Press and Information Division

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Judgment of the Court of First Instance in Joined Cases T-228/99 and T-233/99

Westdeutsche Landesbank, Land Nordrhein-Westfalen v *Commission*

THE COURT OF FIRST INSTANCE ANNULS, ON GROUNDS OF INADEQUATE REASONING, THE EUROPEAN COMMISSION'S DECISION FINDING THAT THE TRANSFER OF THE WOHNUNGSBAUFÖRDERUNGSANSTALT TO WESTLB WAS UNLAWFUL STATE AID AMOUNTING TO DEM 1,579,700,000

The Commission has not provided sufficient reasons for the reference rate that it used to show the inappropriateness of the payment made by WestLB

By a law of 18 December 1991 Land Nordrhein-Westfalen ("Land NRW") transferred to Westdeutsche Landesbank Girozentrale ("WestLB"), a bank governed by public law, the Wohnungsbauförderungsanstalt of the Land NRW ("WfA"), another body governed by public law, wholly owned by Land NRW and whose task is to grant aid for the construction of housing. The transfer was not accompanied by an increase in Land NRW's shareholding in WestLB, but provided that with effect from January 1992 Land NRW would receive for its capital contribution a cash return at an annual rate of 0.6% after tax.

An association of German private banks, the Bundesverband deutscher Banken, lodged a complaint with the Commission questioning the lawfulness of that transaction in the light of Community law. By a decision of 8 July 1999 the Commission classified the transaction as unlawful State aid which was incompatible with the common market. The Commission disputed in particular the appropriateness of the return received by Land NRW in consideration of the transfer of WfA. It took the view that, in respect of part of the assets transferred to WestLB, a return at a market value ought to have been 9.3% per annum after tax. For the period 1992 to 1998, it assessed the difference between the market price return and that actually received by Land NRW at a total of DEM 1,579,700,000

(EUR 807,700,000). According to the Commission, that sum therefore represents the total amount of aid which Germany should recover from WestLB.

WestLB and Land NRW have each sought annulment of that decision before the Court of First Instance. In parallel proceedings, Germany brought an action before the Court of Justice. The latter proceedings were subsequently suspended and Germany intervened in support of WestLB and Land NRW in the cases pending before the Court of First Instance.

The Court of First Instance examines in detail the question whether the relevant provisions of Community law authorised the Commission to find that the transfer of WfA constituted State aid. It rejects in particular the applicants' contention that the Commission had unlawfully extended the concept of State aid. The Court found that the Commission rightly considered that unlawful State aid may exist even where public resources are invested in a profitable undertaking. That is the case where the return demanded by the State for such an investment is less than that which a private investor operating in a market economy would have demanded for a similar investment. The Court considers that the Commission was entitled to take account of the average return on investments in the relevant sector in order to determine the appropriate return which Land NRW ought to have received for the transfer of public resources to WestLB.

On the other hand, observing that the Commission is nevertheless required to state reasons, the Court finds that the **9.3% rate of return which the Commission specifically states to be the appropriate return is not sufficiently substantiated in two respects**. These are, first, the value of the basic rate of return, that is to say, the average return on the investment in the banking sector, and secondly, the increase applied to that rate in order to adapt it to the specific features of the transaction.

As regards the **basic rate of return**, the Court considers that the Commission merely listed the sources of information underlying its choice but failed to explain the essential considerations which led it to make that choice.

Nor, according to the Court, does the decision make it possible to clearly understand the Commission's reasoning with regard to the amount of the **rate of increase**.

Consequently, the Court considers, **having regard to the essential importance of those matters in the Commission's decision, that it is necessary to annul the decision**.

<u>Note:</u> an appeal, limited to questions of law, may be brought before the Court of Justice of the European Communities to contest the judgment of the Court of First Instance within two months from the date of its notification.

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