EUROPEAN COMMISSION

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C(2018) 7783 final

In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […]		PUBLIC VERSION This document is made available for information purposes only.

Subject: State aid n° SA.29338, SA.44910 and SA.52288 (2018/N) – Germany Sale of HSH Nordbank AG

Sir,

The Commission wishes to inform the German authorities that it has decided not to raise objections to the measure for the reasons set out below.

1. PROCEDURE

(1) By letter dated 21 June 2013, the Commission informed Germany that it considered the re-increase of the ceiling of a second-loss guarantee (the "Guarantee") in favour of HSH Nordbank by EUR 3 billion as new State aid[1] (the "2013 Opening Decision").

(2) The Guarantee had been granted by *HSH Finanzfonds AöR* (the “HSH Finanzfonds”), an institution established under public law and controlled by the City State of Hamburg and the State of Schleswig-Holstein (the "Länder"), with an original ceiling of EUR 10 billion in 2009 and was approved by Commission

[1] OJ C 315, 29.10.2013, p. 81.

Seiner Exzellenz Herrn Heiko Maas
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Decision of 20 September 2011 (the "2011 Decision").[2] Following an intermediate reduction of the Guarantee ceiling to EUR 7 billion, Germany, in May 2013, notified the re-increase back to its original level of EUR 10 billion.

(3) The 2013 Opening Decision temporarily approved the re-increase but initiated the proceedings laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU") in respect of that aid.

(4) By Decision of 2 May 2016 (the “2016 Decision”)[3] the Commission finally approved the re-increase of the Guarantee. The approval was based on commitments that the German authorities submitted.[4]

(5) The commitments included a split of the bank into a holding company and an operating subsidiary ("HSH" or "the bank") and a sale of the holding's shares in HSH by 28 February 2018 through an open, non-discriminatory, competitive and transparent bidding procedure.[5] The commitments also included that the intended acquisition of HSH was to be notified following the successful completion of the sale procedure for the Commission to assess it.[6] Accordingly, the purchase will not be implemented before an approval decision of the Commission.

(6) Therefore, a further Commission decision is required to assess, first, whether the final bid price is positive and the implementation of the sale process does not involve aid either to the buyer or to the sold entity and, second, whether the new entity is viable.

(7) In case of a failed sale or a negative price, i.e. the involvement of new aid in the sale process, or if the Commission's assessment of the viability of the joint entity is negative, the German authorities committed that the bank would stop new business and manage its assets with the view to wind them down.

(8) On 23 January 2017, the sale process was launched by a public notice inviting expressions of interest. Following the launch of the sale process, the German authorities provided further information and documentation on its progress and consecutive phases.

(9) On 15 January 2018, the German authorities informed the Commission that out of the potential investors that had submitted binding offers and business plans, one group of bidders was chosen to take part in a concluding round of negotiations as the preferred bidder with the aim to finalise the terms of the sale of HSH by 28 February 2018. This group consisted of the following companies, partially on behalf of funds initiated, advised or managed by them: *J.C. Flowers & Co.* LLC ("Flowers"), *Cerberus European Investments LLC* ("Cerberus"), *GoldenTree Asset Management LP ("GoldenTree"), Centaurus Capital LP* ("Centaurus")[7] and *BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische*

2 OJ L 225, 21.08.2012, p. 1.
3 OJ L 319, 25.11.2016, p. 13.
4 See commitment catalogue in Annex I to the 2016 Decision.
5 See point 5.1 of the commitment catalogue in Annex I to the 2016 Decision.
6 See point 5.7 of the commitment catalogue in Annex I to the 2016 Decision.
7 When using the short names Cerberus, Flowers, Golden Tree or Centaurus in the following text, this includes affiliated funds and/or accounts initiated, advised or managed by each of them.

Postsparkasse Aktiengesellschaft ("BAWAG"), together "the Purchasers". Another bidder was named as the reserve bidder.

(10) Over the course of January and February 2018, Germany submitted further information to the Commission concerning the planned transaction and the business plan of the potential buyers.

(11) On 28 February 2018, the Share Purchase Agreement ("SPA") was signed with the bidders described in recital (9), and on 21 March 2018 Germany submitted the signed SPA and further information about the business plan. Adjacent agreements, contracts and transaction documents were submitted on 4 and 13 April 2018.

(12) Subsequently, additional information and updates were submitted during the period preceding the notification.

(13) On 23 October 2018, Germany formally notified the transaction as no aid measure for the Commission to assess its conformity with the 2016 Decision. The notification included the still valid commitment to change the name of HSH within three months of closing. Following the formal notification, Germany submitted further information and updates.

(14) By letter of 31 August 2018, Germany agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation 1/1958[8] and to have the present decision adopted and notified in English.

2. DESCRIPTION

2.1. The bank

(15) HSH Nordbank was a private joint stock company which was established in 2003 as the result of the merger between the former Hamburgische Landesbank and the Landesbank Schleswig-Holstein.

(16) Until 2016, Hamburg and Schleswig-Holstein held 85.38% of HSH Nordbank, directly or via the HSH Finanzfonds. The remaining shares were in the hands of the *Savings Banks Association of Schleswig-Holstein* and a group of nine funds initiated by J.C. Flowers.

(17) As mentioned in recital (5) above, the commitments attached to the 2016 Decision provided for a split of the bank into a holding company and an operating subsidiary. Consequently, the company structure changed so that currently the holding company *HSH Beteiligungs Management GmbH* ("HSH BM") holds 94.9% of the bank's shares with the nine funds initiated by Flowers holding the remaining shares. HSH BM is majority-owned by the Länder – together they hold, directly and via the HSH Finanzfonds, 94.15 % – with the *Savings Banks Association of Schleswig-Holstein* holding the remaining minority. HSH BM is "the seller" in the sale process dealt with in the present decision.

[8] Council Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

(18) HSH Nordbank used to have a balance sheet total of EUR 208 billion in 2008. At that time, HSH Nordbank was the world's largest provider of ship finance and present in over 20 major financial centres in Europe, Asia and America. For historical reasons HSH has two head offices, in Hamburg and in Kiel.

(19) HSH today is mainly active in corporate banking, real estate and private banking, primarily in the northern and metropolitan areas of Germany. It finances energy and infrastructure projects as well as shipping, the latter, however, on a significantly reduced basis compared to the past. HSH had a balance sheet total of EUR 84 billion at the end of 2016 and of EUR 70 billion at the end of 2017.

2.2. The measures 2011-2016

(20) The financial crisis put HSH Nordbank in difficulties, and in 2009 it received State support from HSH Finanzfonds which injected EUR 3 billion capital into the bank and provided the EUR 10 billion Guarantee. In addition, the German Financial Market Stabilisation Fund (SoFFin) provided HSH with liquidity guarantees covering new issuances of debt of up to EUR 17 billion.

(21) The 2011 Decision approved those aid measures on the basis of Article 107 (3)(b) TFEU, which enables the Commission to find aid compatible with the internal market if it is "to remedy a serious disturbance in the economy of a Member State". The basis for the 2011 Decision was a restructuring plan and related commitments as well as conditions with respect to remuneration and burden-sharing. The plan included the reduction of the bank's balance sheet, in particular of its exposure to the shipping business, and a better diversification within its business model by an increased focus on the regional corporates business and real estate.

(22) As mentioned in recital (2), the EUR 10 billion ceiling of the Guarantee was reduced to EUR 7 billion upon the initiative of HSH in a stepwise-approach between March, June, and September 2011. The decrease reduced the fees that HSH had to pay to HSH Finanzfonds and was included in the restructuring plan that served as a basis for the 2011 Decision.

(23) The 2011 restructuring plan assumed that shipping charter rates would recover. However, in the year following the 2011 Decision, charter rates declined significantly and affected the market value of ships. Despite the considerable reduction of HSH's shipping exposures, this loan portfolio remained a key risk so that the bank was severely affected by the required additional loan loss provisions.

(24) Consequently, in 2013, the supervisor of the bank required to re-increase the ceiling of the Guarantee by EUR 3 billion returning to its original level of EUR 10 billion. The second-loss nature of the Guarantee means that the guarantor is only liable for reimbursing losses on the guaranteed portfolio which exceed a first-loss tranche of EUR 3.2 billion borne by HSH. With the ceiling reset to EUR 10 billion, the Guarantee consequently compensates for losses in the guaranteed portfolio of between EUR 3.2 and EUR 13.2 billion. As mentioned in recital (3), the Commission approved the re-increase temporarily by means of the 2013 Opening Decision as new aid ("2013 Measure") and at the same time initiated the procedure laid down in Article 108(2) TFEU in respect of that aid.

(25) In the 2013 Opening Decision the Commission expressed doubts as to the restoration of HSH's long-term viability on the basis of the restructuring plan submitted with the notified 2013 Measure and questioned whether HSH needed to adjust its business strategy and consider alternative actions.[9]

(26) On 21 March 2016, Germany re-notified the 2013 Measure of the Guarantee ceiling as aid for the sale or winding down of HSH including corresponding commitments.

2.3. The 2016 Decision

(27) In the 2016 Decision, the Commission continued to assess the 2013 Measure under Article 107(3)(b) TFEU. Since the re-increase of the Guarantee ceiling was notified and declared temporarily compatible before the 2013 Banking Communication[10] became applicable, the assessment was based on the 2008 Banking Communication,[11] further elaborated in the Recapitalisation Communication[12] and the Restructuring Communication[13] and subsequently amended by the 2010 and 2011 Prolongation Communications.[14]

(28) In view of the changed purpose of the 2013 Measure, the Commission assessed the compatibility of the aid on the basis of section 2 of the Restructuring Communication and in particular the subsection "Viability through sale of a bank" as well as on section 5 of the 2008 Banking Communication[15], aid for the "controlled winding up of financial institutions".[16]

(29) Subject to a further Commission decision upon a successful conclusion of the sale process assessing positively the new entity's viability and the price and aid-free character of transaction, the 2016 Decision found the 2013 Measure compatible with the internal market.

(30) The approval was based on Germany's commitments, in particular those relating to the split of HSH and the sale of the operating subsidiary by end February 2018 or, if an aid-free sale with a positive price failed, to a stop of new business and to

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9 See 2013 Opening Decision, recital (54).

10 Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ("2013 Banking Communication"), OJ C 216, 30.7.2013, p. 1.

11 Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ("2008 Banking Communication", OJ C 270, 25.10.2008, p. 8.

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

13 Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ("Restructuring Communication"), OJ C 195, 19.8.2009, p. 9.

14 Commission Communication on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis ("2010 Prolongation Communication"), OJ C 329, 7.12.2010, p. 7, and Commission Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis ("2011 Prolongation Communication"), OJ C 356, 6.12.2011, p. 7.

15 See recital (27) for a more detailed explanation as to why the 2008 Banking Communication is relevant in this case.

16 See recital (129) of the 2016 Decision.

commence management of its assets with the view to wind them down as described in recitals (4) and (7) of the present decision. According to the commitments, the bank will also adopt a new name within three months of the successful completion of the sale procedure.[17]

(31) The 2016 Decision furthermore concluded that the measures taken in 2016, namely the split of HSH into a holding company and an operating subsidiary and the distribution of the Guarantee fee payment obligations across those two entities as well as the transfer of assets from operating subsidiary to the Länder at market prices, did not contain new State aid in the meaning of Article 107(1) TFEU.

(32) As regards burden-sharing and competition measures, the Commission in the 2013 Opening Decision noted that it had already considered those criteria for a Guarantee covering an amount of EUR 10 billion in the 2011 Decision and concluded that the re-increase to that ceiling, even if new aid, stayed within the boundaries of the measure approved by the 2011 Decision. The Commission therefore stated that it had no doubts that those measures were still adequate in 2013.[18]

(33) With respect to burden sharing, the Commission reiterated that assessment in the 2016 Decision and concluded that the aid was limited to the minimum and contained sufficient own contribution.[19]

(34) As to the minimisation of distortions of competition, the Commission took into account the re-notified character of the aid and the limited time of the sale process in the 2016 Decision. On that basis, the Commission considered Germany's commitments – in particular commitments to further decrease the overall size of the balance sheet and to limit business segments, in particular the shipping business, as well as commitments relating to conduct such as an advertisement ban, an acquisition ban and a cap on remuneration[20] – as appropriate means to minimise distortions of competition as provided for in section 3 of the 2008 Banking Communication. It therefore finally concluded that during the sale process as well as after and independent of its final outcome, the commitments provided by Germany ensured the avoidance of undue distortions of competition.

(35) Consequently, the Commission finally concluded in the 2016 Decision that the aid remained limited to the minimum necessary and that undue distortions of competition were avoided. However, the Commission deferred to the present decision the assessment of the sale process – regarding the question of whether the final bid price is positive and whether the implementation of the sale process does not involve aid to either buyer or the sold entity – and the assessment of the viability of the entity resulting from the sale process.

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[17] See point 5.8 of the commitment catalogue in Annex I to the 2016 Decision.

[18] See recital (57) of the 2013 Opening Decision.

[19] See recital (137) of the 2016 Decision.

[20] See recital (140) of the 2016 Decision.

2.4. The sale process

(36) To prevent State aid involvement in the sale process, the German authorities committed to sell the shares in the operating subsidiary by means of an open, non-discriminatory, competitive and transparent bidding procedure.[21]

(37) The sale process was launched on 23 January 2017 by the publication of a notice inviting expressions of interest.

(38) In the period between 16 February 2017 and 30 March 2017, 24 of the potential investors that had expressed interest were invited by way of a first process letter to submit indicative offers by 31 March 2017. Ten indicative offers were received.

(39) On 20 April 2017, the second process letter invited seven of those ten bidders to submit extended indicative offers by 30 June 2017. Three bidders did not fulfil the requirements listed in the first process letter with respect to, for instance, the proof of sufficient financial resources or relevant sector specific expertise. Five of the seven bidders submitted extended indicative bids, among them Flowers and Cerberus.

(40) The third process letter invited these five bidders on 21 July 2017 to submit binding offers by 27 October 2017. This was followed by an extended process letter clarifying the requirement of third process letter and extending the period for questions and answers.

(41) Three potential investors, among them Flowers and Cerberus which had formed a bidding consortium in the meantime, submitted binding offers by the set deadline of 27 October 2017, with one additional bidder submitting a non-binding offer.

(42) On 24 November 2017, a fourth process letter was sent to the three bidders that had submitted binding offers. The bidders were informed that they had been selected to participate in the negotiation phase (phase III) and were invited to revise the binding offer by 5 January 2018 and to further specify and develop the business plan that the bidders had submitted with their binding offers, also with a view to the Commission's subsequent assessment of viability.

(43) The fourth process letter also described that "the Seller and the Länder intend to select, in early January, from the revised offers, a Bidder as the “preferred bidder” and to continue the Privatization Process, in any case for a certain period of time, exclusively with it."[22]

(44) On 15 January 2018, the German authorities informed the Commission that on the basis of the three revised binding offers received, one bidder was selected as the preferred bidder, i.e. the one best placed to successfully conclude the negotiation process, namely the bidding consortium headed by Flowers and Cerberus and in the meantime joined by BAWAG, Golden Tree and Centaurus. According to the information, one other bidder was considered as reserve bidder.

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[21] See point 5.1 of the commitment catalogue in Annex I to the 2016 Decision.

[22] See fourth process letter, point 1.

(45) Following further clarifications with respect to the business plan and the SPA amongst others, the SPA was finally signed on 28 February 2018.

(46) Under the terms of the SPA, HSH BM sells, with economic effect as of the closing date, all its shares in HSH. The nine funds initiated by Flowers that together already held 5.1% of shares in HSH will exercise their tag-along rights directly following closing and also sell their shares to the Purchasers. Subsequently, the final shareholder structure will be the following: funds initiated by Flowers will hold 35%, funds initiated by Cerberus 42.5%, BAWAG 2.5%, a fund initiated by Golden Tree 12.5% and a fund initiated by Centaurus 7.5%.

(47) The SPA determines a value of EUR 1.054 billion for 100% of shares in HSH ("Basic Purchase Price"). The Basic Purchase Price is based on the assumption that the full EUR 10 billion are settled under the Guarantee. If less than EUR 10 billion are paid out, the price paid will be reduced by the difference between the amount paid and EUR 10 billion (the "Guarantee Adjustment Amount"). The result is the "Adjusted Purchase Price". Given that HSH BM only holds 94.9% of HSH shares, the actual price payable to the seller is equal to 94.9% of the Adjusted Purchase Price (the "Final Purchase Price").

(48) According to the SPA, HSH has also agreed to sell by the end of 2018 a credit portfolio of non-core non performing exposures ("NPEs") and non-core performing shipping exposures (together "the carve-out portfolio") with a gross book value of EUR [6-8][*] billion[23] and a net book value ("NBV") of EUR 3.53 billion. The portfolio is acquired by a special purpose vehicle (the "SPV") held by bidders from the bidders group or investors associated with the bidders.

(49) The SPV will acquire that portfolio for a purchase price of EUR [2-3] billion, corresponding to a discount to NBV, and hence a loss for the bank, of EUR […] billion. That price was determined in a third party valuation by Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft which estimated the assets' value to be between EUR [2-3] billion and EUR [2-3] billion. The sale of the NPE portfolio will be done after closing of the SPA with the financial impact already taken in the 2017 year-end results. Neither the seller nor other State entities are involved in the sale of the NPE portfolio.

(50) The SPA also contains a best effort commitment to find a solution for those liabilities by HSH that remain under the original State guarantee for public banks ("Gewährträgerhaftung"). No further binding agreements have been submitted.

(51) Finally, HSH, the seller and the HSH Finanzfonds agreed on terms for the termination of the Guarantee. Although accounting-wise the Guarantee has already been fully used, i.e. the expected future payments under the Guarantee already amount to EUR 10 billion, actual payments on the Guarantee are only made after losses are claimed by HSH and approved by HSH Finanzfonds as guarantor. Approval and payment of the last tranches had been foreseen to occur in 2020.

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[*] Confidential information.

[23] As of 31 December 2017.

(52) The parties agreed on an accelerated approval procedure in order to be able to terminate the Guarantee with the closing of the SPA. According to Art. 7.1.11 of the SPA, the closing is conditional upon the confirmation by HSH Finanzfonds that at least EUR 9 billion will be settled under the Guarantee and are not subject to claw-back. Moreover, according to the report of 15 June 2018 by HSH Finanzfonds, losses covered by the Guarantee amount to EUR [>10] billion, i.e. the entire EUR 10 billion would be paid out under the Guarantee. As compensation for the accelerated payment and the economic advantage lying therein, HSH will pay EUR 100 million to HSH Finanzfonds. The compensation payment is non-deductible from the price.

(53) The SPA sets a series of requirements and conditions, including suspensive "conditions precedent" for the closing of the sale. The latter include, inter alia, the necessary approvals by the supervisory authorities, the clearance by the competent merger control authorities, parliamentary approvals in Hamburg and Schleswig-Holstein and the Commission's approval under State aid rules on the basis of the assessment set out in the present Commission decision. It also includes the confirmation of the HSH Finanzfonds on the Guarantee liability (see recital (51)) and the successful transition of HSH from the institutional protection scheme ("IPS") of the German Savings Bank Finance Group (Sparkassen-Finanzgruppe, "DSGV") to the association of German commercial banks in private ownership (Bundesverband Deutscher Banken, ""BdB") (see section 2.5)

2.5. Transition between protection schemes

(54) Currently, HSH is part of the IPS of the DSGV which also includes the basic deposit guarantee scheme according to the Deposit Guarantee Scheme Directive[24]. The DSGV IPS is a recognised IPS with the related benefits in the meaning of Article 113(7) of the Capital Requirements Regulation (“CRR”)[25]. That implies that all members of the DSGV mutually insure each other against default.

(55) As a private bank, HSH will have to leave the DSGV and transit to the basic statutory DGS for private banks (Entschädigungseinrichtung deutscher Banken, “EdB”). The EdB guarantees deposits of up to and including EUR 100,000 in accordance with Directive 2014/49. As part of the business plan for HSH, the Purchasers have also included the successful accession to the BdB's voluntary deposit guarantee fund (Einlagensicherungsfonds, "ESF"). The ESF covers amounts not covered by the EdB (see footnote 26).

(56) According to the ESF statute, a newly accepted bank will normally not be admitted to the ESF's full protection limit[26] until the end of the third full calendar

[24] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149–178.

[25] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms, OJ L 176, 27.6.2013, p. 1–337.

[26] This follows from § 6(16) of the Statute of the ESF (https://bankenverband.de/media/publikationen/27072017_Statut_ELS_web.pdf). According to §6(8)(a) of the Statute, full ESF protection covers amounts above the legally required protection to up to 20 % of own funds of the bank, as defined in Article 72 of the CRR. This amount will change to 15% as of 1 January 2020 and to 8.75% as of 1 January 2025. The coverage limit for newly accepted institutions amounts to EUR 250.000.

year of their participation in the ESF, when a re-examination will take place. At the same time, the DSGV has a common statutory exit transition period of two years only. To ensure successful transition without a coverage gap, the DSGV would have to extend its exit transition period for HSH to three years. The unconditional extension of that exit transition period for HSH is a formal condition precedent in the SPA.

(57) Accordingly, a contract has been concluded ("Extension Contract") between the DSGV, HSH and its Purchasers which extends the bank's membership to three years following closing. In that context, the Framework Statute of the DSGV was also changed to enable an extended three-year exit transition period for leaving institutions. According to the Extension Contract, the prolonged IPS membership is, however, conditional upon the signing of a contract that grants HSH accession to the participation in the ESF from January 2022. Therefore, the ESF acceptance of HSH has *de facto* also become a closing condition.

(58) The BdB decided on 5 November 2018 to grant HSH ESF membership as of 1 January 2022. To that end the DSGV committed itself to pay, by 31 January 2022 at the very latest, a so-called settlement amount of (up to) EUR [30-50] million to the ESF for the transition to the latter.

(59) The BdB decision is conditional on HSH complying with a number of qualitative covenants, such as investment grade rating and compliance with supervisory requirements, on a continuous basis. Moreover, HSH has to comply with a number of core key performance indicators ("KPIs") on a continuous basis and additional, economic KPIs by June 2021, also called quantitative covenants.

(60) The core KPIs primarily mirror supervisory requirements (e.g. on leverage ratio, liquidity coverage ratio and Net Stable Funding Ratio). The economic KPIs include performance indicators (e.g. common equity tier 1 ("CET1") ratio, cost-income ratio ("CIR") etc.) where performance is measured according to a scoring model ("Scoring Model") as to which the bank has to reach a minimum aggregate score ("target score") by June 2021.

(61) The qualitative and quantitative covenants form also part of DSGV's Extension Contract which, first, obliges HSH to use its best efforts to comply with these requirements and, second, binds the BdB with respect to ESF admission, if the bank meets these requirements (the "binding effect"). In other words, the BdB is bound by its commitment to accept HSH's participation in the ESF if the bank complies with the covenants.

(62) In this context, monitoring of the bank's performance will be essential. Therefore, the BdB has agreed to accept HSH already from January 2019 as a member of BdB's audit body. The audit body will already monitor HSH's performance in the run-up period to its ESF membership and will put a particular focus, together with the DSGV, on June 2021.

(63) In case of HSH's failure to comply with one or more of the covenants, there are three scenarios as to the BdB's reaction with respect to the binding effect:

a) If HSH infringes the qualitative covenants, the BdB can declare the immediate termination of the binding effect.

b) If HSH infringes the core KPIs, the bank has certain deadlines (for most of the core KPIs […] days) to remedy the situation before the BdB can declare the termination of the binding effect.

c) If HSH does not achieve the required score in relation to the economic KPIs, calculated by an extrapolation to 31 December 2021 on the basis of data as of June 2021, the Purchasers and the DSGV can inject capital into HSH to increase the bank's CET1 capital in the amount necessary for HSH to achieve at least the target score. Otherwise, the BdB can declare the termination of the binding effect.

(64) Even if the binding effect ends, the BdB remains obliged upon request of HSH to decide on the fulfilment of prerequisites for the ESF participation and an ESF accession on 1 January 2022, or later, on the basis of the relevant circumstances at the time of the assessment.

(65) To be able to potentially increase HSH's CET1, as described in recital (63) c), the Purchasers have committed to inject cash into HSH in the amount necessary for HSH to achieve at least the target score but in any event not more than EUR [significantly >200] million. The capital injection, if necessary, will be done by subscribing to common shares issued by HSH.

(66) Should the EUR [significantly >200] million committed by the Purchasers not be sufficient for HSH to achieve the target score, the DSGV has committed a further injection amount of up to EUR [100-200] million to increase HSH's CET1, also by means of subscribing to common shares issued by HSH.

(67) The subscription conditions are principally the same for the Purchasers and the DSGV. The Purchasers have, however, a call option, i.e. each of them may require the DSGV to transfer to them all of the new shares held by the DSGV. If the call option is exercised, the Purchasers have to pay to the DSGV the injection amount plus an additional interest, corresponding to […]% p.a. if the call option is exercised during the first three years following the issuance of the shares and […]% p.a. thereafter.

(68) The DSGV, on the other hand, has a put option should the Purchasers decide to sell new or existing shares in HSH to a third party[27]. This means that the DSGV may require the Purchasers to buy from it all or a proportion of the shares held by DSGV for a price equal to the relevant proportion of DSGV's injection amount plus interest of […]% p.a.

2.6. The business plan for HSH

(69) The business plan submitted by the German authorities covers the years 2018 to 2022. The new owners do not envisage a major change in the future business model with their primary aims being de-risking and changing the funding structure. The business plan is based on the following main pillars:

[27] In that context it should be noted that each of the Purchasers committed, according to their agreement with the BdB, not to sell until […], without the agreement of the BdB, shares in HSH to one or more third parties except if following such transaction(s) the direct or indirect ownership of one or more third parties taken together relates to less than 25% of all shares outstanding in HSH at the time of the completion of each of such transactions.

(a) A smaller bank, focusing on real estate financing in Germany's metropolitan areas, corporate clients, including project financing, with reduced shipping business;

(b) The portfolio carve-out;

(c) Improvement of the bank's efficiency underpinned by staff reductions;

(d) Improved funding management.

(70) The business plan contains financial projections for both a base case and an adverse case scenario.

Base case scenario

(71) The base case scenario is based on macroeconomic assumptions of a moderate German GDP growth and a moderate increase of interest rates. The USD/EUR exchange rate is assumed flat at [1-2] throughout the whole period. The key macroeconomic assumptions underlying the base case are in Table 1 below.

Table 1: Key macroeconomic assumptions

	2018	**2019**	**2020**	**2021**	**2022**
Nominal GDP growth (annual change)	[1-3]%	[1-3]%	[1-3]%	[1-3]%	[1-3]%
Inflation rate (annual average)	[1-3]%	[1-3]%	[1-3]%	[1-3]%	[1-3]%
3-month EURIBOR (annual average)	[-0.5-2] %	[-0.5-2] %	[-0.5-2] %	[-0.5-2] %	[-0.5-2] %
10-year German government bond yield	[100-300] bps[28]	[100-300] bps	[100-300] bps	[100-300] bps	[100-300] bps
USD/EUR exchange rate	[1-2]	[1-2]	[1-2]	[1-2]	[1-2]

(72) According to the plan, the bank's profit and loss ("P&L") statement shows very little sensitivity to interest rate volatility. Any positive effects from a lower EURIBOR on the funding side would be translated into negative effects on the asset side (and vice versa). The only significant P&L sensitivity to EURIBOR is in the capital benefit, estimated at a EUR […]million lower capital benefit per 10 basis-point decrease in EURIBOR. There is also a small sensitivity of the capital position to EURIBOR related to the reserves for future pension payments, estimated at EUR […]million higher reserves per 10 basis-point decrease in EURIBOR.

(73) The bank will become smaller with a balance sheet of EUR [50-70]billion at the end of the restructuring plan in 2022 as compared to EUR 71 billion in 2017. The decrease is mostly due to a EUR […] billion decrease in outstanding loans (including the sale of EUR […] billion of NPE (see recital (49)), a EUR […] billion reduction in excess liquidity and the sale of EUR […] billion of financial assets.

[28] Basis points.

(74) The bank's expansion will focus on commercial real estate business […](balance sheet increase from EUR 11 billion in 2017 to EUR […] billion in 2022). The corporate clients business will also grow (balance sheet increase from EUR 12 billion in 2017 to EUR […] billion in 2022) and will continue to focus on the German "Mittelstand" and larger corporates in its home markets, as well as on project financing in energy, transport and infrastructure.

(75) Shipping lending (which is denominated in USD) will shrink further (from EUR 6 billion in 2017 to EUR [2-4] billion in 2022) and focus on medium-sized and large shipping companies with a diversified portfolio of containers, bulk carriers and tankers.

(76) On the basis of the macroeconomic assumptions and the business outlook, the bank's total operating income is planned to increase from EUR […] million in 2019[29] to EUR […] million in 2022 (see Table 2), i.e. up by EUR [200-400] million over the three years, corresponding to a compound annual growth rate ("CAGR") of [10-20]%, on the back of:

(a) A EUR […] million increase ([10-20%]% CAGR) in net interest income, mainly in real estate (+EUR […] million or [10-20%]% CAGR) and corporate clients (+EUR […] million or [10-20]% CAGR);

(b) Growth in net fee income (+EUR […] million or [10-20]% CAGR) due to fee-based income initiatives e.g. intensification of syndication and originate-to-distribute activities, particularly for corporate clients;

(c) Nearly steady net trading income at EUR […] million per year;

(d) Completion of the wind-down of the non-core bank.

(77) Consequently, at the end of the plan, [50-70]% of the operating income will be generated by net interest income (real estate […] %, corporate clients […]%, shipping […]%) and [30-50]% by non-interest income ([…]% from trading and […]% from fees).

(78) The bank will continue to optimise its cost structure and reduce its headcount. It identified five efficiency levers to reduce administration expenses by around [20-30%]% from EUR […] million in 2018 to EUR […] million to 2022. Those involve streamlining central functions and the risk office following the disposal of legacy assets, increasing the efficiency of IT systems, optimising provider costs, and centralising the headquarters […]. As a result, the number of full-time equivalents ("FTEs") is set to decline from [1500-2000] in 2017 to [1000-1500] in 2022.

(79) Following the portfolio carve-out, the NPE ratio will decrease from 10% in 2017 (EUR 7.3 billion exposure at default ("EaD"[30]) to [0-5]% (EUR […] billion EaD) at the end of 2018 and [0-5]% (EUR […] billion EaD) in 2022. Thanks to the

[29] 2019 is chosen as a reference year because some figures reported for the years 2017 and 2018 are influenced by one-off effects related to the transformation plans for the bank and are therefore not a good basis for comparison.

[30] Exposure at default means the maximal amount of a bank stands to lose in case of a default of a counterparty. It is used to calculate the credit risk of financial institutions.

clean-up of the balance sheet, loan loss provisions are planned to decrease from EUR 1 511 million in 2017 (of which […] million in the non-core bank, attributable mostly to loans in the carve-out) to EUR [50-100] million in 2022, implying a cost of risk of […] basis points.

(80) Together with a shrinking balance sheet, the bank's funding needs will decrease going forward. Given the exit from the DSGV, the plan assumes the withdrawal of almost all of the saving banks' deposits by the end of […]. While the plan assumes an overall reduction in deposits from EUR […] billion[31] to EUR […] billion by the end of […], the bank will rely on the new owners' experience in raising retail funding to allow the bank to accelerate its retail deposit plan, aiming to grow retail deposits from EUR 0.2 billion in 2017 to EUR [0-5] billion in 2018 and finally to EUR [5-10] billion in […]2022. Over the whole period of the plan, liquidity is planned to be at stable with a liquidity coverage ratio ("LCR") and net stable funding ratio ("NSFR") above 100%.

(81) Since the bank will no longer be a part of the savings bank sector, it will have to exit the DSGV. The bank will remain a full member of the IPS of the DSGV for another period of three years from the moment of the closing of the sale until 31 December 2021 and will afterwards, from January 2022, join BdB's statutory protection scheme, EdB, as well as the BdB's voluntary protection scheme ESF (see recital (55)). To that end HSH has to comply with a number of qualitative and quantitative covenants as described in recital (59).

(82) As a result of the implementation of the business plan, in 2022 the bank is to deliver a net profit of EUR […] million (compared to a EUR 521 million loss in 2017) and to achieve a cost-to-income ratio of [35-45]%. The after-tax return on equity ("ROE") is expected to reach [0-10]% while the CET 1 and total capital ratio are expected to be [15-20]% and [20-30]% respectively.

Table 2: Financial projections base case scenario

Key financial indicators EUR million	**2017 Actual**	**2018 Plan**	**2019 Plan**	**2020 Plan**	**2021 Plan**	**2022 Plan**
Operating income	1 613	[…]	[…]	[…]	[…]	[…]
Operating expenses	-515	[…]	[…]	[…]	[…]	[…]
of which personnel cost	-230	[…]	[…]	[…]	[…]	[…]
Loan provisioning and impairments	-1 295	[…]	[…]	[…]	[…]	[…]
Other non-recurring expenses	-256	[…]	[…]	[…]	[…]	[…]
Tax	-75	[…]	[…]	[…]	[…]	[…]
Net profit	**-521**	[…]	[…]	[…]	[…]	[…]
Total assets (EUR bn)	70.4	[…]	[…]	[…]	[…]	[…]
Total own funds (EUR bn)	4.4	[…]	[…]	[…]	[…]	[…]
RWA (EUR bn)	20.6	[…]	[…]	[…]	[…]	[…]
Return on equity after tax (%)	-11.2%	[5-15]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%

[31] Actual 2017 data.

Cost-to-income ratio (%)	31.9%	[25-35]%	[60-70]%	[50-60]%	[40-50]%	[35-45]%
CET 1 ratio (%)	15.4%	[15-20]%	[15-20]%	[15-20]%	[15-20]%	[15-20]%
Total capital ratio (%)	25.8%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Capital requirements and guidance*						
CET 1 ratio (%)	10.5%	[10-15]%	[10-15]%	[10-15]%	[10-15]%	[10-15]%

** 2017 and 2018 according to the European Central Bank's Supervisory Review and Evaluation Process (SREP decision). 2019-2022 according to the business plan.*

Adverse case scenario

(83) Germany has also submitted an adverse scenario based on the following assumptions:

(a) a further downturn in shipping markets reflected in a [80-100]% increase in default rates and a general rating decrease by […] notch of the overall shipping portfolio resulting in additional provisions;

(b) a few single events in the commercial real estate and corporate segment, both translating into EUR [600-800] million of additional provisions over the five-year period;

(c) tax as in the base case scenario;

(d) no mitigating measures in the form of reduced business or sale of assets.

(84) As a result of these stress factors, the bank would generate losses in 2019 and 2020, but return to profitability in 2021 and in 2022, reaching a net profit of EUR [>250] million, an ROE after tax of [0-10]% and a CET 1 ratio of [10-15]%.

3. POSITION AND COMMITMENT BY GERMANY

(85) Germany does not see indications contesting the future viability of HSH. In that context, the German authorities highlight the fact that the business plan has not only been submitted to the Commission for its assessment but also critically examined by both the DSGV and the BdB in view of the bank's extended, respectively new, membership in their protection schemes.

(86) Regarding the presence of additional aid to the Purchasers, the bank was sold successfully within the committed deadline by an open, non-discriminatory, competitive and transparent sale procedure. At the end of the process, the bidder group submitting the best economic offer on the basis of the given selection criteria was selected.

(87) In Germany's view, the purchase price is positive and aid-free which can be demonstrated by a calculation submitted to the Commission: The purchase price of EUR 1 054 million – based mathematically on 100% of HSH's shares – is to be adjusted by the amount corresponding to the non-used Guarantee. Since this concerns a maximum amount of EUR […] million, the purchase price would in that case be reduced to EUR [900-1100] million (for 100%) and to EUR [900-1100] million for 94,9% of HSH's shares. The price is, in any event, positive and there are no further potential adjustments. The compensation payment for the

early termination of the Guarantee does not have any effects on the purchase price since that will be paid by HSH.

(88) Finally, Germany takes the view that DSGV's two support measures do not constitute State aid in the meaning of Article 107(1) TFEU. This concerns, first, the committed payment of the so-called settlement amount of (up to) EUR [30-50] million to the ESF for the bank's – and parts of its DSGV contributions - transition to the ESF and, secondly, the committed amount of up to EUR [100-200] million to increase HSH's CET1 in case the bank fails to achieve the target score of the economic KPIs and the committed EUR [significantly >200] million committed by the Purchasers should not be sufficient.

(89) As a consequence, Germany considers all commitments have been complied with apart from the commitment concerning the name change of the bank within three months after closing as described in point 5.8 of the commitment catalogue annexed to the 2016 Decision. Germany has confirmed that this commitment continues to apply and that the Purchasers in that respect have committed themselves to stop using the name "HSH Nordbank" or parts thereof within three months from closing.

4. ASSESSMENT

4.1. Existence of aid

(90) Article 107(1) TFEU provides that 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 is, insofar as it affects trade between Member States, incompatible with the internal market. The nature of the 2013 Measure as new State aid has already been established by the Commission in its assessment in the 2013 Opening Decision and in the 2016 Decision.

(91) Since the re-increase of the Guarantee ceiling was notified and declared temporarily compatible before the 2013 Banking Communication became applicable, the assessment in the 2016 Decision was based on the 2008 Banking Communication, section 5 (aid for the "controlled winding-up of financial institutions") and on the Restructuring Communication, section 2, in particular the subsection "Viability through sale of a bank", as mentioned in recitals (28) and (29) above.

(92) In view of the fact that the orderly wind-down of the bank is here implemented by means of a sale, the specific criteria set out in point 49 of the 2008 Banking Communication have to be fulfilled to ensure that no aid is granted to the buyers of the financial institution or parts of it, or to the entities sold. Therefore, the sale process should be open and non-discriminatory, the sale should take place on market terms and the financial institution should maximise the sale price. Those requirements are equivalent to the requirements under section 2 of the Restructuring Communication regarding the sale process.

(93) Correspondingly, the Commission has to verify whether the process includes aid to the Purchasers, that the overall sale price is positive and that the sale agreement does not include any aid measures in favour of HSH.

4.1.1. No aid to the Purchasers

(94) For a measure to fall within the scope of Article 107(1) TFEU, four cumulative criteria must be met: first, the measure must be imputable to the State and financed through State resources; second, the measure must confer an advantage on undertakings; third, that advantage must be selective; and fourth, the measure must distort or threaten to distort competition and have the potential to affect trade between Member States. If any of those criteria are not fulfilled, there is no State aid and no need to examine the other criteria. In the context of the privatisation of HSH, it is sufficient to assess the criterion of whether the sale favoured certain undertakings by conferring an economic advantage.

(95) Economic transactions do not confer an advantage on either of the parties involved, and therefore do not constitute aid, if they are carried out in line with normal market conditions.[32] In other words, a transaction does not confer any advantage if the Member State's behaviour is consistent with that of a private market economy operator or, more specifically in this context, a market economy vendor ("private vendor test"). Where a sale is carried out through an open, transparent and unconditional tender procedure and where the asset or shareholding is sold to the bidder who made the highest binding and credible offer, market conditions can be presumed and, consequently, there is no advantage.[33]

(96) According to the Commission's information, the tender procedure did not contain any limitation as to the parties that could submit offers. The deadlines, in particular for submitting indicative, binding and final binding offers, as communicated in the process letters gave enough time and were, therefore, not eliminatory.

(97) Moreover, clear guidance was given for each phase of the sale process by means of the process letters, access to relevant documents and question & answer rounds. According to the Commission's information, this information was sufficient for the bidders to carry out a proper valuation.

(98) The Commission has also no indication that the sale process was discriminatory at any stage or that bidders did not receive the same information in any given phase of the sale process. Moreover, those bidders that had submitted binding offers were all given the opportunity to improve their bids.

(99) There are furthermore no indications that the process letters imposed conditions on potential bidders that are not customary in comparable transactions between private parties and capable of potentially reducing the sale price. Apart from standard requirements such as the bidder's disposal over sufficient financial resources and the non-existence of a priori hindrances for regulatory approvals, the only specific conditions stemming from the 2016 Decision were the positive price with no further aid element and the preparation of a business plan for the Commission's viability assessment post-signature of the SPA.

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32 Case C-39/94 SFEI and Others v La Poste and Others, EU:C:1996:285, paragraph 60.

33 Joined cases T-268/08 and T-281/08 Land Burgenland v Commission, EU:T:2012:90, paragraphs 70 and 87; joined Cases C-214/12 P, C-215/12 P and C-223/12 P Land Burgenland and others v Commission, EU:C:2013:682, paragraphs 94.

(100) Finally, the shareholding is being sold to the bidders who made the highest binding and credible offer, namely the Purchasers who had submitted the highest and at the same time credible binding offer regarding criteria such as financial resources, track record and the likelihood of regulatory approvals.

(101) On that basis, the Commission considers that HSH BM's shareholding in HSH was indeed sold on market terms, i.e. through an open and non-discriminatory tender procedure to the bidder submitting the highest binding and credible offer. Consequently, no advantage was conferred to the Purchasers, and therefore no State aid was granted to them.

4.1.2. Positive price

(102) The overall economic benefit received by the seller for the bank consists of the Final Purchase Price paid for the transfer of the shares to the Purchasers and the compensation to be paid for the accelerated settlement of the Guarantee.

(103) The Purchasers pay to the seller the Final Purchase price for the transfer of the shares equal to (EUR 1 054 million – Guarantee Adjustment Amount) multiplied by 0.949 (see recital (47)).

(104) According to the report of 15 June 2018 by HSH Finanzfonds, losses covered by the Guarantee amount to EUR [>10] billion – i.e. in excess of EUR 10 billion – so that the Guarantee Adjustment Amount equals to zero. Germany has further submitted that even in the best case, an amount of EUR […] billion would be settled under the Guarantee in which case the Guarantee Adjustment Amount would amount to EUR […] million.

(105) On that basis, the lowest Adjusted Purchase Price would be EUR [900-1100] million and the corresponding Final Purchase Price EUR [900-1100] million. In addition to the Final Purchase Price paid by the Purchasers, HSH will pay EUR 100 million to HSH Finanzfonds as compensation for the accelerated payment under the Guarantee.

(106) In sum, the price paid for HSH is significantly positive fulfilling the conditions of the 2016 Decision.

(107) The side-agreement concluding the sale of the NPE carve-out portfolio is a separate agreement between the SPV owned by some of the Purchasers and HSH itself. There is no legal mechanism for a change in the conditions of that sale to alter in any way the price paid for the shares in HSH by the Purchaser to the seller. Therefore, the price assessed above is independent of the execution and conditions of the side-agreement.

(108) On that basis, the Commission considers that HSH BM's shareholding in HSH was indeed sold at a significantly positive price.

4.1.3. *No new aid to HSH*

(109) The SPA contains three provisions that could lead to measures fulfilling the criteria of aid under Art. 107(1) TFEU in favour of HSH: the sale of the carve-out NPE portfolio (see recitals (48) and (49)), the best effort commitment to find a solution for the remaining liabilities under Gewährträgerhaftung (see recital (50))

and the accelerated termination of the existing Guarantee, paid out to HSH (see recitals (51) and (52)).

(110) Moreover, the agreements for the transition of HSH from the IPS of the DSGV to the ESF of the BdB include measures by the DSGV (see recitals (57), (58) and (66)) which might fulfil the criteria of aid under Art. 107(1) TFEU.

(111) In the following, the Commission will examine the carve-out of the NPE portfolio, the accelerated termination of the Guarantee and the financial contribution of the DSGV to enable HSH's transition from the DSGV to the BdB.

(112) Given that the parties have submitted that there have been no further binding agreements regarding the Gewährträgerhaftung, the Commission concludes that there will be no obligations on the parties arising from the best effort commitment in the SPA and correspondingly no concrete commitment that could amount to new aid for HSH.

4.1.3.1. The carve-out of the NPE portfolio

(113) HSH has agreed to sell the NPEs to the SPV. That sale will be done between private entities after closing of the SPA and without involvement of the seller or other State entities.

(114) Moreover, the purchase price is the fair market value based on the result of the evaluation by Ernst & Young Wirtschaftsprüfungsgesellschaft GmbH that found the fair value to be between EUR [2-4] billion and EUR [2-4] billion.

(115) Therefore, the carve-out of the NPE portfolio does not result in new aid to HSH.

4.1.3.2. Termination of the Guarantee

(116) The termination of the Guarantee foresees the accelerated settlement of the Guarantee in order to be able to terminate the Guarantee with the closing of the SPA.

(117) According to calculations of the seller, the advantage of HSH and the Purchasers resulting from the accelerated settlement (accelerated payment under the Guarantee as well as non-paid Guarantee fees) has a net present value of around EUR [80-90] million.

(118) The Commission has verified the calculations of the seller and confirms that the net present value of the accelerated settlement of the Guarantee is in a range between EUR 80-90 million.

(119) On that basis, the compensation payment of EUR 100 million paid by HSH to HSH Finanzfonds in return for the accelerated Guarantee settlement ensures that there is no advantage received by HSH and, correspondingly, no new aid.

4.1.3.3. DSGV measure

(120) In order to facilitate the transition of HSH from the IPS of the DSGV to the ESF of the BdB, the DSGV intends to implement the following measure which consists of three main aspects. The DSGV will prolong the exit transition period for HSH from the statutory two to three years (see recital (57)). In addition, the

DSGV will pay up to EUR [30-50] million to the ESF (see recital (58)). Finally, the DSGV commits to a contingent purchase of shares in HSH for up to EUR [100-200] million (see recital (66)).

(121) The DSGV measure is granted in a context where the German authorities have previously granted various other measures, which constituted State aid (see recital (2)). The sale of HSH to the Purchasers forms part of the implementation of commitments relating to the compatibility of those previous aid measures.

(122) Therefore, the Commission needs to ascertain first whether the possible qualification of the DSGV measure as State aid should be assessed in isolation or as part of the various aid measures already granted to HSH. According to the case-law, such determination must be made by reference to the chronology of the measures, their purpose and the beneficiary's situation at the time when each measure was granted.[34]

(123) With respect to chronology, the previous aid measures were granted in the years 2009 and 2013. Therefore, they were granted long before the granting of the DSGV measure, the earliest of them dating back to almost 10 years ago.

(124) Regarding their purpose and the situation of HSH, the previous aid measures aimed at addressing the financial difficulties that HSH faced due to the global financial crisis of 2008, initially through temporary measures and eventually through the sale or wind-down of the bank. By contrast, the DSGV measure aims at finalising the smooth transition to the ESF of a privatised and long-term viable HSH.

(125) Therefore, the Commission concludes that the possible qualification of the DSGV measure as State aid should be assessed separately from previous aid measures to HSH.

(126) For the DSGV measure to constitute State aid, it must confer an economic advantage to HSH. Such advantage can be excluded when the measure in question could have been obtained under normal market conditions. Therefore, the Commission must determine whether the same measure would have been adopted in normal market conditions by a private operator in a situation as close as possible to that of the DSGV (market economy operator principle, "MEOP").

(127) In the application of the MEOP, only the benefits and obligations linked to the situation of the DSGV as a private operator are to be taken into account whereas those linked to its situation as a public authority are excluded.[35]

(128) The DSGV currently insures the risk of HSH, both as the obligatory DGS under German law and as an IPS according to the CRR with the related benefits. Therefore, in order to determine whether the DSGV measure complies with the MEOP, the Commission will assess whether the DSGV acts as a private insurer who currently is and will remain statutorily liable for exiting members during the exit transition period. The liabilities of the DSGV as an IPS are private in nature since there are equivalent private structures in the German as well as the wider

[34] Case T-11/95 BP Chemicals v Commission, EU:T:1998:199, paragraph 171.
[35] Case C-579/16 P Commission v FIH Holding and FIH Erhversbank, EU:C:2018:159, paragraph 55.

EU market. Therefore, the liabilities of the DSGV as an IPS with respect to HSH should be taken into account when assessing the question of whether the DSGV acts like a private insurer.

(129) By contrast, the liabilities of the DSGV as a DGS – a public structure with certain obligations mandatory by law – cannot be taken into account in the MEOP assessment. The nature of those liabilities is purely public in the sense that only a public authority and no private insurer would ever have been in a position to incur those liabilities.

(130) The DSGV IPS has a significant existing exposure to HSH. Possible failure of the sale of HSH to the Purchasers would place HSH once more in a financially difficult and uncertain situation, which could result in potentially significant losses for the DSGV IPS. On the other hand, a successful sale of HSH presents the DSGV IPS as an existing insurer with an opportunity to remove that exposure from its IPS.

(131) Therefore, in the same manner that other entities that have an interest in the successful outcome of the sale (such as the Purchasers) are ready to contribute a fair share to the completion of that transaction, the DSGV IPS also has an interest as a rational market economy insurer to contribute its fair share in making that sale happen.

(132) Given that a successful sale under the SPA was conditional on the DSGV IPS prolonging the exit transition period to three years, it is rational from a market participant's point of view for the DSGV IPS to prolong that period in order to fulfil the closing condition. In the absence of such a prolongation, the DSGV IPS would most likely have caused the negotiations for the closing of the sale of HSH to fail, which would have exposed the DSGV IPS to the risk of incurring significant losses from the financial difficulties to which HSH would re-enter.

(133) Nevertheless, the transition of HSH from the DSGV IPS to the ESF does not depend solely on the DSGV IPS' actions. It also depends on the BdB's actions.

(134) In return for the prolongation, the DSGV IPS requires that the BdB commits today to give HSH access to the ESF in three years. While such a commitment by the BdB is not formally part of the SPA closing conditions, it is rational from the perspective of the DSGV IPS to require such a commitment today. If any doubts were present in the market as to the successful transition of HSH to the BdB, effects on funding or other uncertainties would materialise now or in the near future, i.e. at a moment in time where the DSGV IPS as current insurer is still fully responsible. Therefore, the DSGV IPS has a clear economic interest in maximising the likelihood of a smooth transition.

(135) On the other hand, the BdB has now quantified the price of ensuring such a smooth transition by putting up requirements in return for a commitment to admit HSH in three years, namely a contribution of up to EUR [30-50] million from the DSGV IPS to the ESF and a EUR [>400] million contingent capital fund to improve the capital position of HSH if its economic situation in 2021 would potentially put at risk its accession to the ESF.

(136) The contribution of up to EUR [30-50] million from the DSGV IPS to the ESF is covered by the DSGV measure. The contribution is calibrated such that the

transfer of HSH risk is neutralised from the perspective of the liabilities the existing ESF members are incurring for being part of the ESF – i.e. existing members of the ESF will not have to incur higher contributions due to the accession of HSH than they would have incurred if HSH had not been admitted. In other words, following the accession of HSH, the ESF will be provisioned as if HSH had always been member of the ESF.

(137) This is a rational requirement by the BdB and reflects simply that the risk of HSH is now covered by the BdB and no longer by the DSGV IPS. From that perspective, the transfer of up to EUR [30-50] million so that the sale of HSH will be successfully closed would be rational for a market insurer in the position of the DSGV IPS.

(138) The contingent capital fund of up to EUR [>400] million is funded in the majority, by up to EUR [significantly >200] million, by the new private owners of HSH. Such a commitment implicitly increases the amount that the Purchasers invest in the bank on top of the sales price according to the SPA. With respect to the SPA, it therefore presents additional private means that are now committed to increase the likelihood of a smooth transition from the DSGV IPS to the BdB.

(139) The DSGV measure provides for the commitment of up to EUR [100-200]million to the contingent capital fund. This is necessary to ensure that the BdB condition of a contingent capital fund of up to EUR [>400] million is fulfilled. However, the DSGV contribution comes only after the commitment of EUR [significantly >200] million by the Purchasers has been used in full. The significantly lower amount and the subordinated nature of the potential liability of the DSGV IPS, as compared to that of the Purchasers, is in accordance with the fair share that each of those parties are supposed to contribute for the successful closing of the sale of HSH, which is in their respective commercial interest.

(140) Moreover, the likelihood of the DSGV's commitment being called upon is low. The Commission has analysed HSH's performance on the basis of the Scoring Model under the assumption that the bank's business plan is fully implemented. According to that assessment, HSH will be, by June 2021, in a sufficiently good condition to pass the Scoring Model test so that the Reserve Fund will not have to be used, even when including the necessary amendments of the plan discussed below (see recital (211)). Consequently, the conditions for HSH to be admitted as a member to the ESF as of 2022 will in all likelihood be met.

(141) The assessment also shows that the EUR [significantly >200] million first tranche committed by the Purchasers would enable the bank to meet the Scoring Model conditions required by the BdB even in case of some deterioration of its situation (significant underperformance of business and a doubling of its NPE ratio). That does not even take into account that in such a scenario the bank would also be likely to implement further restructuring actions which would further improve the chances of HSH respecting the conditions. This provides further evidence that the DSGV IPS acts as a market economy insurer would have acted in its position.

(142) Even in the unlikely situation in which HSH underperforms its business plan and the DSGV IPS's commitment would have to be called upon, HSH is unlikely to be in a critically bad shape. Its performance will likely merely not be good enough to

meet the challenging conditions that the BdB has put forward in its Scoring Model[36] on the basis of which it has committed to admit HSH to the ESF. Therefore, if the DSGV IPS provides an equity investment to HSH in such a situation, the resulting equity stake is likely to still have value and, therefore, can be considered an element of remuneration. The conditions at which the DSGV IPS will subscribe to that equity stake will be the same as the conditions at which the Purchasers will subscribe to their contribution, in spite of the fact that the DSGV IPS will only have to contribute after the Purchasers. For the DSGV IPS, the remuneration is therefore the same even though the risk is lower.

(143) Finally, the equity construction allows the DSGV to ensure that the equity stake can with high likelihood be monetised. The conditions contain a call option for the Purchasers to buy the shares back from the DSGV […](including an interest of […]% p.a., respectively […]% if exercised later, see recital (67)) as well as a right by the DSGV to sell their shares back to the Purchasers (including an interest of […]% p.a.) if the Purchasers divest part of their shareholding. Given that the Purchasers are private equity investors with a clear vision to exit their investment that will in all likelihood allow the DSGV to exit this equity stake with a profit.

(144) On the basis of the preceding arguments, the Commission considers that by granting the DSGV measure the DSGV IPS acts as a private insurer would have acted in its position. Therefore, the DSGV measure in favour of HSH does not grant any advantage and it does not constitute State aid.

(145) In a subsidiary manner, the Commission notes that, even if the possible qualification of the DSGV measure as State aid had to be assessed as part of the various aid measures already granted to HSH, that measure would still not entail new aid to HSH.

(146) From the moment of its signature, the SPA was conditional on a smooth transition of HSH from the DSGV to the ESF. Therefore the signed SPA never provided unconditionally for the net positive price described in section 4.1.2. That price was subject to the condition of HSH's smooth transition to the ESF, which simply did not have a price tag at that moment of the signature of the SPA.

(147) Now, the negotiations between BdB, DSGV and the Purchasers have quantified the price for such a transition (see section 2.5), which would burden the German State with EUR [130-250] million in total. That amount results from the EUR [30-50] million ESF contribution plus the EUR [100-200] million contingent capital that the DSGV (as part of the German authorities in this subsidiary reasoning) would commit to pay for such transition.

[36] E.g. the Scoring Model assumes 0 points for a CET1 capital of 5.75% and 100 points for CET1 ratio of 20%, while the aggregate minimum pass threshold is 66 points, corresponding to 15.2% CET1 which still would be an extremely well capitalised bank (as for example compared to the current supervisory SREP capital requirement of 12.5% CET1).

(148) Given that, even after deduction of the EUR [130-250] million of financial burden[37] for the German authorities, the net price of the sale of HSH remains significantly positive for Germany, there is no new aid granted to HSH.

(149) In view of the above, the Commission concludes that, in any event, the transaction does not involve new aid to HSH and therefore fulfils that condition under the 2016 Decision.

4.2. Compatibility assessment of the 2013 Measure

4.2.1. Legal basis for the compatibility assessment of the 2013 Measure

(150) As mentioned in recital (27), the Commission in the 2016 Decision continued to assess the 2013 Measure under Article 107(3)(b) TFEU. However, since the purpose of the aid in the 2016 notification changed to aid used for the orderly wind-down of HSH Nordbank through either an aid-free sale or stopping new business and winding down, the 2016 Decision did not assess the viability of the bank. The Commission deemed it unnecessary to assess the previously submitted restructuring plans in more detail and did not draw any consequences from the fact that its doubts on the viability of the bank had not been allayed.[38]

(151) Instead and as mentioned in recitals to (28) and (29), the 2016 Decision assessed the compatibility of the 2013 Measure on the basis section 2 of the Restructuring Communication and in particular the subsection "Viability through sale of a bank" as well as on section 5 of the 2008 Banking Communication (aid for the "controlled winding-up of financial institutions").

(152) The assessment of whether the purchaser is viable and capable of absorbing the transfer of the ailing bank as required by section 2 of the Restructuring Communication is dealt with in section 4.2.4.

(153) Section 5 of the 2008 Banking Communication as well as section 2, sub-section "Viability through a sale of a bank" and section 3 and 4 of the Restructuring Communication also require that aid for the controlled wind-down of financial institutions has to be kept to the minimum and that undue distortions of competition have to be avoided.

4.2.2. Burden sharing and limitation of the aid to the minimum

(154) As described in recital (32) above, the Commission in the 2013 Opening Decision found that the re-increase of the Guarantee ceiling, even if new aid, stayed within the boundaries of the measure approved by the 2011 Decision (the EUR 10 billion Guarantee ceiling) and that, therefore, the burden sharing measures were still adequate in 2013.

(155) That assessment was reiterated in the 2016 Decision for the conclusion on the compatibility of the 2013 Measure, namely that the aid was limited to the

[37] EUR [100-200] million of which would have to be paid only if certain conditions materialised.
[38] See recital (128) of the 2016 Decision.

minimum and contained sufficient own contribution.[39] No further assessment is required in the present decision.

4.2.3. *Assessment of distortions of competition*

(156) As described in recital (32) above, the 2013 Opening Decision also concluded for the competition measures that they stayed within the boundaries of the EUR 10 billion ceiling of the Guarantee approved by the 2011 Decision.

(157) In the 2016 Decision the Commission considered Germany's commitments submitted with the re-notification in view of the changed character of the 2013 Measure as appropriate means to minimise distortions of competition. In that respect it particularly took into consideration the commitments relating to the market exit of HSH either through a sale or through stopping new business, but also the business commitments given for the time of the sale process.

(158) On that basis, the 2016 Decision finally concluded that during the sale process as well as after and independent of its final outcome, the commitments provided by Germany ensured the avoidance of undue distortions of competition (see recital (34) above).

(159) Those commitments have been fully complied with. This applies to the committed deadline of a sale of HSH BM's shares in HSH by 28 February 2018 as well as to the business commitments given for the time of the sale process, namely the business restrictions (limitation of the shipping business to EUR [1-2] billion a year, limitation of the corporate banking to business with a relation to Germany and a commitment to not engage in proprietary trading), the further decrease of the overall size of the balance sheet to EUR 105 billion in 2016 and EUR 98 billion in 2017 and the conduct commitments (such as an advertisement ban, an acquisition ban and a cap on remuneration).

(160) In particular, the Commission notes that HSH has shrunk even further well beyond its commitments with a balance sheet size of roughly EUR 65 billion as of end of June 2018.

(161) The only outstanding commitment concerns the disappearance of the name *HSH Nordbank*[40]. This will, however, become relevant only after closing of the sale since, according to the commitment, the bank will have to adopt a new name within three months of the successful completion of the sale procedure.

(162) For the present decision, Germany has reconfirmed that commitment and will provide the Commission with the relevant information after the three months have elapsed. On that basis, the Commission is confident that a new name will be adopted timely following the closing of the transaction.

(163) The Commission concludes that both throughout the sales period and after closing, distortions of competition are minimised.

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[39] See recital (137) of the 2016 Decision.

[40] See point 5.8 of the commitment catalogue in Annex I to the 2016 Decision.

4.2.4. Assessment of the post-sale viability of the bank

(164) According to section 2 of the Restructuring Communication, the sale of an ailing bank to another financial institution can contribute to the restoration of long-term viability if the purchaser is viable and capable of absorbing the transfer of the ailing bank. Therefore, the purchaser has to demonstrate to the Commission that the integrated entity will be viable.

(165) For the purpose of the viability assessment of the new company structure, Germany has submitted – in line with its commitments[41] – a business plan backed by the Purchasers which claims the bank's return to operational viability. The business plan covers the period 2018-2022.

(166) Long-term viability is achieved when a bank is able to cover all its costs including depreciation and financial charges and provide an appropriate return on equity, taking into account the risk profile of the bank. The restructured bank should be able to compete in the marketplace for capital on its own merits in compliance with relevant regulatory requirements.[42]

4.2.4.1. Commitment and expertise of the Purchasers

(167) The Commission notes that the Purchasers are private equity investors which do not already own other banking operations in Germany. However, the Commission recognises the commitment of the Purchasers to the full implementation of the submitted business plan which has been submitted to demonstrate the return to viability of the bank going forward.

(168) In that aspect, the Commission takes positive note of the fact that in the SPA (see recital (11)), the Purchasers commit to a no-disposal period of 24 months starting from the closing date, subject only to minimal exceptions.[43] Moreover, the Purchasers commit to a longer no-disposal period vis-à-vis BdB, until end […].

(169) In addition, the Purchasers have committed themselves vis-à-vis the DSGV to subject any disposal of HSH shares envisaged during the […] year following the acquisition to the prior approval of the DSGV. In such a case, DSGV has the right to forbid such disposals if they would jeopardise the stability of the bank or, alternatively, to make them dependent on conditions (again subject only to

[41] See point 5.7 of the commitment catalogue in Annex I to the 2016 Decision.

[42] See point 13 of the Restructuring Communication.

[43] Section 15.4.1 of the signed SPA: *"Each Purchaser further undertakes not to dispose (as defined below) of all or substantially all of (A) the Sold Shares or (B) 30% or more of the Business to a third party purchaser (or its Affiliates) (in one or several transactions), during a period of twenty-four (24) months starting from the Closing Date (the "No-Disposal Period"), except for transactions: (a) with Purchasers' Affiliates; or (b) involving a merger or analogous transaction with a financial institution regulated by the European Central Bank with an investment grade rating which results in each Purchaser exchanging its holding of the Sold Shares for an interest in the enlarged group following such transaction provided that no Purchaser receives cash consideration for any of its Sold Shares pursuant to such transaction; or (c) prior to Closing, any offer to transfer or the transfer of Sold Shares as a result of a deferred closing pursuant to Clause 10.3.2; or (d) in connection with any requirements or requests made by the European Central Bank, the European Commission, BaFin,CSSF or any other regulatory body of authority or requirements of the BdB and the DSGV, aimed at fulfilling full membership requirements, including where necessary to avoid the requirement for any Purchaser or any Affiliate of a Purchaser to issue a guarantee as provided for in Sec. 5 para 10 of the bylaws of the ESF."*

reasonable exceptions). The Purchasers have also committed to the BdB an additional EUR [significantly >200] million of equity investment in the third year contingent on HSH not fulfilling the required score on the BdB Scoring Model test.

(170) Moreover, the two main purchasers of the bank, Flowers and Cerberus, have presented to the Commission a track record of past investments in financial institutions, several of which banks which demonstrate a holding period of more than five years. The track record includes a number of successful investments in financial institutions (see recital (188)) as well as expertise in specific areas of the business plan which will limit execution risks (see recital (205)). In the case of several of these portfolio institutions, the purchasers injected additional capital after their initial investment, which can be considered a further signal of their commitment.

(171) On that basis, the Commission is confident that the Purchasers will be present in the bank to implement the restructuring plan for at least […] years following the acquisition.

4.2.4.2. Assessment of the submitted business plan

(172) The submitted business plan aims to restore the bank's viability by addressing four different areas:

(a) Pursuing a prudent income strategy

(b) Improving cost efficiency

(c) De-risking of the balance sheet

(d) Optimising the funding structure

(173) The Commission will assess the main actions envisaged in the business plan in each of those four areas to consider whether those actions are sufficient to return HSH to viability.

4.2.4.3. Pursuing a prudent income strategy

(174) The business plan puts forward an income strategy which aims to capitalise on the bank's existing geographical footprint in Northern Germany and its existing business mix which focuses on the real estate, shipping and corporate clients (incl. project financing in energy, transport and infratructure) segments. After the carve-out of a non-core portfolio of non-performing and performing shipping assets, the bank plans a modest expansion of its reduced balance sheet (from EUR […] billion in 2019 to EUR […] billion in 2022)[44].

(175) Over the period 2019-2022, the bank's total income is set to grow by [10-20]% on average per year (from EUR […] million to EUR […] million), driven by the

[44] Whenever appropriate, the year 2019 is chosen as starting year to describe the evolution in certain variables because some figures reported for the years 2017 and 2018 are influenced by one-off effects related to the transformation plans for the bank.

growth in net interest income and net commission income. Net trading income – accounting for almost […] of total income – is set to remain flat.

(176) The amount of new business per year is set to rise significantly in the real estate and the corporate clients segments from EUR [3-5] billion to EUR [6-8] billion whereas it remains almost flat in the shiping segmet at a level of around EUR […] million per year. At the same time, gross margins will increase only modestly from roughly [150-200] to [150-200] basis points driven both by an increase in Euribor as well as by the bank's selective targeting of higher-margin business.

(177) The Commission notes that growing net interest income will be challenging. In particular, regarding the bank's intention to increase income by targeting higher-margin new business, the Commission notes that the German banking sector is currently characterised by overcapacity, entailing strong competition for business opportunities with the most attractive risk-return profile.

(178) The bank's business mix towards real estate and corporate clients has already been part of past plans and has historically been very challenging to actually put in practice, in particular with respect to the corporate business where competition in the German market is particularly fierce.

(179) At the same time, the Commission acknowledges that the bank has a strong regional position which it can leverage. The Commission also takes positive note of the fact that the importance of the shipping segment – which is risky and was the main source of the bank's problems in the past[45] – is set to continue to decline.

(180) Finally, the business plan assumes (see recital (72)) that the bank hedges its interest risk almost completely[46] […]. Such an assumption is extremely prudent […], in particular in an interest rate environment that is set to improve. In the Commission's view, this highly conservative approach provides some significant buffer to support the business plan's income targets.

(181) With respect to commission income, the bank has provided details as to how it plans to grow, mainly in the corporate clients segment. Some of those initiatives leverage proven existing capacities of HSH for external fee generation […] whereas others are currently very limited and future growth therefore more uncertain […].

(182) Therefore, the Commission has reduced the related benefits for the purpose of the assessment by making more prudent assumptions leading to only [70-90]% of the projected extra revenues to be realised.

(183) In conclusion, taking into account the adjustment described in recital (182), the Commission considers the business plan's targets for the generation of new business and the corresponding income broadly achievable for the bank.

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45 See recital (43) of the 2016 Decision.

46 The general interest rate risk hedging approach does not apply to the bank's capital benefit (which remains sensitive to changes in short-term EURIBOR rates) and its reserves for future pension payments (which remain exposed to changes in long-term interest rates). In addition, the bank maintains a EUR […] billion interest-rate transformation position which is actively managed ("Aktive Zinsbuchsteuerung"). This represents [5-7]% of the bank's total liabilities in 2022, implying that over [80-100]% of the bank's liabilities are hedged against interest rate risk.

4.2.4.4. Improving cost efficiency

(184) The business plan aims to reduce the bank's operational costs from EUR [<500] million in 2018 to EUR [<350] million in 2022, corresponding to a reduction of around [20-30]%. The achievement of this target – combined with the projected increase in revenues – is expected to help the bank reach a cost-to-income ratio of around [30-40]% by 2022. This planned reduction in the cost base is one of the main factors underpinning the expected recovery of the bank's profitability.

(185) The Commission considers it crucial for the return to viability that costs are reduced further, also taking into account obvious inefficiencies such as the maintenance of two headquarters or the administration of the extremely complex Guarantee arrangement which will no longer be present going forward.

(186) However, the cost reduction targets are ambitious. In 2018, the bank's cost-to-income ratio is expected to be at [60-70]% (excluding beneficial off-off effects). The gap to the 2022 cost-to-income ratio target of [35-45]% is significant and a ratio of [35-45]% broadly corresponds to the level achieved by the most efficient European banks currently. The Commission also notes that the average cost-to-income ratio for the German banking sector as a whole stood at 72% in the third quarter of 2017.[47]

(187) While the scope for reducing the bank's cost base further may be limited by the significant cost-cutting measures which were already implemented in previous restructuring phases, the successful implementation of ambitious cost reduction measures in recent years also demonstrates the capacity of the bank's management to deliver upon cost targets set.

(188) In this context, the Commission notes that the bank's management already went beyond its obligation under the 2016 Decision[48] to reduce operational costs to EUR 570 million in 2017. As the bank's management will not be changed after the closing of the sale, the Commission is of the view that the implementation risk related to the new cost reduction plan is limited. In addition, the Purchasers have a track record of improving cost efficiency in banks they have acquired (such as BAWAG or NIBC).

(189) In conclusion, the Commission considers the business plan ambitious but overall realistic with regard to reducing the bank's cost base and improving the cost-to-income ratio.

4.2.4.5. De-risking of the balance sheet

(190) In parallel with the sale of the bank, HSH will sell a portfolio of NPE (see recitals (48) and (49)). That sale will reduce the bank's non-performing exposure ratio ("NPE ratio") from 10.1% in 2017[49] to [1-2]% in 2018, broadly in line with the average ratio of 1.6% for German banks in the first quarter of 2018.[50] For the rest of the business plan time horizon, the NPE ratio is assumed to be stable at a

[47] Source: ECB Statistical Data Warehouse (accessed in April 2018).
[48] See point 6.1 of the commitment catalogue in Annex I to the 2016 Decision.
[49] Excluding a EUR [0.1-0.5] billion exposure-at-default in the energy segment in Italy, which is 100% covered by loan loss provisions.
[50] Source: ECB Statistical Data Warehouse (accessed in October 2018).

sustainable level of around [1-3]%. The Commission recalls that the significant reduction in the bank's NPE ratio was also a supervisory requirement.

(191) The reduction in the NPE ratio, and correspondingly in risk-weighted assets, will in turn support the regulatory capital ratios of HSH and support an improvement in the bank's credit rating and correspondingly better funding conditions (see recital (208)).

(192) The business plan more generally assumes a reduction in the cost of risk[51] due to the improvement in the asset quality of the bank's portfolio and the selective origination of new business with high asset quality (see recital (176)). As of 2019, loan loss provisions are assumed to amount to around EUR […] million per year, corresponding to an average cost of risk of around [20-30] basis points. The values are even lower for particular segments (e.g. [10-20] basis points for the real estate business). The business plan claims that these assumed values are based on peer benchmarking, a conservative view of historical actual figures and modeling on the basis of realistic macroeconomic forecasts.

(193) The Commission considers the business plan's cost-of-risk assumptions too optimistic and is of the view that an extra degree of prudence should be incorporated in those projections.

(194) Regarding the real estate segment, the Commission is of the view that the possibility of a downward correction in real estate prices after several years of strong price increases (particularly in metropolitan areas which the bank intends to target) warrants more prudent cost-of-risk estimates. Such a correction would negatively affect the value of the bank's collateral in that segment and increase loan-to-value ratios.

(195) In addition, the bank has been offsetting lower-than-expected new business volumes in the corporate clients segment by generating higher volumes in the real estate segment which may have lowered the average asset quality of the bank's real estate portfolio.

(196) For these reasons, the Commission will factor in an additional degree of conservatism in the business plan and double the level of loan loss provisions in the real estate segment from 2020 onwards.

(197) Regarding the corporate clients segment, the Commission considers that corporate clients business – in particular project financing – tends to exhibit a higher probability of default than real estate business, which is however offset by a lower loss-given-default due to the high degree of collateralisation. On that basis, the Commission considers it not reasonable to assume a lower cost of risk for the corporate business than for real estate and correspondingly adjusts cost of risk levels as of 2020 to the same adjusted cost of risk as used in the real estate segment. Those proposed adjustment are also in line with the historically observed values for the bank.

51 Defined as the ratio of loan loss provisions recorded over a period on a portfolio and the exposure-at-default which that portfolio entails.

(198) With regard to the shipping segment, the Commission considers a [considerable increase] of projected loan loss provisions as of 2020 warranted as the segment is inherently prone to strong volatility and in particular sensitive to global trade volume. Given the current uncertainties in global trade, such prudence seems minimally required, also taking into account the remaining USD currency risk as shipping assets are typically denominated in USD.

(199) The cost-of-risk adjustments proposed by the Commission in recitals (194) to (198) result in a [considerable increase] of the average cost of risk initially assumed in the business plan to around [30-50] basis points. This corresponds to an additional amount of loan loss provisions of ca. EUR [100-300] million to be recorded over the period 2020-2022.

(200) In conclusion, the Commission considers the removal of most of the the non-performing assets from the bank's balance sheet a key factor in support of viability going forward. At the same time, the Commission considers the business plan's cost-of-risk assumptions too optimistic and has adjusted them as described in recitals (193) to (199).

4.2.4.6. Optimising the funding structure

(201) Regarding the bank's funding structure, the business plan expects an overall reduction in the bank's funding needs driven by the shrinking of the balance sheet. It also includes a liability management exercise ("LME") and a shift in the composition of the bank's deposit funding from 100% wholesale deposits in 2017 to [50-60]% retail deposits and [40-50]% wholesale deposits in 2022. In addition, the business plan assumes a gradual decrease in the bank's funding cost over Euribor by [20-40] basis points over the period 2018-2022 as the bank reaches an investment-grade credit rating by the end of 2019 and makes progress towards successfully completing its transformation.

(202) The Commission notes that the planned reduction in the bank's balance sheet accompanied by the exit of wholesale deposits, the envisaged liability management exercise and the portfolio carve-out will largely eliminate the excess liquidity which the bank was holding in preparation of its privatisation. Removing the need to fund those levels of excess liquidity will allow the bank to reduce its absolute funding cost and support the bank's profitability going forward.

(203) The Commission also notes that that reduction in excess liquidity does not jeopardise the bank's compliance with regulatory liquidity ratios. The business plan expects the liquidity coverage ratio ("LCR") and net stable funding ratio ("NSFR") to be met throughout the planning horizon.

(204) The privatisation of the bank will entail the withdrawal of a significant amount of wholesale deposits (e.g. from large public investors and German savings banks) that were primarily linked to the bank's membership in the IPS of the DSGV which is set to end at the end of 2021. The business plan envisages to replace those wholesale deposits to the extend necessary by stepping up its retail deposit collection […]. The business plan suggests that by 2019, the stock of retail deposits will reach a level of EUR [0-5] billion and EUR [5-10] billion by 2022.

(205) The Commission considers the diversification of the bank's deposit base as a positive development, in particular given that retail deposits are stickier and more

granular than wholesale deposits. Therefore, the bank's funding will become more stable and reliable, addressing a major concern of the past.[52] Taking into account the previous track record of the Purchasers (e.g. in NIBC) and the fact that the bank has already managed to raise EUR [0-5] billion in retail deposits by the end of June 2018, the bank appears to be well on track to achieve its targets.

(206) With respect to the LME, the bank intends to terminate hybrid funding instruments (silent participations) with a nominal value of EUR [0-5] billion (on 31 December 2017) by the end of 2020. […]In addition, given its transformation process, the bank does not plan to release reserves for the write-up of the hybrid instruments that are still outstanding after the first phase of the LME. This is expected to yield additional savings of EUR [0-3] billion in 2019.

(207) The Commission takes positive note of the beneficial effects of the envisaged LME. […]Nonetheless, some aspects of the planned LME might entail litigation risks for which the bank may have to record provisions that could partially offset the expected beneficial impact on its regulatory capital ratios.[53]

(208) Finally, the Commission considers the bank's intention to improve its credit rating to investment-grade level by the end of 2019 as realistic. The bank will be characterised by a more diversified and stable funding structure, a high capital ratio, more cost-efficient operations, a balance sheet which has thoroughly been cleaned up, and backing by committed investors with a good track record.

4.2.4.7. Viability in the base case scenario

(209) The Commission notes that in the base case scenario, the bank will reach at the end of the planning horizon in 2022 a fully-loaded common equity tier 1 ratio ("CET 1 ratio") of [15-20]% and a return on equity ("ROE") before tax of [0-10]% and after tax of [0-10]%.

(210) The Commission considers an after-tax ROE of [0-10]% as insufficient to sustainably restore a bank's viability, in particular taking into account the specific nature of HSH's business model as a commercial bank.

(211) In addition, the Commission recalls the necessary adjustments to the base case scenario assumptions of the business plan, notably a more prudent increase in net commission income (see recital (182)) and a significant increase in the cost-of-risk assumptions (see recitals (193) to (199)). Finally, the Commission considers it prudent to apply the standard German corporate tax rate of 29% to the bank's expected pre-tax profit, neutralising any effects related to deferred tax assets and liabilities.

(212) The Commission notes that the above-described adjustments lower the bank's pre-tax ROE even further to [0-10]% and after-tax to [0-10]%. The corresponding CET 1 ratio is [15-18]%.

(213) At the same time, the Commission considers that the plan's base case scenario also contains a degree of conservatism which it will take into consideration.

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52 See recital (14) of the 2016 Decision.

53 […]

(214) First, the Commission observes that the bank – both in the unadjusted and adjusted base case scenario – exhibits a very high CET 1 ratio in 2022 (respectively [15-20]% and [15-18]%). This not only exceeds the current regulatory requirement of 12.5% which is based on the current significantly worse state of HSH but also the assumed bank's capital requirement for 2022. On that basis, the capital requirement in the base scenario are likely to be lowered in the future as the bank's business plan is successfully implemented.

(215) For this reason, the Commission is of the view that it is adequate to assess the bank's profitability that would emerge when its equity would be consistent with a lower but still acceptable CET 1 ratio of [11-13]%.

(216) The Commission already discussed the highly conservative approach of the business plan with respect to hedging interest rate risk (see recital (180)). The plan is currently based on a very high hedging rate of more than [80-100]% of the bank's total liabilities in 2022. In that respect, the Commission is aware that the Purchasers have informally admitted that this assumption might be too conservative but that they also would like to have some upside buffers for their internal decision taking.

(217) Even an [70-90]% hedging rate would remain very conservative and the Commission considers it adequate to reassess the current plan on the basis of that assumption.

(218) In addition, the Commission considers that the bank's success so far in collecting retail deposits will likely allow the bank to lower deposit rates offered earlier than foreseen. That in turn would contribute to a further decrease in the bank's funding cost. While there might be additional margin here, the Commission will not incorporate a further adjustment following this consideration.

(219) The Commission finds that the combined effect of the additional adjustments proposed in recitals (215), (217) and (218) lead to an increase in the bank's pre-tax ROE to almost [>10]% and after-tax to close to [>6]%.

(220) Given the arguments presented in this section, the Commission considers that the submitted business plan is on balance sufficiently robust to ensure the bank's viability going forward.

4.2.4.8. The adverse scenario

(221) Germany has also submitted an adverse case scenario assuming stress on the bank's shipping portfolio and single-stress events in the commercial real estate, corporate clients and project finance portfolio. Compared to the submitted base case scenario, these assumptions result in EUR [600-800] million in additional loan loss provisions and a negative ROE in 2019 and 2020. The bank's CET 1 ratio would be around [1-5] percentage points lower in 2022 than in the base case scenario.

(222) For the Commission, the presence of an adverse scenario is imporant to ensure that the ongoing restructuring is unlikely to put the bank under pressure from a capital perspective even in very adverse circumstances. While the adverse scenario submitted by Germany does contain some more careful assumptions, the

Commission has also run a more extreme adverse case scenario based on the following assumptions:

(a) no net growth of the bank's real estate and corporate clients portfolios over the period 2020-2022 (i.e. the size of those portfolios is frozen at their respecive size at the end of 2019 under the submitted base case scenario);

(b) a doubling, by 2022, of the bank's loan loss provisions under the Commission's adjusted base case scenario due to a gradual increase in the probability of default across all portfolios;

(c) a gradual build-up of new non-performing loans over the period 2020-2022 whereby the gross non-performing loan ratio eventually reaches a gross stock of non-performing loans across all portfolios of ca. EUR 3.5 billion;

(d) a loan loss provisioning policy targeting a 50% non-performing loan coverage ratio, further increasing the flow of loan loss provisions compared to the Commission's adjusted base case scenario;

(e) no increase in the bank's net fee income over the period 2020-2022 from the level reached in 2019 under the submitted base case scenario;

(f) a 10% reduction applied to the bank's net trading income in each of the years in the period 2019-2022 under the submitted base case scenario;

(223) The Commission concludes that even under such extreme adverse conditions, resulting in a strongly negative ROE over the period 2020-2022, the bank's CET 1 ratio would fall only to around [11-13]% by 2022.[54] The bank would thus still be solvent and meet supervisory capital requirements even under the Commission's extreme adverse case scenario.

[54] This is partially thanks to the reduction in the bank's risk-weighted assets pursuant to the assumption of no net growth in the bank's real estate, corporate clients and shipping portfolios and the extra loan loss provisions built up.

5. CONCLUSION

The Commission has accordingly decided to consider the State aid contained in the re-increase of the Guarantee ceiling of 2013 to remain compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union and the 2016 Decision, and not to raise objections. Moreover, no new aid measures are present in the sales agreement and all related side agreements.

For reasons of urgency, Germany exceptionally accepts that the present decision be adopted and notified in the English language.

If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: http://ec.europa.eu/competition/elojade/isef/index.cfm.

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