude that these measures granted by NG can be considered State resources imputable to the State. The Commission therefore invites Germany and third parties to comment on this issue. The Commission also requests Germany to submit all information and documents (e.g. instructions by the Land, its government or its officials) necessary to assess the issue of imputability in accordance with the criteria mentioned in paragraph (83).

Measures for the promotion of tourism

- (103) As for the short-term financing of NG through the cash pooling between undertakings of the Land, the long-term re-financing of NG through the ISB loan and the underlying guarantee provided by the Land as well as the lease of the Nürburgring complex to NAG, the same reasoning as for the facilities of the race ring applies.
- (104) As to the silent participations of RIM in Mediinvest, RIM is 100 % owned by ISB which is 100 % owned by the Land. For this reason RIM is a public undertaking according to Article 2 (b) of Commission Directive 2006/111/EC.⁸⁴ Its participations must thus be regarded as State resources. The imputability regarding the loans by RIM follows from the fact that the Finance Ministry of the Land has taken over the related risks and also the Ministry of Economy, Transport, Agriculture and Wine agreed to these silent participations.⁸⁵ Moreover, the first and the second silent participation by RIM was granted as a consequence of a phone call of the Finance Minister of the Land to ISB of 6 May 2008 during which he asked that assistance for the financing for Mediinvest should be provided.⁸⁶
- (105) The guarantee to the RIM silent participations in Mediinvest was granted by the Land. It thus stems from State resources and it is imputable to the State. The guarantee must be assessed when the guarantee is given, not when it is invoked.

⁸¹ Opinion of the Court of Auditors of the Land of 15 June 2010, part I, page 14.

⁸² Opinion of the Court of Auditors of the Land of 15 June 2010, part I, page 15.

⁸³ Opinion of the Court of Auditors of the Land of 15 June 2010, parts I and II.

⁸⁴ OJ L 318, 17 November 2006, page 17.

⁸⁵ Opinion of the Court of Auditors of the Land of 15 June 2010, part II, page 21.

⁸⁶ Opinion of the Court of Auditors of the Land of 15 June 2010, part II, page 16.

- (106) The revenues of NG from a tax on gambling are direct fiscal aid by the Land. The annual amount of EUR 3.2 million is paid out of the budget of the Land to a single undertaking and therefore, the funds thereby obtained are granted by the State within the meaning of Article 107(1) TFEU. These revenues are clearly based on a decision of the Land implemented through its law and therefore, they are imputable to the State.
- (107) The shareholder loans and debt subordination by the Land to NG for the "Nürburgring 2009" project also involve State resources. They are allocated by the Land and are imputable to the State. The Commission asks Germany to clarify whether the district of Ahrweiler provided any shareholder loans for the "Nürburgring 2009" project.
- (108) The transfer of shares of MSR held by Mediinvest and Geisler & Trimmel to NG and the transfer of shares of MSR held by Weber to RIM involve State resources. The shareholder of NG and RIM is the Land and in case of NG also the district of Ahrweiler. For this reason NG and RIM are public undertakings according to Article 2 (b) of Commission Directive 2006/111/EC⁸⁷.
- (109) An indication of the imputability of the transfer at stake to the State is the Ernst and Young's assessment of the business plan of 11 December 2009 presenting the said transfer as a significant part of the planned separation of the ownership and operation of the Nürburgring complex. This assessment was commissioned by the Ministry of Economy, Transport, Agriculture and Wine of the Land. The Commission invites Germany and third parties to comment on the imputability of this measure. The Commission also requests Germany to submit all information and documents (e.g. instructions by the Land, its government or its officials) necessary to assess the issue of imputability in accordance with the criteria mentioned in paragraph (83).

Organisation of Formula 1 races

- (110) As for the short-term financing of NG through the cash pooling between undertakings of the Land, the same reasoning as for the facilities of the race ring applies.
- (111) The shareholder loans by the Land to NG for Formula 1 racing also involve State resources. They are allocated by the Land and they are imputable to the State. The Commission asks Germany to clarify whether the district of Ahrweiler provided any shareholder loans for Formula 1 racing.
- (112) The concession regarding the organisation of Formula 1 race events granted by NG to NAG also involves State resources. The only shareholders of NG are the Land and the district of Ahrweiler. For this reason NG is a public undertaking according to Article 2 (b) of Commission Directive 2006/111/EC⁸⁸.
- (113) It must be highlighted that the Land has the right to take any decision regarding the future organisation of Formula 1 events. This fact illustrates that the concession for the organisation of Formula 1 races is imputable to the State. The Commission invites Germany

⁸⁷ OJ L 318, 17 November 2006, page 17.

⁸⁸ OJ L 318, 17 November 2006, page 17.

and third parties to comment on the imputability of this measure. The Commission also requests Germany to submit all information and documents (e.g. instructions by the Land, its government or its officials) necessary to assess the issue of imputability in accordance with the criteria mentioned in paragraph (83).

4.1.3. *Economic advantage*

- (114) In the submission of the German authorities, an argument was made that if the Commission came to the result that NAG paid a market price for the lease, no State aid would be involved.⁸⁹ The German authorities exclude such aid at the level of NAG, as – according to them - it paid a market price and under the application of the market economy investor principle thus does not receive any advantage. However, this argument seems to be flawed. Indeed, without the aid measures, such facilities would not be available for NAG and it is not established that the rent paid by NAG would cover all the construction costs of the facilities. Therefore, there is an economic advantage for NAG, which would not exist in the absence of aid. Furthermore, Germany seems to draw wider implications from this as it argues that, in addition, *all* previous support to NG should by the same token not be considered as aid, which seems not acceptable. The argumentation that NG is currently no longer 'in the market' as Germany puts it,⁹⁰ does not exclude that it might have received State aid in the past. Therefore, the Commission needs to assess the legality of all measures preceding the conclusion of the lease agreement.

Facilities and operation of the race ring

- (115) The costs of the Nürburgring facilities, including market conform interests from loans and market conform fees for guarantees, should normally be borne by the operator of the complex (NG until April 2010, NAG thereafter). In the case at hand, the Commission raises doubts for the reasons expressed below whether NG paid any interests or fees (shareholder loans, increase of own capital, guarantee for ISB loan) or interests based on market rates (liquidity pool, ISB loan). Moreover, it is doubtful that these interests or fees are reflected in the level of rent paid by NAG for the lease of the Nürburgring complex. Therefore, the Commission raises doubts whether the market investor principle has been complied with. In this context, Germany is invited to submit all its business plans established for the "Nürburgring 2009" project.
- (116) In relation to the payments in the capital reserve and the increases of own capital of NG of EUR [...], the German authorities have not clearly indicated by which considerations their decision to invest in NG was motivated. It appears that such capital injections as those made by the Land and the district of Ahrweiler would be deemed unacceptable for a market economy investor if the expected return on the investment would be below the return that could be expected for a comparable investment. Given the persistent poor financial situation

⁸⁹ Letter of the German authorities dated 15 November 2011, paragraphs 281 to 287.

⁹⁰ Germany states that the elimination of NG from a market corresponds in its economic effect to insolvency and that it excludes further distortive effects for the competitors. In this respect Germany refers to Commission decisions in cases *Seleco SpA*, 2.6.1999, 2000 L 227/24, paragraph 113, *Brauereibedarfsindustrie*, 22.10.1986, 1987 L 20/30 and *MERCO*, 4.11.1992, 1993 L 55/54.

of NG and its permanent dependence on State capital and loans from the liquidity pool, it appears likely that a market economy investor would not have invested in NG since, on the one hand, the risks would be too high and, on the other hand, the expected profit, if any, would be too low to make such investment reasonable. In view of the small profit NG made in 2001 and 2003 and the negative business results in the following years, it is doubtful that a private investor operating under normal market conditions would have found it profitable or possible to contribute capital worth almost EUR [...] million over a period of five years. Thus the Commission believes at this stage that the decision of the public authorities to participate in the capital injections provided an economic advantage to NG. In this case, the amount of the advantage could be as high as the total amount contributed by the State.

- (117) 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 lender 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 aid⁹¹.
- (118) In the present case, the Commission has to assess whether the conditions of the cash pooling facility (hereinafter referred to also as a "short-term loan" or "short-term financing") provided to NG and ISB confer an economic advantage to them, which the recipient undertakings would not have obtained under normal market conditions.
- (119) The Commission assumes that the principle of a lender in a market economy was not respected as the cash pooling facility does not provide financing at market conditions. As regards the relevant date to be taken into account with a view to comparing the conditions and the interest rate of short-term loan provided by the cash pooling facility in question with the market conditions and interest rates, the Commission is of the opinion that this should be the date of the legally binding act according to which the credit line was granted.
- (120) The Commission has doubts whether the conditions of the cash pool reflect the assessment of the probability of default of NG obtaining these short-term financing. Furthermore, the cash pooling facility is placed at disposal of NG in form of a daily available credit line. At the current stage, it appears that NG is not paying any fee with the exception of the interest charged on the used credit line amount. The German authorities are invited to provide further information about the conditions of the credit line provided by the cash pooling facility to NG.
- (121) According to its decision practice, in order to determine whether the financing 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*

⁹¹ 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, paragraph 51.

*and discount rates*⁹² of 19 December 2007 (hereinafter: the "reference rate communication").

- (122) The reference rate communication 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 a base rate based on one-year inter-bank offered rates (IBOR), to which risk 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 or strong rating and no 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 up to 1000 basis points).
- (123) At the current stage the Commission has no information about the base lending rate of the financing provided by the cash pooling facility. As mentioned above, the Communication envisages normally 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 German authorities have not provided arguments in this respect. Thus, the Commission invites the German authorities to provide further details on the applicable base rate.
- (124) At the current stage the Commission has no information how the applicable risk margin of the credit line has been determined. The German authorities are asked to clarify whether the short-term financing is provided to NG at the financing conditions of the Land and which rating the Land enjoyed at the time the credit lines were granted.
- (125) The Commission has no information whether the risk margin was set according to an assessment of the probability of default of NG.
- (126) The Commission notes that that 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 German authorities to provide ratings of NG established at the time the credit lines were 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.
- (127) In absence of any rating, the Commission notes 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 400 basis points in case of high level of collateralisation, 600 basis points in case of normal collateralisation and 1000 basis point, if there is no collateralisation.

⁹² OJ C 14, 19.01.2008, p. 6.

- (128) In the present case, the Commission observes that the short-term financing appears to be granted without underlying collaterals. Therefore, it takes the preliminary view that 1000 basis points should have been added to the base lending rate.
- (129) In addition, the Commission argues that the simple fact that the reference rates have been respected does not exclude the existence of State aid and that the reference rate communication rather acts as a proxy that can be disregarded if there is better evidence of the actual market conditions.⁹³ Therefore, the Commission should rather examine the circumstances under which the loans from the cash pooling were granted. They do not support the view that a private market investor would have given the credits under these conditions.
- (130) As regards the loan of EUR 285 million taken by ISB from the liquidity pool of the Land, the advantage obtained by ISB compared to a situation where it raised funds on the capital market was EUR 900 000 thousand per year.⁹⁴ In this context, the Commission requests Germany to provide all information and documents on the basis of which the Commission would be able to verify whether the loan of EUR 285 million taken by the ISB from the liquidity pool of the Land or other loans taken by the ISB in connection with the Nürburgring complex from the liquidity pool of the Land, if any, were granted at market conditions.
- (131) Furthermore, the Commission invites Germany to submit information about all actual payments of the interest by NG and ISB to the liquidity pool (amount and date) in connection with the Nürburgring complex and any deferrals in payments.
- (132) On the basis of what precedes, the Commission takes at this stage of investigation the preliminary view that the conditions of the cash pooling facility of the Land cannot be compared to those of a market economy lender and therefore constitute an advantage to NG and ISB.
- (133) The Commission further invites the German authorities and third parties to submit their observations as to whether, in the present case, the short term financing provided by the cash pooling facility referred to above was granted at market conditions.
- (134) Furthermore, the Commission has to assess whether the conditions of the loan provided by ISB to NG, MSR and CMHN confer an economic advantage to it, which the recipient undertakings would not have obtained under normal market conditions.
- (135) The German authorities argue that the principle of an investor in a market economy was respected as the ISB loan was granted at market conditions. According to Germany, tranche 1 of the loan was not subject to State aid rules and tranches 2 to 4 were granted under the Temporary Framework.

⁹³ See Commission decision of 23 June 2010 in case C 38/2007 (ex NN 45/2007) *Arbel Fauvet Rail*.

⁹⁴ The 2011 annual report of the Court of Auditors of the Land, part II, page 11, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>.

- (136) In order to establish market conditions, the Commission has established as a proxy the Commission reference rate. It results from the proxy nature of the Commission reference rate that where the Commission is in the presence of other indicators in a concrete file, these other indicators may prevail.
- (137) In the present case, the Commission observes that the loans in question are granted by a special credit institution in the sense of Commission decision in case E 10/2000. In view of the special status of ISB, the Commission has doubts whether the loans are granted at market conditions.
- (138) Furthermore, the Commission has also assessed whether the application of the Commission reference rate to the present case hints to the presence of an advantage.
- (139) 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 (date of the ISB loan agreement).
- (140) Table 2 above summarises the conditions of the ISB loan and at that time the applicable base lending rate.
- (141) As stated further above in paragraphs (121) and (122), the reference rate communication establishes a method for setting reference and discount rates that are applied as a proxy for the market rate.
- (142) In the present case the base rate for tranches 2 to 4 of the ISB loan is EONIA plus [...] % until 31 December 2012 and the Commission reference rate from 1 January 2013.
- (143) The Commission questions the relevance in this particular case to use the EONIA rate as the base rate to determine the interest rate of the loan. As mentioned in paragraph (122), 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 German authorities have not provided arguments in this respect. Indeed, as regards the methodology, the EONIA interest rate can be expected to be, under normal market circumstances, lower than the interest rates for longer maturities. Moreover, as shown in table 5, the sum of the EONIA and [...] % equals [...] % which is below the Commission base reference rate of 1.24%. Thus, the Commission has doubts whether the use of the EONIA rate can be justified in the present case.
- (144) At the current stage, the Commission has limited information how the risk margins of the ISB loan were determined. According to Germany, the risk margin of tranches 2 to 4 amounts to 400 basis points.
- (145) Furthermore, the level of the collateralisation of the ISB loan of EUR 330 million in the form of mortgages equals EUR [...].

- (146) In this situation the Commission can base itself on the reference rate communication to assess if the loan has been granted at a favourable interest rate. The risk margins according to the reference rate communication 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 or strong rating and no 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 up to 1000 basis points).
- (147) NG is not rated by a rating agency. The German authorities assume that NG has a weak rating. Moreover, the loss given default calculated in accordance with the reference rate communication⁹⁵ equals 26.35% and the collateralisation is thus low in the case at stake. Under these presumptions, the loan margin is 650 basis points. In the present case, however, the Commission has doubts whether NG's financial situation corresponded to the rating category "B" ("weak") suggested by the German authorities. Thus, the Commission is not in a position to establish whether the requirements for the calculation of the State aid element are fulfilled.
- (148) The Commission notes that that 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 therefore invites the German authorities to explain how the rating of NG was established 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. In absence of an rating, the Commission notes 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 400 basis points in case of high level of collateralisation, 600 basis points in case of normal collateralisation and 1000 basis point, if there is no collateralisation.
- (149) At this stage, it can also not be excluded that the total nominal value of the ISB loan would qualify as State aid, if further Commission investigation confirms that no investor would have granted the loan. In this respect, the German authorities are invited to explain why no private financing for the "Nürburgring 2009" project could be found. In the context of the ISB loan, the information and documents about financial standing of NG, MSR and CMHN and their business plans should also be provided to the Commission.
- (150) In the present case, the fulfilment of the liabilities from the ISB loan is guaranteed 100% by a guarantee of the Land. At the current stage the Commission has no information about the type and underlying conditions of the guarantee. The German authorities are invited to provide information and documents on the basis of which the Commission would be able to verify whether a guarantee premium was paid by NG, MSR and CMHN at market conditions, taking into account their financial situation.

⁹⁵ Footnote 2 of the reference rate communication.

- (151) According to point 3.2 of the *Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees*⁹⁶, with regard to individual State guarantee, the fulfilment of the following cumulative conditions is sufficient to rule out the presence of State aid element in an individual guarantee: "(a) *The borrower is not in financial difficulty [...], (b) The extent of the guarantee can be properly measured when it is granted, [...]* (c) *The guarantee does not cover more than 80 % of the outstanding loan or other financial obligation [...], (d) A market-oriented price is paid for the guarantee [...].*"
- (152) At the current stage the Commission cannot conclude that the guarantee granted by the Land was granted under normal market conditions. On the basis of what precedes the Commission takes the preliminary view that the ISB loan and the respective guarantee by the Land have not been granted at market conditions.
- (153) As regards the lease of the Nürburgring complex to NAG, the Commission raises doubts whether the rent is at market conditions. The German authorities indicate that the rent is based on an assessment of an independent expert, the obligations acquired by the lessee and an expert review regarding market opportunities and risks and that it was agreed under normal market conditions through negotiations. Germany submitted an analysis of [...] of 29 September 2011 concluding that the agreed minimum rent is between [...] and [...]. According to Germany, that analysis shows that the lease is free of State aid as it has been concluded on market terms.
- (154) In this respect, it has to be taken into account that the sum of the minimal rent stipulated for in the lease contract for the duration of the lease contract from 1 May 2010 until 30 April 2030 equals EUR 280 million. This amount does not cover the cost of the "Nürburgring 2009" project in the amount of EUR 330 million plus the interest from the ISB loan.⁹⁷ Therefore, this unprofitability suggests that this measure is not compliant with the market economy investor principle. In the rent amount, a private investor would reflect not only the costs of the leased property and the interest from the underlying loan, but also a reasonable profit. The Commission invites Germany to submit an indication of the rent actually paid by NAG including the dates of the payments.
- (155) Indeed, any possible difference between the actual rent and a rent at market conditions could be State aid. The Commission thus raises its doubts whether the costs of the "Nürburgring 2009" project are covered by the total sum of the rent to be paid for the lease of the Nürburgring complex over the duration of the lease contract.

Measures for the promotion of tourism

- (156) As for the short-term financing of NG through the cash pooling between undertakings of the Land, the long-term re-financing of NG, MSR and CMHN through the ISB loan and the underlying guarantee provided by the Land as well as the lease of the Nürburgring complex to NAG, the same reasoning as for the facilities of the race ring applies.

⁹⁶ OJ C 155, 20 June 2008, page 10.

⁹⁷ See the 2012 annual report of the Court of Auditors of the Land, pages 98 to 102, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>.

- (157) Germany claims that some measures of part I (*ring^owerk, Autoworld, parking house*) are considered SGEIs. However, as Germany does not claim and the Commission does not consider that all the Altmark criteria⁹⁸ are fulfilled, this argument will have to be assessed in the compatibility assessment, but not for the finding of State aid.
- (158) As regards the silent participations of RIM in Mediinvest for the financing of part II (hotels), the German authorities argue that the applicable reference rates were followed and thus the market economy investor principle applies and that there is thus no selective advantage in these sub-measures. However, the Commission argues that the simple fact that the reference rates have been respected does not exclude the existence of State aid and that the reference rate communication rather acts as a proxy that can be disregarded if there is better evidence of the actual market conditions.⁹⁹ Therefore, the Commission should rather examine the circumstances under which the silent participations were granted. They do not support the view that a private market investor would have given the credits under these conditions. According to Germany the silent participation of RIM in Mediinvest was granted at market conditions. A silent participation is comparable as regards the risk to a loan of lowest rank and should thus be considered a loan with a high risk. In case of bankruptcy or liquidation it is only paid back after all other liabilities have been honoured. The risk linked to the participation thus exceeds the risk of a traditional bank loan for an investment, which is normally secured according to the conditions requested by the bank, which is reflected by the reference rate of the Commission. The remuneration to be paid for such participation should thus significantly exceed the reference rate of the Commission.
- (159) The silent participations were provided with a fixed remuneration stated in table 6 plus a variable remuneration. Table 6 also indicates the reference rate of the Commission at the time of their granting plus the risk margin applied by Germany.¹⁰⁰
- (160) With the exception of the third and fourth tranches,¹⁰¹ the agreed remuneration lies above the reference rate of the Commission. However, the financial situation of Mediinvest did not allow to provide its share of a shareholder loan of EUR [...] million in May 2008 and to cover a short term financing need of MSR of EUR [...] million in October 2008.¹⁰² The latter was granted solely by NG. It is thus likely that Mediinvest could be considered as a company in difficulty at that time. The Commission therefore doubts that the remuneration was appropriate taking into account the risk. The Commission therefore has doubts that the participations were provided at market conditions.

⁹⁸ The criteria to be fulfilled for public measures to be regarded as compensations for public service obligations and for them to escape being regarded as State aid under Article 107 (1) TFEU as established in the judgment of the Court in case C-280-00 *Altmark Trans GmbH* [2003] ECR I-7747, for the application of Article 87 (1) EC. In any event, in this case no public procurement procedure was carried out nor was it established by other means that the compensation matched the costs of a typical, well run, undertaking. Furthermore, it follows from paragraphs (188) to (198) that the Commission has strong doubts that the Altmark criteria are fulfilled.

⁹⁹ See Commission decision of 23/06/2010 in case C 38/2007 (ex NN 45/2007) *Arbel Fauvet Rail*.

¹⁰⁰ As regards the first participation of 29 May 2008, *the Commission notice on technical adaptations to the method for setting the reference and discount rates*, OJ C241, 26.8.1999, page 9, applies.

¹⁰¹ The German authorities argue that the advantage stemming from tranches 3 and 4 would amount to EUR [...] and would therefore be below the de minimis threshold.

¹⁰² Opinion of the Court of Auditors of the Land of 15 June 2010, part II, pages 14 and 16.

- (161) Mediinvest is not rated by a rating agency. The German authorities assume that Mediinvest has a good rating and that the collateralisation is normal in the case at stake. Under these presumptions, the loan margin is 100 basis points. In the present case, however, the Commission has doubts whether Mediinvest's financial situation corresponded to the rating category "BBB" ("good") suggested by the German authorities and whether the collateralisation was normal. Thus, the Commission is not in a position to establish whether the requirements for the calculation of the State aid element are fulfilled.
- (162) First, Germany itself states that it was not possible to find private financing for part II.¹⁰³ In addition, the opinion of the Land's Court of Auditors demonstrated clearly that the potential investors did not see the "Nürburgring 2009" project including part II as viable under market terms and that several private operators of leisure parks rejected their engagement in the project.¹⁰⁴ The preliminary investigation found that the silent participations of RIM in Mediinvest were granted at interest rates that would not have been available to Mediinvest on the private credit market due to its weak financial standing and/or its doubtful business plan. Mediinvest, therefore, may have received an economic advantage amounting to the difference between the interest payable under the preferential terms of aid and the interest which would have been payable at market rates. Germany is invited to comment on the said difference in case of all the eleven tranches concerned. At this stage, it can also not be excluded that the total nominal value of the loans would qualify as State aid, if further Commission investigation shows that no investor would have granted the silent participations given the company's poor financial standing and/or a weak business plan.
- (163) Furthermore, the Commission invites Germany to submit information about all actual payments of the liabilities from the RIM' silent participations including the interests (amount and date) and any deferrals in these payments.
- (164) The guarantee provided by ISB for the silent participations of RIM could also confer an economic advantage on Mediinvest if it could not be obtained under normal market conditions on the financial market. However, the Commission does not have sufficient information about the conditions of that guarantee. Germany is therefore invited to provide information on the basis of which the Commission would be able to verify whether Mediinvest paid a guarantee premium at market conditions, taking into account the financial situation of Mediinvest.
- (165) For tranches 2 to 4 of the loan of ISB, it seems to be clear that the interest rates are below market rates. This might be acceptable if the conditions of the Temporary Framework are met, but this is a question of compatibility (see paragraphs (199) tot (206) below). As explained in paragraphs (150) to (152) above, the terms of the guarantee by the Land regarding the ISB loan suggest that NG could receive selective advantages.
- (166) The revenues from a tax on gambling incurred to NG could be illegal State aid to NG and/or NAG. Germany highlights that already at the moment of the investment decision regarding the project "Nürburgring 2009" the participants calculated with the receipt of a need-based support from the Land and that the intention thus was to generate "needs-dependent"

¹⁰³ Letter of the German authorities dated 15 November 2011, paragraphs 57, 76 and 77.

¹⁰⁴ Opinion of the Court of Auditors of the Land of 15 June 2010, part I, pages 13 and 17.

subsidies to the benefit of NG from the public revenue on the basis of the Gambling Act of the Land. These subsidies are however no longer a part of budget planning of NG in its role as lessor under the lease model and thus also not a part of the basis for calculation of the rent for the Nürburgring complex.

- (167) The Gambling Act of the Land foresees that a part of the tax on gambling is transferred to NG for the purpose of promoting tourism. The lease contract suggests that also NAG could benefit from the revenues of the tax on gambling. This suggests that the undertakings involved could receive advantages.
- (168) Tax revenues, by their own nature, cannot be market conform. Accordingly at this stage of its investigation the Commission considers that these tax revenues granted an economic advantage to NG and NAG. Account being taken of NG's financial difficulties, the amount of the advantage could be as high as the total amount of tax allowed. In this context, Germany is invited to submit justification of these tax revenues as well information about their distribution between NG and NAG.
- (169) As regards the shareholder loans and debt subordination by the Land to NG for the "Nürburgring 2009" project, these loans were granted without any interest or fee and for an undefined period of time. The Commission has doubts that a market investor would provide loans or debt subordination to its subsidiaries under such favourable conditions.
- (170) In view of the financial situation of NG the Commission has also doubts whether at the time the Land granted these shareholder loans NG would have obtained comparable financing, if any, on the financial market. The Commission recalls moreover, that NG was loss making at least since 2006 and that Germany did not provide any element confirming that the shareholder loans had any prospect of reasonable return for a private investor. Thus the Commission believes at this stage that the decision of the public authorities to participate in the shareholder loans provided an economic advantage to NG. In this case, the amount of the advantage could be as high as the total amount contributed by the State.
- (171) Therefore on the basis of what precedes the Commission must, at this stage of investigation express doubts as to whether the actions of the Land can be compared to those of a private market economy investor and be therefore free of economic advantage to NG. The amount of the advantage could be as high as the total amount of loans.
- (172) According to Germany the acquisition of 83.3% and 6.7% of the shares of MSR by NG and RIM, respectively, does not constitute State aid. They only paid EUR [...] for these shares. NG and RIM currently hold all the shares of MSR. However, the Commission cannot exclude that MSR was a firm in difficulty at the time of the transfer. If so, the transfer could entail an economic advantage to the sellers of the shares, Mediinvest, Geisler & Trimmel and Weber. On the basis of the information submitted, the Commission thus at this stage cannot exclude that State aid was involved in the acquisition of 90% of the shares of MSR. The Commission invites therefore the German authorities to provide information and all relevant documents on the basis of which the Commission would be able to verify whether MSR was a firm in difficulty at the time when the agreement regarding the transfer of the shares of MSR was concluded.

- (173) To conclude, the Commission believes that, absent the State funding, the above measures would not have been carried out. Further, they relate to the construction and operation of the complex and do not classify as infrastructure and there are no expectations that the State contribution will yield a market-conform return. The Commission thus assumes that there is State aid to the *construction* and *operation* of the above facilities.

Organisation of Formula 1 races

- (174) The German authorities do not deny the existence of an economic advantage as such. Germany claims that the organization of Formula 1 racing constitutes an aid measure that is compatible under the SGEI rules. Since Germany does not claim that the measure was aid-free compensation because it meets all requirements set out in the Altmark jurisprudence, this point will be assessed in the compatibility assessment, not in the finding of State aid.

4.1.4. *Specificity*

- (175) 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, at this stage of the reasoning, it seems that the advantages in question were granted to NG, ISB, NAG, Mediinvest, MSR, CMHN, Geisler & Trimmel and Weber. As the public funding was – within each individual measure - directed at a single undertaking, it is a selective within the meaning of Article 107 (1) TFEU.
- (176) The Commission notes that the credit line at the cash pooling facility is granted only to the undertakings participating in that facility. Thus the measure is selective within the meaning of Article 107 (1) TFEU. At this stage, the Commission has no information at its disposal with regards to the other undertakings participating in the cash pooling facility apart from NG and Frankfurt Hahn GmbH¹⁰⁵. As to the liquidity pool, the present opening is limited to NG and ISB. This does not prejudice any further investigation with regards to possible advantages obtained by the other undertakings participating in the cash pooling facility.
- (177) In fact the direct and indirect beneficiaries of the measures seem to be all the undertakings, which can own, use or manage part of the facilities benefiting from the aid, when these beneficiaries could not find the same facilities at the same price on the market without State aid.

4.1.5. *Distortion of competition and effect on trade*

- (178) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-union trade, the latter must be regarded as affected by that aid. In accordance with settled case law¹⁰⁶, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

¹⁰⁵ Commission decision of 13 July 2011 in case SA.32833 *Alleged State aid to Frankfurt Hahn airport*.

¹⁰⁶ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

Facilities and operation of the race ring

- (179) Race circuits with [...] visitors per year compete to attract race circuits visitors even from across borders. The size of the Nürburgring circuit and its proximity to other European race circuits, notably the Spa-Francorchamps race circuit, the Zolder race circuit, the Hockenheim race circuit, the Valkenswaard race circuit and the Mettet race circuit, does not allow to consider that trade between Member States is not liable to be affected.
- (180) From a State aid perspective, for the reasons outlined above, there appears to be a distortion of competition or at least a potential distortion of competition if aid to race tracks activity promotes the use of these facilities, as appears to be the case. As regards the effect on trade between Member States, Nürburgring with its German TouringCar Championship competes with other race tracks in the Union organizing top motorsport competitions. The motorsport activities seem to attract visitors not only from Germany, but also from neighboring Belgium and Luxembourg as well as other Member States.

Measures for the promotion of tourism

- (181) Leisure parks with [...] visitors per year compete to attract leisure parks visitors. The size of the Nürburgring complex and its proximity to other European leisure parks, notably the Eifelpark Gondorf leisure park, the Phantasialand Brühl leisure park, the Freizeitpark Lochmühle leisure park, the Le Labyrinth Durbuy leisure park and the Durbuy Adventure leisure park, does not allow to consider that trade between Member States is not liable to be affected.
- (182) For the reasons outlined above, there appears to be a distortion of competition or at least a potential distortion of competition if aid to the leisure park activity promotes the use of these facilities, as appears to be the case. It has to be recalled that a complaint has been received from a competing leisure park operator. As regards the effect on trade between Member States, the Nürburgring leisure park seems to attract not only visitors from Germany, but also visitors from neighboring Belgium and Luxembourg as well as other Member States. In the case at hand, it might be too narrow to assess the distortion of competition, only taking into account competition with other leisure parks. There might be competition with other types of activities (like museums for instance). Furthermore, the number of visitors of the leisure park ([...] visitors a year) is not negligible.

Organisation of Formula 1 races

- (183) Formula 1 race circuits with 68 000 visitors per year compete to attract Formula 1 race visitors. The size of the Nürburgring complex and the limited number of Formula 1 race circuits in the Union (notably Hockenheimring in Germany, Circuit de Spa-Francorchamps in Belgium, Silverstone circuit in the UK, Hungaroring in Hungary, Autodromo di Monza in Italy Circuit de Catalunya in Spain and Valencia Street Circuit in Spain) does not allow to consider that trade between Member States is not liable to be affected. On the supply side, Formula 1 goes to different races in different Member States.
- (184) There appears to be a distortion of competition or at least a potential distortion of competition if the aid to the organisation of Formula 1 racing events promotes the access of

customers to those events, as seems to be the case. As regards the effect on trade between Member States, Nürburgring with its Formula 1 races competes with other Formula 1 race tracks in the Union. Visitors are attracted not only from Germany, but also from other Member States.

4.1.6. *Conclusion*

- (185) For the reasons set out above at the current stage the Commission takes the preliminary view that the measures listed in paragraph (71) above directly or indirectly by the Land or the district of Ahrweiler involve State aid within the meaning of Article 107 (1) TFEU. Even if one of these measures, considered in isolation, was not State aid, it should still be examined if it is State aid considered in conjunction with the other measures. If proven that the measures at stake involve State aid, the award of which was not conditioned by the Commission's preliminary approval, Germany has not respected the stand-still obligation of Article 108 (3) TFEU.

4.2. **Compatibility of aid**

- (186) The Commission must assess if the aid identified above can be found compatible with the internal market. According to the case-law of the Court, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met.¹⁰⁷

Facilities and operation of the race ring

- (187) Germany does not claim that the measures taken before the launch of the "Nürburgring 2009" project in 2007 or the measures of part I relating to the *tribune, ring°arena, access facilities and some equipment* (which it considers to be general infrastructure and thus not State aid) would constitute support for SGEIs.

Measures for the promotion of tourism

- (188) Article 106(2) TFEU states that undertakings entrusted with the operation of SGEIs, or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaties, in particular to the rules on competition. However, Article 106(2) TFEU allows an exception from the rules contained in the TFEU, providing that a number of criteria are met: Firstly, there must be an act of entrustment, whereby the State confers responsibility for the execution of a certain task to an undertaking. Secondly, the entrustment must relate to a SGEI. Thirdly, the exception has to be necessary for the performance of the tasks assigned and proportional to that end. Finally, the development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
- (189) At this stage, the Commission will focus its analysis on the existence of SGEIs and the entrustment requirements for the exception under Article 106(2) TFEU. Since the definition of the SGEI obligations remains unclear, it is not even in a position to assess the costs resulting from those obligations and the level of compensation that would be necessary and

¹⁰⁷ C-364/90 *Italy/Commission*, paragraph 20.

proportional. In this context, Germany is requested to provide the Commission with all information and documents necessary to assess compliance with all compatibility conditions included in section 2 of the 2011 *European Union framework for State aid in the form of public service compensation*¹⁰⁸ ("SGEI Framework"), which also refers to section 3 of the 2011 *Communication on the application the European Union State aid rules to compensation granted for the provision of services of general economic interest*¹⁰⁹ ("SGEI Communication").

- (190) The compatibility of the present aid has to be examined in light of that SGEI Framework.¹¹⁰
- (191) Germany argues that some of the financing supported the provision of a SGEI and that the Commission's 2005 decision should apply to the respective financing. This concerns certain elements of Part I of the measure, namely the creation of *ring^owerk*, *parking house* and *Autoworld*.
- (192) As the definition of the SGEI is within the Member States' competence, the Commission's powers are limited. However, in this case the subsidized facilities do not seem to provide any general benefit for the society. The Commission cannot exclude that a manifest error was made in the definition of the public service remit and that the services provided do not exhibit special characteristics compared with those of other economic activities¹¹¹.
- (193) For the *ring^owerk*, the Commission doubts that there are educational elements which might justify the existence of a SGEI. For the complex of *Autoworld*, the Commission considers that the existence of spaces reserved for the sale and marketing of specific car brands excludes the classification as a SGEI.¹¹² In addition, it is not obvious why a *parking house* for a race ring should constitute a SGEI.¹¹³ In particular, if the financing for the ring and the tribune are not classified as infrastructure, but as support to the management company NG and/or NAG, it is hard to argue that parking spaces, which only serve this purpose, can be considered a SGEI.
- (194) On the basis of the above assessment, the Commission considers that the definition of the public service has not been sufficiently precise to allow the Commission to conclude that it does not contain manifest error.

¹⁰⁸ See Communication C (2011) 9406 fin., European Union framework for State aid in the form of public service compensation, of 20.12.2011, Official Journal C8, 11.01.2012, p. 15-22.

¹⁰⁹ See Communication C (2011) 9404 final on the application the European Union State aid rules to compensation granted for the provision of services of general economic interest, of 20.12.2011, Official Journal C8, 11.01.2012, p. 4-14 .

¹¹⁰ See Communication C (2011) 9406 final, European Union framework for State aid in the form of public service compensation, of 20.12.2011, paragraph 69.

¹¹¹ See Communication C (2011) 9404 final on the application the European Union State aid rules to compensation granted for the provision of services of general economic interest, of 20.12.2011, paragraph 45.

¹¹² Germany refers to the judgment of the Court in joined cases C 223/99 and C 260/99 *Agora v. Ente Autonomo Fiera Internazionale de Milano*, which admitted that a body whose object is to carry on activities relating to the organisation of fairs, exhibitions and other similar initiatives does not constitute a body governed by public law for the coordination of procedures for the award of public service contracts.. However, it seems difficult to draw any implications from this judgement on the case at stake since it was taken in a procurement context not relating to State aid.

¹¹³ This case differs from the T-274/01 *Valmont case* as *only* visitors to the Nürburgring would park here.

- (195) In any event, the entrustment of its execution to NG and the provision for its funding has to be compatible with the SGEI rules. For all of these measures, Germany sees the entrustment in the statutes of NG, the approval of the project "Nürburgring 2009" by the supervisory board of NG (covered by a government decision of the Land) and the business plans.¹¹⁴ The Commission invites the German authorities to submit the approval of the project "Nürburgring 2009" by the supervisory board of NG and the respective government decision of the Land as well as the business plans referred to by them.
- (196) Although a part of the documents declared as the entrustment act have not yet been made available to the Commission, the compatibility requirements of the SGEI rules seem very unlikely to be met in this case. In this regard, the Commission accepts the fact that different elements of the entrustment may be placed in several acts without questioning the appropriateness of the definition of the obligations. Nevertheless, it is unlikely that acts from the beneficiary itself might be considered as entrustments of this beneficiary. Moreover, the acts currently referred to by Germany as the entrustment acts probably do not include any provisions on the financing mechanism and the avoidance of over-compensation. Furthermore, business plans declared by Germany as forming part of the entrustment act do not fulfil the condition that the parameters for the calculation of the compensation have to be contained in a legally binding document. Thus, at this stage the Commission cannot conclude that the definition of the public service obligations has been clear and precise.
- (197) Insofar as at this stage the public service obligations have not been precisely defined, on the basis of the information available, the Commission considers that the public mission has not been adequately entrusted to the beneficiary.
- (198) In view of the foregoing assessment of compatibility, at this stage the Commission raises doubts as to the compatibility with the internal market of the aid in the alleged form of public service compensation under Article 106(2) TFEU.
- (199) As for the ISB loan for investments other than facilities of the race ring (tranches 2 to 4 equalling to EUR [...] million), Germany argues that the Temporary Framework applies. If NG was not in financial difficulty on 1 July 2008, tranches 2 to 4 of the ISB loan could fall under the Temporary Framework.
- (200) According to Germany, NG was not a firm in difficulty on 1 July 2008. Germany argues that the company was financially stabilised by the shareholder loans provided by the Land with irrevocable subordination of liabilities ("unwiderruflicher Rangrücktritt").¹¹⁵ The balance sheet negative results of NG were allegedly eliminated mainly by ranking the Land behind all other creditors and a positive forecast of the company's business, so that bankruptcy under the German law was avoided. Moreover, Germany seems to classify the activities related to the loss making Formula 1 races or to the "Nürburgring 2009" project as special effects and to show that if these activities were deducted from the calculation of the annual results, the latter results would become positive.

¹¹⁴ See footnote 63.

¹¹⁵ For this purpose, the Land granted to NG a shareholder loan of 21 August 2007 regarding EUR [...] million and with the letter dated 21 August 2007 the Land assured NG to rank all its claims under the loan agreement behind all other creditors.

- (201) The approved German scheme on the Temporary Framework applies to firms which were not in difficulty on 1 July 2008. Aid 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.
- (202) In view of the mounting debt and negative own capital, the Commission cannot exclude that NG was an undertaking in difficulty on 1 July 2008. Furthermore, and as set out above in paragraphs (23) and 0 and table 2, NG demonstrates the typical symptoms of a company in difficulty, such as increasing losses, overall negative operating cash flow and loss of net assets.
- (203) This firm should also be considered in difficulty if the reason for its alleged recovered financial stability is the granting of illegal State aid.
- (204) The Commission is of the opinion that NG was in economic difficulties at the time and so it would have been charged a higher rate of interest on the private credit market. It is also clear that the company did not have access to external financing¹¹⁶.
- (205) It appears that without the State intervention, the financial liabilities of NG would result in negative liquid funds causing its insolvency. Therefore, in the view of its financial situation the Commission cannot currently exclude that without the decision to subsidize NG before 1 July 2008 it would not have become insolvent.
- (206) In view of the above, the Commission has doubts whether tranches 2 to 4 of the ISB loan fall within the scope of the Temporary Framework. On the basis of the information currently at its disposal the Commission cannot thus exclude that NG was on 1 July 2008 a company in difficulty within the meaning of section 2.1 of the Guidelines. The Commission invites the German authorities to provide further explanation and all relevant documents in this regard.

Organisation of Formula 1 races

- (207) Germany claims that the organisation of Formula 1 races is considered SGEI. The respective measures include the short-term financing of NG through the cash pooling of the Land, the shareholder loans for Formula 1 races as well as the concession granted by NG to NAG.
- (208) When it comes to cash pooling of the Land and the shareholder loans for Formula 1 races, the government of the Land sees some value for the region in offering the Formula 1 events. However, it seems clear from the German submission that the Formula 1 business is loss making at Nürburgring and that the Land decided to subsidise it. Germany also clearly admits that Formula 1 races are structurally loss making and it points out that Formula 1 races at other race tracks also result in a deficit.
- (209) Regarding the concession agreement, the German authorities maintain that the conditions of the 2005 SGEI decision are fulfilled and that the compensation is justified aid.

¹¹⁶ Cf. Commission decision in case C 19/2009 *TV2 Denmark*, 23.02.2012, OJ L 50, p. 21.

- (210) The Commission believes that a manifest error was made in the definition of the public service remit as the services provided do not exhibit special characteristics compared with those of other economic activities¹¹⁷. Taking into account that the German authorities have not referred to any entrustment act for Formula 1 races, the Commission has in any event strong doubts as to the compatibility of financing of these races with the conditions of the SGEI rules. In this context, Germany is requested to provide the Commission with all information and documents necessary to assess compliance of the financing of Formula 1 races with all compatibility conditions included in section 2 of the SGEI Framework, which also refers to section 3 of the SGEI Communication. In addition, the Commission invites Germany to submit information about all payments made between NG and NAG in relation to the Formula 1 races.
- (211) Germany is invited to submit information about aid granted in connection with the Formula 1 races at the Nürburgring race track in 2011. Furthermore, the Commission invites Germany to submit information about payments of interest from the liabilities of NG relating to the Formula 1 races to the cash pool of the Land which occurred in the past (amount and date) and any deferrals in these payments.

Other compatibility provisions

- (212) Germany does not forward any other reasons to declare the various measures compatible. Apart from Article 107 (3) (c) TFEU there is no manifest legal basis for this kind of aid under the State aid rules. As there exist already in the EU a number of race tracks and commercial leisure parks, aid does not seem to address a market failure. The necessity of aid is therefore doubtful.

4.3. Preliminary conclusions

- (213) The Commission has doubts on all the afore-mentioned measures. At this stage the Commission takes a preliminary view that the measures listed in paragraph (71) above granted directly or indirectly by the Land or the district of Ahrweiler at privileged terms represent incompatible investment aid or operating aid, reducing the race circuit and leisure park owner's and operator's current expenditure. According to the case law of the Court, such operating aid is in principle incompatible with the internal market.¹¹⁸

5. DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108 (2) of the Treaty on the Functioning of the European Union, requests Germany to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. This should include:

¹¹⁷ See Communication C(2011)9494 fin. on the application the European Union State aid rules to compensation granted for the provision of services of general economic interest, of 20.12.2011, paragraph 45.

¹¹⁸ Case T-459/93 *Siemens SA vs Commission*, ECR [1995] II-01675, paragraph 48. See in that sense also T-396/08 *Freistaat Sachsen et Land Sachsen-Anhalt vs Commission*, paragraphs 46 to 48 and C-156/98 *Germany vs Commission*, rec. p. I6857, paragraph 30, and case-law cited.

- (a) key financial indicators regarding Mediinvest, MSR, CMHN and NAG for the period between 2006 and 2011 as well for January and February 2012;
- (b) key financial indicators of NG for 2009 to 2011 as well as for January and February 2012;
- (c) an exact indication of the distribution of money granted by the ISB loan of EUR 330 million between NG, MSR and CMHN;
- (d) information about aid to be granted in the context of the Nürburgring complex in the future (including 2012);
- (e) clarification whether there was any financial contribution granted by the district of Ahrweiler in the context of the Nürburgring complex between 2002 and 2011 (if so, please indicate date, type of aid, amount, justification) other than the increase of own capital of NG of 31 August 2004 through liquidity of EUR 488 700 and what the amount of aid provided by the district of Ahrweiler in connection with the capital increase of EUR 10 million of 4 September 2007 was;
- (f) information about the (re)payments of all liabilities under the measures covered by this decision (including the payments of interests) which occurred in the past (legal basis, amount, maturity date, payment date) and specifically about any deferrals in these (re)payments;
- (g) all memoranda of understanding relating to the Nürburgring complex;
- (h) the financing conditions of the credit line provided by the cash pooling facility to NG (other than the average annual interests);
- (i) comments on the imputability of the lease of the Nürburgring complex, the transfer of shares of MSR and the concession regarding the organisation of Formula 1 races as well as all information and documents (e.g. instructions by the Land, its government or its officials) necessary to assess the issue of imputability of these measures in accordance with the criteria mentioned in paragraph (83);
- (j) comments on the imputability of the shareholder loans of NG both before the "Nürburgring 2009" project and for the "Nürburgring 2009" project, the loans, letter of comfort and subordination of claims by NG to CST, the payments to Pinebeck/IPC and the cession of claims of MIB to the State as well as all information and documents (e.g. instructions by the Land, its government or its officials) necessary to assess the issue of imputability of these measures in accordance with the criteria mentioned in paragraph (83);
- (k) all business plans established for the "Nürburgring 2009" project;
- (l) applicable base rate of the financing provided by the cash pooling facility;
- (m) ratings of NG established at the time the credit lines of the cash pooling facility were granted;
- (n) clarification whether the short-term financing is provided to NG at the financing conditions of the Land and which rating the Land enjoyed at the time the credit lines were granted;
- (o) all information and documents on the basis of which the Commission would be able to verify whether the loan of EUR 285 million taken by the ISB from the liquidity pool of the Land and other loans taken by ISB in connection with the Nürburgring complex from the liquidity pool of the Land, if any, were granted at market conditions;
- (p) all actual payments of the interest by NG and ISB to the liquidity pool (amount and date) in connection with the Nürburgring and any deferrals in payments;
- (q) observations as to whether, in the present case, the short term financing provided by the cash pooling facility referred to above was granted at market conditions;
- (r) explanation how the rating of NG was established at the time the ISB loan was granted;
- (s) explanation why no private financing for the "Nürburgring 2009" project could be found;

- (t) information and documents about financial standing of NG, MSR and CMHN and their business plans in the context of the ISB loan;
- (u) information and documents on the basis of which the Commission would be able to verify whether a guarantee premium at market conditions was paid by NG for the guarantee of the Land regarding the liabilities from the ISB loan, taking into account the financial situation of NG;
- (v) indication of the rent actually paid by NAG for the lease of the Nürburgring complex including the dates of the payments;
- (w) comments on the difference between the interest payable under the actual terms of aid and the interest which would have been payable at market rates in case of all the eleven tranches of the silent participations of RIM in Mediinvest;
- (x) information about all actual payments of the liabilities from the RIM' silent participations including the interests (amount and date) and any deferrals in these payments;
- (y) information and documents on the basis of which the Commission would be able to verify whether a guarantee premium at market conditions was paid by Mediinvest for the guarantee of the ISB regarding the liabilities from the RIM' silent participations, taking into account the financial situation of Mediinvest;
- (z) justification of the revenues from the tax on gambling as well information about their distribution between NG and NAG;
- (aa) information and all relevant documents on the basis of which the Commission would be able to verify whether MSR was a firm in difficulty at the time when the agreement regarding the transfer of the shares of MSR was concluded;
- (bb) all information and documents necessary to assess compliance of the financing of the creation of *ring°werk*, *parking house* and *Autoworld* with all compatibility conditions of section 2 of the SGEI Framework and in section 3 of the SGEI Communication;
- (cc) all information and documents necessary to assess compliance of the financing of Formula 1 races with all compatibility conditions included in section 2 of the SGEI Framework and in section 3 of the SGEI Communication;
- (dd) approval of the project "Nürburgring 2009" by the supervisory board of NG and the respective government decision of the Land;
- (ee) further explanation whether NG was on 1 July 2008 a company in difficulty within the meaning of the Guidelines;
- (ff) information about all payments made between NG and NAG in relation to Formula 1 races;
- (gg) information about aid granted in connection with the Formula 1 races at the Nürburgring race track in 2011;
- (hh) information about payments of interest from the liabilities of NG relating to the Formula 1 races to the cash pool of the Land which occurred in the past (amount and date) and any deferrals in these payments.

The Commission requests the German authorities to forward a copy of this letter to the potential recipients of the aid immediately.

The Commission wishes to remind Germany that Article 108 (3) of the Treaty on the Functioning of the European Union has suspensatory effect, and would draw your attention 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.

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. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Fax: +32 2 296 12 42

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President