State aid: main developments between 1 May and 31 August 2011

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Policy developments

In the second quarter of 2011 no legislation was adopted in the State aid field. The public consultations launched in the previous quarter on the EU Emission Trading Scheme (ETS), on regional airports and public funding to broadband networks, were closed.

Decisions adopted (2)

Decisions taken under Article 106 TFEU: services of general economic interest

Crédit Mutuel

On 24 May 2011, following a formal investigation started in 1998, the Commission decided that Crédit Mutuel was not overcompensated for distribution of the Livret bleu savings account in France (3). In 1975 France created the Livret bleu savings account and entrusted Crédit Mutuel with its distribution. In 1991, Crédit Mutuel gradually had to transfer the funds collected through the Livret bleu accounts to the Caisse des Dépôts et Consignations (CDC), which, in return, paid Crédit Mutuel a commission. In 2009 France liberalised the rules on the distribution of the Livret bleu and Livret A tax-free savings accounts, allowing all banks to market them. The Commission’s decision has established that Crédit Mutuel was not overcompensated for distribution of the Livret bleu from 1991 to 2008 and the investigation was closed.

The Commission holds that Crédit Mutuel benefited from State aid from 1991 to 2008 for distributing the Livret bleu accounts in France. However, this aid is deemed compatible with the EU rules on State aid and services of general economic interest, since the institution was not overcompensated for performing the public service, which consisted of collecting savings to fund the social housing sector through the CDC. This ruling is supported by three main considerations:

(i) the Commission excluded from its calculations certain revenues received by Crédit Mutuel before the 1991 Government Order transferring the funds gathered via the Livret bleu accounts to the CDC, since those revenues could clearly not be linked to the transfer, initiated after the Order, of the funds to the CDC;

(ii) the Commission deemed it justified for Crédit Mutuel to generate a profit margin (a limited one since the activity involves little risk) for collecting the funds;

(iii) the method used from 1991 to 2005 to assess whether overcompensation had taken place consisted of comparing the amount of aid received with the net costs incurred over the period, rather than comparing the aid received each year with the net costs incurred over that same year (in which case overcompensation for a given year could not be offset against under-compensation for another year).

Decisions taken under Article 107(1) TFEU

Ålands Industrihus

On 13 July 2011 the Commission adopted a negative decision (4) concerning financing in the form of guarantees and other equity interventions granted by the local government of Åland to Ålands Industrihus Ab (ÅI), a state-owned commercial property company in the Åland islands, in the Baltic Sea between mainland Finland and Sweden.

The Commission’s investigation covered several capital increases and guarantees for bank loans that were granted to ÅI by the local government for the purpose of developing the “iTiden” office park in Mariehamn, the regional capital. The Commission established that the return the local government expected on its investments was much lower than the return a private investor would have demanded, and that the public guarantees were also priced below market levels. Consequently, the company received funding on much better terms than other firms, which had to obtain financing on the private markets. This gave ÅI an unfair advantage over its competitors. The Commission therefore ordered Finland to recover the aid, around €4.7 million, plus interest from the time the aid was granted.

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
(2) This is only a selection of the decisions adopted in the period under review.
Aid to certain Greek casinos

Following an in-depth investigation, on 24 May 2011(6) the Commission found that the different taxation of casino entrance fees is unlawful aid because it creates fiscal discrimination in favour of public casinos and causes the State to forgo revenues which it would otherwise have collected. The measure distorts competition and affects trade between Member States, as operators in this sector are often international hotel groups, whose decisions to invest or divest can be affected by the selective measure. The Commission found that the declared objective of discouraging gambling cannot be reconciled with the fact that the lower-priced casinos include those closest to the major centres of population in Greece, or with the explicit possibility to admit customers without payment.

The Commission ordered recovery by Greece from the State-owned casinos, starting from 1999. In the absence of complete information regarding the aid amounts, the Commission provided Greece with guidance on how to calculate the recovery amount and requested Greece to cancel all outstanding fiscal advantages deriving from the measure. It notes that Greece is considering changing the pricing regime to eliminate discrimination between casinos.

In 2009 the Commission received a complaint alleging that the taxation of admissions to casinos in Greece was discriminatory and entailed State aid in favour of the public casinos. Under Greek law, admission tickets are taxed at a uniform 80%, but the price of tickets, which is regulated, is €6 for State-owned casinos, whereas private ones are required to charge €15. This means that private casinos must pay a €12 admission tax per person (80% x 15) to the State, while public casinos (and also a single private casino exceptionally treated as a public one) only pay €4.8 (80% x 6).

Decisions taken under Article 107(2)(a) TFEU

Social support for individual consumers

German tax exemption for flights to and from North Sea islands

On 29 June 2011, the Commission authorised(7) a plan by Germany to exempt selected groups of passengers to and from seven German islands (Juist, Norderney, Helgoland, Baltrum, Langeoog, Wangerooge, Borkum) from a newly-created tax on air transport. This is to avoid penalising islanders who already pay comparatively more for air travel. The measure is an exemption from a new German air transport tax. Since 1 January 2011 all passengers departing from German airports are subject to an air transport tax, the amount of which depends on their final destination (€8 for domestic, EU and EEA destinations). The exemption is limited to residents of the islands, medical flights and civil servants working on the islands. Thus, the aid is limited to flights between islands that face a connectivity problem due to ferries that can only run at high tide and in good weather conditions. Germany requires passengers to prove their eligibility for the scheme. The annual budget for the aid is estimated to be around €120,000.

Article 107(2)(a) TFEU permits aid of a social character, providing it is granted to individuals on the basis of conditions where there is no discrimination related to the origin of the products or services concerned. The German tax exemption is in line with the Commission’s decision practice that residence on an island may be regarded as a social handicap.

Decisions taken under Article 107(2)(b) TFEU

Natural disasters

German ex ante disaster aid scheme

On 10 May 2011 the Commission approved(8) a scheme notified by Germany to grant support for damage caused by natural disasters in the Federal State of Bavaria. The aid can be granted over a six-year timeframe in the form of direct grants, interest subsidies or guarantees to enterprises active in all sectors, except agriculture, and will only cover certain categories of uninsurable disasters for which there is a consolidated Commission practice (i.e. earthquakes, landslides, floods and avalanches).

The key aspect of the case is that the Commission accepted this notification and adopted a decision before a natural disaster actually occurred (ex ante disaster aid scheme). However, aid can be granted only if a natural disaster occurs and once the requirements of the scheme are met. Thus, the Federal State of Bavaria will be able to start implementing aid measures without any further authorisation from the Commission.

Even though no common definition of a “natural disaster” exists, the categories covered by the notified scheme are in line with the Commission’s practice and the jurisprudence of the European Court of Justice. Moreover, the German authorities must inform the Commission about every concrete application of the notified scheme within fifteen days,
starting from the first implementation of the measures. If an event does not qualify as a natural disaster, the Commission would take appropriate action.

Decisions taken under Article 107(3)(b) TFEU

Banking

Schemes
The Commission extended certain bank guarantee schemes for credit institutions in Greece, Hungary, Ireland, Lithuania, Poland, Portugal and Spain(9). The extended schemes comply with the 2010 Communication on support measures for banks during the financial crisis. Furthermore, the Commission approved an amendment to a winding-up scheme in Denmark(10) and prolonged recapitalisation schemes in Greece, Poland and Portugal(10).

Ad hoc aid

Agricultural Bank of Greece
On 23 May 2011 the Commission approved(11) the restructuring plan of the Agricultural Bank of Greece (ATE), judging it apt to restore the bank’s long-term viability whilst ensuring it shares the burden of its restructuring and limits distortion of competition in the Greek retail banking market.

ATE is the fifth largest banking group in Greece. With assets totalling around €30 billion at the end of 2010, ATE has approximately 6% of total bank assets in Greece. ATE’s difficulties arose mainly from poor asset quality (weighing on profitability and on solvency) and from a traditionally low pre-impairment profitability. ATE received State capital of €675 million in 2009 under the support communication provided did not allay all the doubts raised by the Commission regarding HGAA’s return to long-term viability. It also contains sufficient measures to ensure that the bank’s owners contribute adequately to the cost of restructuring and to limit the distortion of competition brought about by the state support. Therefore the plan fulfils the criteria of the Commission’s Restructuring Communication for banks. The plan was also assessed in the context of the international macro-financial assistance programme by the International Monetary Fund (IMF), the European Central Bank (ECB) and the EU, where Greece reaffirmed its commitment to fully implement the restructuring plan of ATE.

Hypo Alpe Adria Group
On 19 July 2011 the Commission temporarily approved(15) a €200 million asset guarantee, which Austria granted to the bank at the end of 2010. Given the specific characteristics of the guarantee, which shelters the bank from losses already incurred, the Commission assessed the aid under the rules applicable for capital injections and found that the terms are in line with the Commission’s guidance documents on the recapitalisation of financial institutions during the crisis. In particular, the bank will have to pay back any amounts actually paid out by Austria. The additional aid became necessary after an asset screening exercise revealed the need for further asset write-downs.

On the same day the Commission also decided to extend(16) its in-depth investigation into the bank’s newly submitted restructuring plan, in order to take into account the additional aid, as to date the information provided did not allay all the doubts raised by the Commission regarding HGAA’s return to long-term viability, and necessary safeguards to limit distortion of competition.

HGAA is the sixth largest Austrian bank. A former subsidiary of the German BayernLB, it was taken over by the Republic of Austria in December 2009, when Austria had to grant emergency aid in the form of a €650 million recapitalisation operation.

Amagerbanken
On 6 June 2011 the Commission granted temporary approval(17) to Danish support for the liquidation of Amagerbanken, which was declared bankrupt in February 2011. The aid is limited to what is necessary to facilitate an orderly wind-up of Amagerbanken, the country’s eighth largest bank, which has been in trouble since it was severely hit by the 2008 financial crisis. The liquidation is being carried out in accordance with the Danish scheme for winding up

(10) SA.33001.
(11) Greece: SA.33154; Poland: SA.33007; Portugal: SA.33177.
(12) SA.31154 (N429/2010).
financial institutions in distress. The plan involves measures that require swift Commission approval, which is being granted provisionally.

The Commission found that in the present case the bank, its shareholders and its subordinated debt holders are contributing sufficiently to the State aid effort. Moreover, measures will be taken to limit the negative spillover effects for other competitors. Therefore, the measures, comprising a conditional agreement on the transfer of assets and certain liabilities, a liquidity facility agreement and a subordinated loan, can be considered proportionate to the objective, well targeted and limited to the minimum necessary and thus temporarily compatible with Article 107(3)(b) TFEU as set out in the Commission’s guidance on aid for banks during the crisis. The measures in favour of Amagerbanken are approved for six months or, if the Danish authorities submit a wind-up plan within six months, until the Commission has adopted a final decision on that plan.

**Eik Bank**

On 6 June 2011 the Commission cleared\(^{(3)}\) Danish support for the liquidation of Eik Bank, as it provides for an orderly wind-up of the bank and foresees sufficient safeguards to limit distortion of competition. The bank, until 2010 the biggest financial institution in the Faroe Islands, with significant retail and corporate banking activities in the rest of Denmark, ran into severe liquidity and solvency difficulties due to excessive lending in risky projects and entered into the Danish scheme for the winding-up of financial institutions in distress.

Some activities were offered for sale in a public tender while others were transferred to the publicly owned Danish Financial Stability Company (FSC), to be either sold or liquidated. Denmark’s declared objective is for the liquidation to be finalised within a maximum of five years.

The Commission found that the liquidation support measures, comprising asset and liability transfers, liquidity facility agreements, credit facilities, capital injections and a loss guarantee, are compatible with the internal market. In particular, the aid is limited to what is necessary to carry out an orderly wind-up of the bank. Moreover, the fact that the parts of the bank which are not sold will not pursue any new activities but merely phase out on-going operations will limit potential distortion of competition.

**Anglo Irish Bank and Irish Nationwide Building Society**

On 29 June 2011, the Commission cleared\(^{(4)}\) a joint plan for Anglo Irish Bank (Anglo) and Irish Nationwide Building Society (INBS) whereby they will be merged and resolved over a period of 10 years. The two Irish financial institutions received massive state support during the crisis after they overexposed themselves to the commercial loan and property development sector, which eventually caused their downfall.

Anglo and INBS together have received a total of €34.7 billion in capital injections to cover the losses on their impaired property loans. Both institutions also benefitted from guarantees and an impaired asset measure. These measures were necessary because of the very poor quality of the loans resulting from risky lending practices in the past and the drop in prices on the commercial property market combined with the on-going crisis on financial markets. After several rescue measures in favour of the two institutions and the submission of several individual restructuring plans by the Irish authorities, a joint restructuring plan for Anglo and INBS was submitted to the Commission on 31 January 2011 in the context of the Programme for Support for Ireland.

The joint plan fulfils the EU criteria on restructuring aid for banks as: (i) it provides for an orderly resolution of both institutions; (ii) it contains appropriate measures to ensure that burden-sharing is achieved by their stakeholders; and (iii) it limits the distortion of competition through the complete exit of Anglo and INBS from the markets in which they operate (mostly Ireland, UK and US). The Commission has therefore approved all aid measures granted to Anglo, INBS and to the merged entity as restructuring aid and closed its investigation into the restructuring of Anglo.

**Bank of Ireland**

On 11 July 2011, the Commission temporarily approved\(^{(5)}\) the recapitalisation of the Bank of Ireland (BoI) by the Irish authorities of up to €5.35 billion, after a first €3.5 billion restructuring plan was approved in July 2010. This follows from the calculations of the Irish central bank, in March 2011, of the capital needed to deleverage and meet higher than normal loan-to-deposit ratios to be able to resist stress situations.

The prudential capital assessment review carried out by the Irish central bank was required under the Programme for Support for Ireland agreed in November 2010 between the Irish authorities, on one hand, and the EU, ECB and IMF, on the other. The Support Programme requires BoI to increase its capital to meet new regulatory requirements during the period 2011 to 2013. The €85 billion

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\(^{(3)}\) SA.31945.


\(^{(5)}\) SA.33216.
EU-IMF Support Programme comprises €35 billion to meet the recapitalisation needs of the financial sector and to act as a contingency fund (half of this is provided by Ireland itself).

The Commission found that the measure is necessary to increase the bank’s solvency ratios and maintain confidence in the Irish financial markets. Therefore, it temporarily authorised the measure as emergency aid subject to the submission of a revised restructuring plan. The final approval of the measure is conditional on the plans ensuring: (i) a return to long term viability of the bank; (ii) adequate participation in the restructuring costs by shareholders and subordinated debt holders; and (iii) proper measures to limit the distortion of competition created by the State support.

Allied Irish Banks/Educational Building Society and Irish Life & Permanent Group Holdings

On 15 July 2011 the Commission temporarily approved(18) a recapitalisation worth up to €13.1 billion of an entity resulting from the merger of Allied Irish Banks and Educational Building Society (AIB/EBS), as well as a recapitalisation worth up to €3.8 billion of Irish Life & Permanent Group Holdings (IL&P) (20 July 2011), both by the Irish authorities. These recapitalisations also arise from the Support Programme’s stress test requirements.

The Irish State will purchase ordinary shares (in AIB/EBS for €5.0 billion, in IL&P for €2.3 billion), contingent capital notes (in AIB/EBS for €1.6 billion, in IL&P for €0.4 billion) and it will inject a capital contribution in the banks’ reserves (in AIB/EBS for €6.5 billion, in IL&P for €1.1 billion).

As in the Bank of Ireland case, the Commission found the measures to be necessary to increase the banks’ solvency ratios, to enable them to resist stress situations, and to preserve stability on the Irish financial markets. The Commission will take a final decision on aid to AIB/EBS and IL&P based on the new restructuring plans that Ireland committed to submit in due course to take account of this additional State support.

Hypo Real Estate

On 18 July 2011 the Commission approved(19) restructuring aid consisting of capital injections of €10 billion, an asset relief measure with an aid element of about €20 billion, as well as liquidity guarantees amounting to €145 billion for the banking group Hypo Real Estate (HRE).

In 2008 HRE faced a severe liquidity shortage after the interbank lending markets dried up in the aftermath of the Lehman Brothers bankruptcy. In 2009 HRE was nationalised and Germany notified the first version of the restructuring plan. After the opening of an in-depth investigation triggered by doubts on the bank’s viability and the adequacy of the measures aimed at burden sharing and minimising distortion of competition, the restructuring plan was finally updated in June 2011.

The Commission concluded that the restructuring plan of HRE and its core bank Deutsche Pfandbriefbank (Pbb) is liable to restore Pbb’s long-term viability while ensuring that the bank and its former owners adequately contribute to the restructuring costs and that distortion of competition created by the aid are mitigated. All business activities of the HRE group will be phased out (in particular, budget and infrastructure finance, capital markets and asset management activities), except for the activities of Pbb (essentially public investment and real estate finance). At the end of 2011 Pbb’s adjusted balance sheet size will be around 85% smaller than HRE group’s balance sheet size at the end of 2008. This will adequately address distortion of competition created by the massive State support received by the German banking group during the financial crisis.

Real economy cases adopted under the Temporary Framework

Schemes

The Commission authorised the prolongation of certain schemes allowing compatible aid in the form of guarantees in Greece, Latvia, Luxembourg and Spain(20). Furthermore, the Commission decided to extend the authorisation of short-term export credit insurance schemes in Belgium, Denmark and Luxembourg(21).

Decisions taken under Article 107(3)(c) TFEU

Rescue and Restructuring

Ruse Industry

On 13 July 2011 the Commission found(22) that the Bulgarian metal manufacturer Ruse Industry received subsidies in the form of unpaid debts to the State of around €3.7 million.

(19) Belguim: SA.32159; Denmark: SA.32573; Luxembourg: SA. 32846.
(20) SA.28903 (ex C 12/2010).
The company had been in difficulties for several years. In June 2009, the Bulgarian authorities notified(23) plans to restructure Ruse Industry to the Commission. After the Commission opened an in-depth investigation in April 2010, Bulgaria withdrew the notification in November 2010 and filed for bankruptcy proceedings against Ruse Industry, but the Commission continued its investigation in view of the State's failure to enforce its debt in previous years. It concluded that Ruse Industry benefitted from State aid, as any other creditor would have sought repayment of the debt sooner and more effectively. This distorts competition vis-à-vis other companies, which had to operate their businesses without such support and were subject to the discipline of credit markets. In order to remedy this distortion, the Commission ordered recovery of aid to Ruse Industry.

This was the first time the Commission issued a recovery order to Bulgaria which covers aid granted as from 1 January 2007, when Bulgaria became a member of the EU. The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid, thereby cancelling or at least alleviating the distortion of competition brought about by the aid.

Research, Development and Innovation

Institut Français du Pétrole

By decision of 29 June 2011(24) the Commission concluded that the unlimited State guarantee granted to the Institut Français du Pétrole Énergies Nouvelles (IFP) constitutes compatible State aid as long as the IFP’s economic activities are conducted solely on an ancillary basis and are connected with its main activity, which is public research.

The IFP is a research body with legal status of Établissement public à caractère industriel et commercial (EPIC). Most of its budget is devoted to non-economic activities, such as independent R&D, training and dissemination of research results. Its economic activities (contractual research, leasing of facilities, exclusive transfer of technology to its commercial subsidiaries) are very limited and are covered only collaterally by the State guarantee.

The Commission considered that IFP derives only limited financial benefits from the guarantee in terms of its economic activities. In particular, IFP conducted contractual research accounting for only a small portion of its activities over the reference period (2006-2009). The Commission found that, insofar as this contractual research was closely linked to IFP’s main activity of independent public research, the State guarantee had not altered the trading conditions to a degree contrary to EU interests. Furthermore these ancillary activities had a positive impact on the spread of scientific knowledge.

Energy & Environment

Romanian Green Certificates

By decision of 13 July 2011(25), the Commission found that Romania’s plan to support the production of energy from renewable energy sources is in line with the 2008 Environmental Aid Guidelines, as it creates clear incentives for increased use of renewable energy, while containing safeguards to limit distortion of competition. The scheme will run until the end of 2016 to help Romania reach the mandatory national renewable energy target set under EU legislation by 2020.

Green certificates are granted to electricity producers for each MWh generated from wind, hydro, biomass, landfill gas, sewage plant treatment gas or solar. If the energy is produced in high efficiency co-generation plants, a bonus is applied. The certificates issued by the State to the producers can be sold to the energy suppliers on a specific market, independent of the electricity market. The electricity suppliers must acquire annually a certain number of green certificates and if they fail to do so they must pay a penalty. The penalties are collected by the transmission system operator and transferred to the Romanian Environmental Fund, which uses them for support to small individual producers of electricity from renewable sources.

Other

Urban regeneration in Northwest England

On 13 July 2011 the Commission cleared under EU State aid rules(26) an investment fund that will support sustainable urban regeneration in the Northwest region of England, a common interest objective promoted by the EU cohesion policy through the Joint European Support for Sustainable Investment in City Areas initiative (JESSICA).

JESSICA is a new financial instrument created by the Commission in cooperation with the European Investment Bank (EIB). In the context of this initiative, the Northwest Regional Development Agency (NWDA) has established and notified to the Commission the Northwest Urban Investment Fund (NWUIF), a £100 million Holding Fund

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(25) SA.33134.
(26) SA.32835.
which will be managed by the EIB. The NWUIF will receive £50 million funding from the European Regional Development Fund (ERDF) and the equivalent match funding of £50 million from the NWDA.

The fund will provide debt and equity investment to promoters and other private investors with a view to fostering urban regeneration projects and unlocking sustainable development in the Northwest’s urban areas.

The NWUIF will target regeneration projects with a financial viability gap that would not be undertaken by the market on its own. Private investors will finance at least 50% of each project, thus creating a leverage effect. Moreover, each project must have a business plan to ensure repayment of the public investment. Incentives for private investors will be limited to the minimum necessary to trigger urban projects and may not exceed a so-called Fair Rate of Return, established through a competitive process or, where this is not possible, by an independent expert. Professional and independent fund managers will ensure prudent investment decisions and the financial sustainability of the funds.

The NWUIF will operate as a Holding Fund deploying resources via investment intermediaries, so-called Urban Development Funds (UDFs). The selected UDFs (Merseyside UDF and Evergreen UDF) will provide sub-commercial loans and equity to urban regeneration projects that form part of integrated sustainable urban development plans. Each UDF will have to invest its resources by the end of 2015.

With this first decision, the Commission has clarified the guiding principles for the assessment of similar support measures that several Member States are currently envisaging. The Commission has considered that aid granted pursuant to this initiative in the form of sub-commercial loans and equity capital is compatible with Article 107(3)(c) TFEU as it allows tackling urban regeneration market failures identified in preparatory studies.

No aid

France’s fourth 3G mobile phone licence

On 10 May 2011 the Commission rejected complaints filed by three mobile phone operators already active in the French market, as it found that the procedure for awarding France’s fourth 3G mobile phone licence in 2009 did not involve any State aid. The award was made by a transparent and open procedure in accordance with EU regulations and resulted in a competitive outcome.(27)

For ten years France had been trying to bolster competition and foster growth in the mobile phone services market by authorising a fourth operator. A number of failed attempts demonstrated that the conditions previously on offer were dissuasive. In 2009 France therefore decided to subdivide the frequencies initially intended for a fourth operator into three batches and to launch separate calls for tender. The first, in 2009, was set aside for new entrants. The beneficiary, Free Mobile, was chosen on the basis of a comparative procedure in which qualitative criteria such as the project’s coherence and planned national coverage were assessed. Bidders also had to agree to pay a spectrum usage fee, comprising a fixed fee of €240 million and 1% of related turnover. The three operators already active in the French market (Orange, SFR and Bouygues Télécom) claimed that the fixed fee was not high enough and thus constituted State aid.

The Commission considers that Member States, when allocating frequencies for mobile communications, act as regulators and are obliged to take into account the goal of facilitating increased competition. Therefore, any loss in revenue for the State when awarding frequencies does not necessarily constitute State aid. Moreover, France had taken sufficient precautions to ensure a competitive outcome and the call for tenders was carried out transparently. Since only one undertaking responded to the call, the Commission noted, moreover, that a bidding procedure would probably have resulted in an even lower fee. For these reasons, the Commission found that the fourth operator did not benefit from a selective economic advantage which might constitute State aid.

Casino Mont Parnès

On 24 May 2011 the Commission rejected(28) a complaint from a bidder who had been excluded from the tender process, and found that the sale took place in an open and unconditional bidding procedure and Greece is assumed to have obtained a market conform price. Thus the Commission concluded that the terms of the sale of the Greek State’s 49% stake in Casino Mont Parnès were market conform and therefore free of State aid.

(27) SA.29191.

(28) SA.16408 (ex C 15/2010, ex NN 21/2010)