JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
6 March 2003 *

In Joined Cases T-228/99 and T-233/99,

Westdeutsche Landesbank Girozentrale, established in Düsseldorf (Germany), represented by F. Montag, lawyer, with an address for service in Luxembourg,

Land Nordrhein-Westfalen, represented by M. Schütte, lawyer, with an address for service in Luxembourg,

applicants,

* Language of the case: German.

supported by

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by H.-F. Wissel, lawyer,

intervener,

v

Commission of the European Communities, represented by K.-D. Borchardt and V. Kreuschitz, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Bundesverband deutscher Banken eV, established in Berlin (Germany), represented by H.-J. Niemeyer, lawyer,

intervener,

APPLICATION for annulment of Commission Decision 2000/392/EC of 8 July 1999 on a measure implemented by the Federal Republic of Germany for Westdeutsche Landesbank — Girozentrale (WestLB) (OJ 2000 L 150, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: R.M. Moura Ramos, President, V. Tiili, J. Pirrung, P. Mengozzi and A.W.H. Meij, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 5 and 6 June 2002,

gives the following

Judgment

Background to the dispute

I — *Facts*

1 These cases concern the integration of the Wohnungsbauförderungsanstalt des Landes Nordrhein-Westfalen ('WfA') into the Westdeutsche Landesbank Girozentrale ('WestLB') (hereinafter 'the transfer' or 'the transaction at issue').

A — *Requirements relating to own capital imposed by the Own Funds Directive and the Solvency Directive*

2 In accordance with Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions (OJ 1989 L 386, p. 14) and Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions (OJ 1989 L 124, p. 16), banks are required to have own funds equivalent to at least 8% of their risk-adjusted assets and risk-bearing off-balance-sheet transactions. Pursuant to those directives, amendments were made to the Kreditwesengesetz (German Law on credit institutions) on 1 January 1992 and the new requirements entered into force on 30 June 1993.

3 As regards the new 8% threshold established by those directives, at least half of these own funds have to be 'original own funds', which consist of capital items available to a credit institution for unrestricted and immediate use to cover losses as soon as they occur. Original own funds are therefore of crucial importance for the level of a bank's total own funds for prudential purposes, as other own funds of lower quality, or 'additional own funds', are accepted only up to the amount of original own funds to underpin the risk-bearing business of a bank.

4 Moreover, the amount of own funds limits a bank's exposure to large risks. At the time of WfA's transfer, Section 13 of the Kreditwesengesetz laid down that no single loan granted may exceed 50% of a bank's own funds and that the total of such loans exceeding 15% of own funds may not be higher than eight times the bank's own funds. An amendment of the Kreditwesengesetz in 1994 to bring it into line with Council Directive 92/121/EEC of 21 December 1992 on the

monitoring and control of large exposures of credit institutions (OJ 1993 L 29, p. 1) reduced the maximum loan to 25% of a bank's own funds and laid down that the sum of single loans exceeding 10% of a bank's own funds may not be higher than eight times the total of own funds.

5 The size of qualifying holdings in other credit and financial institutions is limited by Article 12 of Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1). Furthermore, Section 12 of the Kreditwesengesetz, a provision not based on European legislation but found in other Member States, limits the total amount of long-term investments, including holdings in non-financial enterprises, to the total amount of the bank's own funds. German banks had to adapt to the new capital requirements by 30 June 1993.

B — *WestLB*

6 WestLB is a public-law institution governed by the legislation of the Land Nordrhein-Westfalen ('the Land'). On 31 December 1991, WestLB's own funds amounted to DEM 5.1 billion. Under the legislation of the Land, WestLB has three functions. WestLB acts as central bank for the independent local savings banks in the Land and, since 17 July 1992, also for those of the Land Brandenburg. WestLB fulfils a State-bank function by handling financial transactions for its shareholders. WestLB operates as a normal commercial bank in its own right.

7 WestLB is 100% publicly owned. The largest single shareholder is the Land (43.2%), other shareholders being the Landschaftsverband Rheinland and the Landschaftsverband Westfalen-Lippe (municipal associations of the Rhineland and Westfalen-Lippe regions), which each hold 11.7%, and the Rheinischer Sparkassen- und Giroverband and the Westfälisch-Lippischer Sparkassen- und Giroverband (the associations of local public savings banks of Rheinland and Westfalen-Lippe), which each have 16.7%. This ownership structure, which existed at the time of the transfer, remained unchanged, at least until 8 July 1999.

8 At the time of the transfer, the WestLB group ranked third among German credit institutions behind Deutsche Bank AG and Dresdner Bank AG when measured by balance-sheet total. The WestLB group offers financial services to enterprises and public institutions and is also present on international capital markets, both for its own account and as manager of other issuers' debt instruments. Like many other German all-purpose banks, WestLB holds stakes in financial and non-financial enterprises. Moreover, in 1997, WestLB carried out a significant part of its activities outside the Federal Republic of Germany.

C — *WfA*

9 WfA was founded in 1957 and operated until 31 December 1991 as an institution governed by public law. As such, it had legal personality. Its initial capital was DEM 100 million and the Land was the sole shareholder. By law, WfA devoted itself exclusively to the promotion of housing by granting low-interest or non-interest-bearing loans. As a body operating in the public interest, it was exempt from corporation tax, property tax, and tax on business capital.

10 As a public-law institution, WfA was the Land's responsibility and covered by its guarantor liability for all its liabilities. These guarantees remained unchanged after the transfer.

D — *Integration of WfA into WestLB*

11 Pursuant to the Gesetz zur Regelung der Wohnungsbauförderung (Law regulating aid to housing construction), adopted on 18 December 1991 by the Parliament of the Land, WfA was transferred on 1 January 1992 to WestLB.

12 According to the statement of reasons for that law, the reason for the transfer was to increase WestLB's own funds to enable it to comply with the stricter capital requirements entering into force on 30 June 1993. Moreover, combining the housing promotion activities of WfA with those of WestLB would increase efficiency.

13 As part of the transfer, the Land waived WfA's guarantee of about DEM 7.4 billion for liabilities of the Land in connection with funds raised for housing promotion.

14 WestLB became the universal legal successor to WfA (except for WfA's liability *vis-à-vis* the Land for debts entered into by the Land for reasons of housing promotion, which was waived prior to the transfer). WfA became an organisationally and economically independent public-law institution without

legal capacity within WestLB. WfA's nominal capital and reserves must therefore be shown in WestLB's balance sheet as a special reserve. The Land continues to guarantee WfA's liabilities by virtue of its responsibility for any losses and its liability as guarantor.

15 The assets transferred, namely nominal capital, capital reserves, the housing promotion fund and other claims of WfA, as well as any future return flows from housing loans, remained earmarked for housing promotion, under Article 2, Section 16(2) of the law mentioned in paragraph 11 above, even after their transfer to WestLB. However, the same provision established that the assets transferred were to have another function: as equity capital, within the meaning of the Kreditwesengesetz and hence also of Directive 89/299, which is used to calculate the solvency ratio of the bank and which thus also serves as a guarantee for WestLB's business activities, that is to say those open to competition.

16 On the occasion of the transfer, WestLB's shareholders changed the covering agreement and agreed that the assets earmarked for housing promotion must always be preserved, even if WestLB suffered losses which absorbed the original capital. Internally, WfA's capital should be called upon only after WestLB's remaining equity had been called upon. The covering agreement made it clear that the responsibility of WestLB's shareholders for any losses also extended to WfA's special reserve. If WestLB were to be wound up, the Land would have a priority claim on WfA's capital. It was also stated in this covering agreement that the increase in WestLB's equity base through the integration of WfA constituted an act in money's worth by the Land and that the annual return for this act should be agreed on by the shareholders once the first financial results for the years from 1992 onwards were available. This was done in a protocol note to the covering agreement dated 11 November 1993. It provided that WestLB would pay to the Land, in the event of a profit, an annual return of 0.6% after tax in respect of the part of the capital of WfA usable by way of guarantee for the transactions of WestLB.

17 Notwithstanding the internal agreement intended to guarantee WfA's assets, there is no priority as regards either of the other two functions of WfA's assets, namely their allocation for housing construction and their function as guarantee capital for WestLB in its external relationships with creditors. The transferred assets are fully and directly available to WestLB to cover losses or, in the event of bankruptcy, to cover creditors' claims.

18 The management contract regarding the housing promotion law concluded between the Land and WestLB lays down that WestLB will use the special reserve to underpin its own business activities only in so far as fulfilment of WfA's statutory tasks is guaranteed.

19 Wfa lost its legal independence by becoming a housing promotion division of WestLB. However, its business activities were not integrated fully into WestLB. WfA remained a distinct entity within WestLB under the name Wohnungsbauförderungsanstalt Nordrhein-Westfalen — Anstalt der Westdeutschen Landesbank Girozentrale (Institution for the promotion of housing — institution of WestLB). This new 'housing promotion' division of WestLB is included in WestLB's accounts but also publishes separate ones. WestLB's existing housing promotion department was merged with WfA.

20 WfA's assets transferred to WestLB, namely capital, reserves, other assets and future profits, are still earmarked for housing promotion and must therefore be administered separately from WestLB's other commercial activities. This separation is also a prerequisite for continuing recognition of the housing promotion activities as of public interest under German tax legislation. The tax exemptions from which WfA benefited were thus not abolished.

II — *Administrative procedure*

21 By a complaint dated 23 March 1993, the Bundesverband deutscher Banken eV (Federal association of German banks) ('the BdB'), representing about 300 privately owned banks in Germany, asked the Commission to initiate the procedure laid down in Article 226 EC against the Federal Republic of Germany. It claimed that the Bundesaufsichtsamt für das Kreditwesen (Federal German Banking Supervisory Authority) had infringed Article 4(1) of Council Directive 89/299 in accepting assets of WfA, which had been merged with WestLB, as own funds of WestLB.

22 By letter dated 31 May 1994, the BdB informed DG IV of the Commission, responsible for competition, of the asset transfer, alleging a distortion of competition from which WestLB would benefit. On 21 December 1994 it filed a formal complaint requesting the Commission to initiate the procedure laid down in Article 88(2) EC against the Federal Republic of Germany. In February and March 1995, and in December 1996, 10 individual banks associated themselves with the complaint of their association.

23 By letters dated 12 January 1993, 9 February 1993, 10 November 1993, 13 December 1993 and then 16 January 1996, the Commission asked the Federal German authorities for further information in order to determine whether the asset transfer constituted State aid. The German authorities replied by letters dated 2 February and 16 March 1993, 8 March 1994, 12 and 26 April 1996 and 14 January 1997. A number of further letters and documents were submitted by the different parties. Commission representatives met representatives of the German authorities, WestLB and other regional banks and the complainants on several occasions.

24 After this exchange of information, the Commission, by decision of 1 October 1997, initiated the procedure laid down in Article 88(2) EC ('the decision to initiate the procedure') The relevant decision was adopted after the Commission concluded that the measure in question probably constituted aid within the meaning of Article 87(1) EC and that it needed additional information to carry out the necessary appraisal. This information related mainly to the measures taken by the Land to ensure its proper participation in the additional profits which WestLB can generate on the basis of the increase in capital, the effects of the inadequate liquidity content of the transferred capital, the effects of the fact that the Land's influence on WestLB had not increased, of the preferential nature of the fixed return, and of any other aspects determining the appropriate level of return, and, lastly, information on the level of WfA capital available to underpin WestLB's commercial business, the value of the amount exceeding this sum but shown in WestLB's balance sheet, the tax exemptions, the waiver of liability, the profitability of WestLB and any synergies.

25 The decision to initiate the procedure laid down in Article 88(2) EC was notified to the German Government by letter dated 23 October 1997. The removal of confidential data before publication was agreed by letters dated 7 and 25 November 1997 and 2 December 1997. The German Government submitted its observations by letter of 27 February 1998 after an extension of the deadline had been requested by letter of 19 November 1997 and granted by letter of 1 December 1997.

26 The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* of 5 May 1998 (OJ 1998 C 140, p. 9). The Commission invited interested parties to submit their comments on the measure. It received comments from WestLB (19 May 1998), the Association française des banques (26 May 1998), the British Bankers' Association (2 June 1998) and the BdB (4 June 1998). By letter dated 15 June 1998, it forwarded them to the German Government for comments, which it received by letter of 11 August 1998.

27 Meetings took place with representatives of the BdB on 15 January 1998 and 16 September 1998 and with representatives of WestLB on 9 September 1998. By letter dated 22 September 1998, the Commission invited the German authorities, WestLB and the BdB to a meeting on various aspects of the case. The BdB provided information by letter dated 30 October 1998. The meeting with the three parties took place on 10 November 1998.

28 Following that meeting the Commission departments requested additional information and documents from the German authorities and from the BdB by letter of 16 November 1998. By letter dated 14 January 1999, the BdB submitted the information requested after an extension of the deadline had been granted. The German authorities submitted some information by two letters dated 15 January 1999 after an extension of the deadline. Additional information was provided by letter dated 7 April 1999. As the German authorities refused to provide certain information, the Commission, by decision of 3 March 1999, ordered the German Government to submit that information. The decision was sent to the German Government by letter dated 24 March 1999. The German Government complied with this order by letter dated 22 April 1999 after an extension of the deadline.

29 The Commission arranged for an independent study of the appropriate return which the Land ought to require for the transfer of WfA to WestLB. Representatives of the consultancy charged with that task ('First Consulting') also attended the meeting with the three parties on 10 November 1998.

III — *The contested decision*

30 On 8 July 1999 the Commission adopted Decision 2000/392/EC on a measure implemented by Germany for Westdeutsche Landesbank — Girozentrale (WestLB) (OJ 2000 L 150, p. 1, 'the contested decision'). That decision was

notified to the Federal Republic of Germany on 4 August 1999, which communicated it to the Land by letter of 6 August 1999. The Land informed WestLB by letter of 9 August 1999, which reached WestLB on the same day. The operative part of the contested decision states as follows:

'*Article 1*

The State aid which Germany has implemented for Westdeutsche Landesbank Girozentrale in the years 1992 to 1998, amounting to DEM 1 579.7 million (EUR 807.7 million), is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to discontinue and recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months of notification of this decision, of the measures taken to comply with it.

...'

A — *General analysis*

31 In the grounds of the contested decision the Commission sets out its assessment of the measure in question. It may be summarised as follows.

32 First, as regards distortion of competition and the effect on trade between Member States, the Commission takes the view that WestLB offers its banking services in competition with other European banks outside Germany and inside Germany. Therefore, any aid given to WestLB will distort competition and affect trade between Member States. As in order to operate and expand its commercial operations a bank must have sufficient accepted own capital, the measure provided WestLB with such own capital for solvency purposes and directly influenced WestLB's business possibilities.

33 Next, the Commission considers that the transaction in question constitutes a transfer of public capital to an enterprise. State assets of this kind, in having a commercial value and being transferred to an enterprise without sufficient remuneration being paid, are State resources within the meaning of Article 87(1) EC.

34 In order to verify whether the transfer of State resources to a public enterprise favours the latter and is therefore liable to constitute State aid within the meaning of Article 87(1) EC, the Commission applies 'the market economy investor principle'.

35 The Commission then sets out its detailed analysis of the transaction from the point of view of the market economy investor principle.

36 It states, first, that even though Article 295 EC provides that the EC Treaty does not replace the national systems of property ownership this cannot justify any infringement of the Community's competition rules. The Commission does not question the right of the Member States to create special-purpose funds in order to fulfil tasks of general economic interest. However, as soon as such public funds and assets are used for commercial competitive activities, they must be subject to normal market economy rules. This means that, as soon as the State decides to assign public-purpose assets to a commercial use, it should seek a return corresponding to market terms.

37 Second, as regards the special nature of the transaction, the Commission states that, if a transaction like the one at issue is chosen by a Member State, a thorough analysis of its financial and economic impact on the competitive part of the entity is imperative.

38 Third, one way of ensuring an adequate return on the capital provided would have been to increase the Land's participation in WestLB accordingly. As this was not done, the Land should, according to the contested decision, have demanded appropriate return on its capital in another form, in accordance with the market economy investor principle. Otherwise, according to the Commission, the Land is granting WestLB an advantage that constitutes State aid.

39 Fourth, the Commission explains how it determined the capital base taken in order to calculate the return. In order to establish an appropriate return, a distinction should be made between the different parts of WfA's special reserves, according to their use to WestLB.

40 The Commission observes that DEM 5.9 billion was entered as equity on WestLB's balance sheet. However, only DEM 4 billion was accepted by the Bundesaufsichtsamt für das Kreditwesen as original own funds. Of the latter amount only DEM 2.5 billion can actually be used by WestLB to expand its commercial business, as own funds and pursuant to the solvency provisions, and should therefore be the primary basis of a return for the Land. The remaining DEM 1.5 billion is needed to underpin WfA's housing promotion business. An amount of DEM 1.9 billion is still shown in the balance sheet but not accepted as own funds for solvency purposes. Therefore, the amount shown in WestLB's balance sheet but not usable by WestLB to expand its commercial business is DEM 3.4 billion. However, inasmuch as that amount improves the bank's appearance in the eyes of creditors, its economic function may be compared to at least that of a guarantee even if it is shown as equity in the balance sheet. Since that amount is also of economic use to WestLB, a market economy investor would have asked for a remuneration to be paid on it. However, the level of this remuneration would be lower than that for the DEM 2.5 billion which can be used under the solvency rules as own funds to expand its commercial business.

41 Fifth, the Commission gives a detailed explanation of how it calculated the appropriate return on the capital.

B — *Analysis of the appropriate return on capital*

42 The Commission states that, in the light of the State aid rules in the EC Treaty, the transaction must be regarded as a capital injection and not as a guarantee and it is therefore necessary to assess the return on the capital in order to calculate an appropriate return. However, when calculating appropriate return, the Commission may treat part of the capital as a guarantee, since it cannot be used by WestLB as classical own funds, on account of its special nature.

43 Next, the Commission, while emphasising that the special nature of the integration of WfA into WestLB makes it difficult to compare it with a financial instrument on the market, first states why it considers that, because of the peculiarities of WfA's capital, the comparison with hybrid equity instruments put forward by the German Government is not a suitable way to determine the appropriate return to be paid for WfA's capital.

44 Second, the Commission refers to the impact of the lack of liquidity on the calculation of the return on capital. Since WfA's capital does not provide WestLB with initial liquidity because the assets transferred and all the income of WfA remain earmarked by law for housing promotion, WestLB faces additional funding costs equal to the amount of the capital if it is to raise the necessary funds on the financial markets to take full advantage of the business opened up by the additional capital. Because of these extra costs, which do not arise in the case of normal equity capital, the appropriate return must be reduced accordingly.

45 However, in the Commission's view and contrary to the opinion of WestLB and the German Government, the entire refinancing interest rate does not have to be taken into account. Only the net costs should be taken into account as an additional burden on WestLB because of the special nature of the capital transferred. Overall, the Commission accepts that WestLB incurs additional 'liquidity costs' to the extent of 'refinancing costs minus tax'. The Commission accepts the studies submitted by the German Government on the level of remuneration, which give the figure of 8.26% as an appropriate long-term refinancing rate. Applying German tax rates, this gives a rate of 4.2% for net refinancing costs.

46 Third, the Commission explains how it calculated the appropriate return on the DEM 2.5 billion corresponding to the increase in WestLB's available own capital.

47 The Commission's outside experts argue that the basis should be the normal rate of return on investment in the banking sector adjusted for a number of specific features of the transaction. In its investigation the Commission also took into consideration, alongside its own experience, several statements and studies by investment banks and consultancies regarding actual and expected returns on equity and investments, as well as the statements submitted by the different parties involved in the case.

48 On the basis of this information, its own relevant experience, market statistics and decisions taken in the past on capital provided by the State, the Commission assumes an expected minimum return of 12% after tax for this type of capital investment at the time of the transfer.

49 In order to calculate the appropriate return, the Commission also took into account the fact that an investor operating in a market economy would have demanded an increased return on capital, owing to the specific features of the transaction.

50 That increase is explained by three factors. First, the size of the amount transferred was considerable, its effect on WestLB was decisive from the point of view of solvency regulations, and WestLB was, on average, making less profit than other banks. Second, because of the integration of WfA, the Land was exposed to a higher risk in the event of WestLB becoming insolvent. Moreover, the transfer of WfA did not provide the Land with additional voting rights. To compensate for this acceptance of a higher risk without a corresponding increase in influence over the company, a normal market economy investor would demand a higher return. Third, the investment of the Land is in the nature of a long-term investment in unquoted stock. Owing to the special features of the transfer of WfA, the Land is unable to withdraw the capital and terminate its investment. Consequently, the Commission considers that owing to those features 1.5% is the minimum reasonable premium.

51 The Commission concludes that an appropriate return on the investment in question would be 9.3%, namely, a 12% normal return on the investment plus a premium of 1.5% for the particularities of the transaction minus 4.2% on account of the financing costs for WestLB resulting from the transferred assets' lack of liquidity.

52 Fourth, the Commission explains how it calculated the appropriate return on DEM 3.4 billion, the amount entered in the accounts of WestLB but which cannot serve to extend its commercial activities. It observes that in its decision to initiate the procedure under Article 88(2) EC, it quoted a rate of 0.3% as having been indicated by the German Government as the appropriate commission on a bank guarantee for a bank like WestLB. It considers that this amount exceeds

what is normally covered by such bank guarantees and that although bank guarantees are normally associated with certain transactions and limited in time, WfA's special reserve is at WestLB's disposal without any time-limit. These two factors require an increase in the rate of return of between 0.5% and 0.6%. Guarantee premiums normally count as operating expenses and therefore reduce taxable profit, but the return on WfA's capital is paid to the Land from after-tax profits, so the rate must be adapted accordingly. The Commission is of the opinion that a rate of 0.3% after tax is thus appropriate for this kind of capital.

53 Fifth, the Commission takes the view that any synergies and savings which result for the Land and WfA from the transfer of WfA and its integration into WestLB cannot be considered to be consideration for the provision of the original own funds to WestLB. Since these synergies neither reduce the usability of the transferred capital for WestLB nor increase WestLB's costs from the transfer, they should not influence the level of return on the equity provided which a market economy investor could demand from the bank. On the other hand, the Commission accepts that the DEM 33 million paid by WestLB in 1992 for WfA's pension costs is part of the remuneration paid by WestLB for the transfer.

54 Finally, on the basis of the above calculations concerning the capital to be taken into account and the return on it, the Commission defined the State aid element in the transaction in question. It considered a rate of return of 9.3% after tax to be in line with market conditions for the part of the capital which could be used by WestLB to underpin its commercial business, namely DEM 2.5 billion at the end of 1993, and 0.3% after tax for the difference between this amount and the DEM 5.9 billion shown as own funds in WestLB's balance sheet, namely DEM 3.4 billion at the end of 1993. Moreover, according to the Commission, it is also

necessary to take into account the 0.6% which WestLB had been paying since 1993 on the amount which it can use for underpinning its commercial business. Furthermore, the Commission also accepts the payments by WestLB in 1992 for WfA's pension claims as additional return for the Land. The aid element is calculated as the difference between the actual payments and the payments which would correspond to market conditions. The total aid so calculated is DEM 1 579 700 000 from 1992 to 1998.

55 After its observations on the application of the market economy investor principle to the transaction in question, the Commission goes on to set out its analysis of other aspects of the transaction before presenting its final conclusion.

56 As regards the tax exemptions enjoyed by the 'WfA' housing promotion sector within WestLB, the Commission observes that they boost WfA's profits (or reduce its losses), and thus its net assets could increase. Thus, WestLB might have larger amounts available to underpin its competitive activities. However, if this share increases, the basis for the remuneration to be paid to the Land will also increase. The Commission concludes that if the remuneration is fixed at an appropriate level, the tax exemption for the aid to housing construction will not lead to any distortion of competition in favour of WestLB. According to the calculations set out in paragraphs 51 and 52 above, an appropriate level would be 9.3% with regard to the amount corresponding to the increase in available own capital and 0.3% with regard to the amount entered in the accounts of WestLB but which cannot be used to extend its commercial activities.

57 As regards the waiver of guarantee liability, the Commission considers that it had certainly increased WfA's value. However, since the remuneration to be paid by WestLB had been based on the valuation of WfA after the waiver, that is, after

taking into account this increase in its value, the waiver does not constitute an advantage for WestLB if the return is in line with market conditions.

58 On the basis of all these considerations, the Commission concludes that all the criteria laid down in Article 87(1) EC are met and that as none of the exemptions provided for in Article 86(2) EC and Article 87(2) and (3) EC is applicable in the present case, the aid cannot be regarded as compatible with the Treaty.

Procedure and forms of order sought

59 By applications lodged at the Registry of the Court of First Instance on 12 October 1999 the applicants brought the present actions.

60 By order of 22 August 2000 of the President of the Fourth Chamber, Extended Composition, of the Court, the Federal Republic of Germany was given leave to intervene in support of the form of order sought by the applicants, and the BdB was given leave to intervene in support of the form of order sought by the Commission.

61 In that same order, the Court considered an application for confidential treatment lodged by the applicants and granted such treatment for certain information in the file. That order was rectified by order of 23 October 2000.

62 By order of 11 July 2001 the President of the Fourth Chamber, Extended Composition, of the Court, after hearing the parties, joined the two cases for the purposes of the oral procedure and of the judgment, in accordance with Article 50 of the Rules of Procedure.

63 Owing to a change in the composition of the Chambers of the Court with effect from 20 September 2001, the Judge-Rapporteur was assigned to the Second Chamber, Extended Composition, and the present cases were therefore assigned to that chamber.

64 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral procedure. The applicants, the Commission and the Federal Republic of Germany replied to written questions put by the Court, and the Commission produced the documents requested in measures of organisation of procedure.

65 By order of 29 May 2002, the President of the Second Chamber, Extended Composition, of the Court provisionally granted the confidential treatment sought by the applicants in regard to certain information in one of the documents referred to in the previous paragraph.

66 The parties presented oral argument and replied to the questions put by the Court at the hearing on 5 and 6 June 2002.

67 At the hearing, their views having been expressly sought, the interveners did not submit observations on the applicants' request for confidential treatment of certain information in one of the documents produced by the Commission at the request of the Court. The order provisionally granting confidential treatment to that information must therefore be confirmed.

68 WestLB claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

69 The Land claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs;

— order the BdB to bear its own costs.

70 The Federal Republic of Germany, intervening, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

71 The Commission contends that the Court should:

— dismiss both applications as unfounded;

— order the applicants to pay the costs.

72 The BdB, intervening, contends that the Court should:

— dismiss both applications as unfounded;

— order the applicants to pay the costs, including its own costs.

Substance

73 In support of its application WestLB relies on five pleas, alleging lack of competence of the outgoing Commission to adopt the contested decision, irregular composition of the Commission, infringement of the rights of the defence, infringement of the obligation to state reasons and infringement of Article 87(1) EC. The Land relies on four pleas, alleging lack of competence and irregular composition of the Commission, infringement of the rights of the defence, infringement of essential procedural requirements and infringement of Articles 87(1) EC and 295 EC.

74 At the hearing, following a question from the Court, the applicants stated that they were withdrawing the plea alleging that the composition of the Commission was irregular when the contested decision was adopted.

75 The Court will analyse, first, the plea alleging lack of competence of the Commission; second, the plea alleging infringement of the rights of the defence; and, third, the plea alleging infringement of essential procedural requirements with regard to the Federal Republic of Germany's right to be heard, erroneous findings of fact and infringement of the principle of neutrality.

76 Fourth, the Court will examine the plea of infringement of Articles 87(1) EC and 295 EC as regards the interpretation of the concept of State aid by the Commission in the contested decision. Lastly, the Court will analyse the plea of infringement of the duty to state reasons in conjunction with the plea, submitted in the alternative, of infringement of those two provisions as regards the Commission's application of the market economy investor principle (hereinafter also 'the private investor principle').

I — *The first plea: Commission's lack of competence to adopt the contested decision*

A — *Arguments of the parties*

77 The applicants submit that, because the Commission resigned on 16 March 1999, the Commission's functions were restricted, at the time of the adoption of the contested decision, to dealing with current and urgent matters. Since the contested decision did not fall within the scope of such matters, that must lead to its annulment.

78 First, they submit that, as the legal consequences of the resignation of the College of Commissioners are not expressly laid down in the EC Treaty, the second sentence of the second paragraph of Article 201 EC must be applied by analogy, it being the only provision of the Treaty which concerns the resignation of the Commission as a body. Consequently, the Commission's functions were limited to dealing with current business.

79 Article 215 EC cannot be applied in the present case. The Commission's resignation was not voluntary, since it took place with the sole aim of avoiding the inevitable adoption of a censure motion by the European Parliament. The Land adds that if the Treaty limits the Commission's competence to the performance of current business in the event of a motion of censure, it is certainly contrary to the effectiveness of Article 201 EC to allow the Commission to avoid that restriction by a preventive voluntary resignation. Moreover, to avoid circumvention of Article 201 EC, in the event of resignation as a body it is necessary to apply the same restriction as applies in the event of adoption of a motion of censure.

80 Furthermore, the restriction of the outgoing Commission's competence to dealing with current business also follows from the general principle of Community law derived from the legal systems of the Member States. The Land refers in that regard to an opinion of the Commission's legal service of 9 January 1995.

81 The applicants also submit that the resignation of the College of Commissioners cannot be regarded as a series of individual resignations. Article 215 EC concerns only the resignation of some Commissioners and therefore presupposes that the Commission continues to function and that vacancies can therefore be filled. To regard the resignation of the Commission as a body as being the sum of individual resignations would unlawfully extend the scope of Article 215 EC and restrict the rights of the Parliament in the procedure for appointing a new Commission. They dispute that the Parliament may adopt a motion of censure of the Commission even after the resignation of all its members and observe that a draft of such a motion was rejected as inadmissible by the President of the Parliament.

82 Alternatively, the applicants submit that the Commission's functions were also restricted to the performance of current and urgent business because the Commission was bound by its own statement of 17 March 1999 and by its guidelines of 23 March 1999 concerning the activities to which it intended to confine itself following its resignation. WestLB observes that the Court has often held that statements of the Commission of general scope are binding on it even if they are not in the form of a legal measure provided for in Article 249 EC (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 34 to 36, Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57, and Case T-149/95 *Ducros* v *Commission* [1997] II-2031, paragraph 61).

83 Second, the applicants submit that the contested decision is a model case and a precedent in State-aid law and is therefore neither current nor urgent business.

84 They submit that the contested decision is well outside the scope of measures of day-to-day management. The integration of WfA into WestLB is, by virtue of its particular structure, distinguishable from any other measure which could be classified as State aid. Moreover, it was the first time that the Commission had applied the principle of the market economy investor to a healthy undertaking by requiring it to pay the average return in the sector concerned for capital introduced by a public investor ('the average return'). It is also a procedure whose outcome was decisive for other similar cases.

85 They add that the question whether the procedure had already been initiated before the resignation can have no bearing whatsoever, otherwise the Commission could continue to work in the same way as it had done prior to its resignation. As to the Commission's argument that there was no need to assess facts or new circumstances during the formal examination procedure, the Land argues that, on the contrary, it is during that procedure that the real importance of the investigation emerged and that the sole determining factor was the decision to close the procedure. In view of those specific features and the primordial importance of the case, the contested decision, concerning closure of the procedure, cannot be classified as a decision that was integral to current business dealt with by the Commission.

86 Nor did the decision concern an urgent case. The Commission did not have to act in order to avoid additional damage to the Community or individuals. There is no time-limit applicable in the State aid procedure. Moreover, the procedure had been underway since 1994.

87 The Land also observes that the Commission's previous practice during an interim period confirms its opinion that the Commission was no longer competent to adopt the contested decision because it was not an ordinary matter falling within its day-to-day management of public affairs, nor was its adoption urgent. The only Commission whose mandate had expired and which had

continued to exercise its functions until the designation of a new Commission was the Commission under the presidency of Mr Delors, which, during the transitional period, had strictly bound itself by the principle of adopting only decisions concerning current, really urgent business. No decision to close a formal procedure examining State aid was made during that period.

88 The Commission, supported by the BdB, disputes that the legal effect of the resignation of the Commission under the presidency of Mr Santer in March 1999 was to limit its powers to the conduct of current matters and, in the alternative, submits that the contested decision was adopted within such limits.

89 The Commission submits that the production by the Land of the opinion of the Commission's legal service, referred to in paragraph 80 above, is inadmissible because it is an internal document and was obtained unlawfully. It also asks the Court to withdraw that document from the file in Case T-233/99, in accordance with Article 64(4) of the Rules of Procedure.

B — *Findings of the Court*

90 First of all, pursuant to Articles 49 and 64(4) of the Rules of Procedure, the Court must examine the Commission's request for an order that the opinion of the Commission's legal service concerning the scope of the Commission's powers after the expiry of its Members' mandate be removed from the file in Case T-233/99.

91 As the document in question is an internal document of the Commission and as the Land has been unable to show that it obtained it lawfully, the Commission's application must be granted (see, by analogy, the order of the Court of Justice of 15 October 1986 in Case 31/86 *LAISA* v *Council*, not published in the ECR, paragraph 5, and the order of the President of the Court of First Instance in Case T-610/97 R *Carlsen and Others* v *Council* [1998] ECR II-485, paragraph 36 to 41 and 45 to 49).

92 Moreover, the Court finds that the opinion does not contain anything decisive for its review of legality (see, to that effect, the orders of the Court of Justice of 11 December 1986 in Case 212/86 *ICI* v *Commission*, not published in the ECR, paragraphs 5 to 8, and of 20 March 1991 in Case C-308/90 *Advanced Nuclear Fuels* v *Commission*, not published in the ECR, paragraph 12; Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraphs 85 and 86).

93 By the present plea, the applicants are essentially arguing that the contested decision is unlawful because the Commission was restricted, when exercising its functions, to dealing with current and urgent business and that the decision did not relate to business of that type.

94 It must be examined whether, aside from any limitation of the powers of the Commission at the time when the contested decision was adopted, that decision may be classified as a measure dealing with current business.

95 The applicants submit that the decision concerned a transaction which, by its particular structure, differed from other transactions submitted to the Commission and that the Commission was applying for the first time the principle of the market economy investor to a healthy undertaking in requiring that it pay an average return. Furthermore, the contested decision was a precedent for similar cases.

96 First, the Court observes that the contested decision did not constitute a new political initiative which thus exceeded the powers of a Commission that was restricted to dealing with current business.

97 The Court finds that, even if the present case displayed some differences in comparison with those previously dealt with by the Commission in matters of State aid, the Commission, in the contested decision, in any event confined itself to applying to that case a legal scheme of long-established rules and principles.

98 The application of that scheme falls within the scope of the Commission's supervisory function pursuant to Article 211 EC and in particular of its duty to apply Article 87(1) EC in such a way as to ensure that aid granted by a Member State or through State resources in any form whatsoever does not distort or threaten to distort competition by favouring certain undertakings.

99 Such an obligation is part of the fulfilment of an essential task of the Community, namely to ensure, pursuant to Article 3(1)(g), that competition in the internal market is not distorted.

100 Consequently, it must be found that the contested decision concerned a matter falling within the scope of the management of current business.

101 Furthermore, the applicants cannot allege that the way in which the Commission applied Community law in the present case changes the nature of the case.

102 As regards the application of the principle of the market economy investor to healthy undertakings, the Commission had already examined the conformity of certain measures with that principle in a case where an undertaking benefiting from that measure had made profits (Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost, OJ 1998 L 164, p. 37, sections I.B and II) and, moreover, the Commission had announced such an approach in points 22 and 23 of its communication to the Member States concerning the application of Articles [87] and [88] of the [EC] Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ 1993 C 307, p. 3, 'the 1993 Commission Communication', see paragraph 211 below).

103 As regards the requirement for an average return, the Court finds that the average return is merely an analytical tool for the application of the principle of the market economy investor (see paragraphs 243 to 277 below).

104 In the circumstances, the fact that the contested decision might be a precedent for similar cases does not prevent the conclusion that the present case must be regarded as falling within the scope of the management of current business.

105 The present plea must therefore be rejected and it is not necessary to rule on the correctness of the argument that the Commission's powers were restricted by virtue of its resignation.

II — *The second plea: infringement of the rights of the defence*

A — *Arguments of the parties*

106 The applicants, supported by the Federal Republic of Germany, claim that the Commission infringed the applicants' right to be heard, and also that of the Federal Republic of Germany, in refusing to grant them access to the experts report produced by First Consulting and to two letters of the BdB dated 30 October 1998 and 14 January 1999 ('the two BdB letters'), and an opportunity to submit their views on those documents, including the expert opinion of Professor Schulte-Mattler annexed to the latter letter. Moreover, the Land observes that in its decision the Commission adopted an appropriate rate of return after tax, which was thus well above the rate to be expected in view of the complaint of the BdB and the draft decision to initiate the formal investigation procedure, which mentioned a rate before tax. As the Federal Republic of Germany and the Land were unable to submit their observations in that regard, their rights of defence were infringed.

107 As regards the First Consulting report, the applicants and the Federal Republic of Germany submit that it is an essential element in the statement of reasons of the contested decision.

108 First, the applicants submit that not only the Member State which is the addressee of a decision adopted in the course of the State aid procedure but also the undertaking which is deemed to have benefited from the aid have a right to be heard (Joined Cases C-48/90 and C-66/90 *Netherlands* v *Commission* [1992] ECR I-565, paragraph 50 et seq). Although that right was recognised in regard to the application of Article 86 EC, it should be recognised *a fortiori* in the State aid procedure under Article 87 EC. They reject the Commission's argument based on

Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2045, paragraphs 57 to 64, as the reference in that case to interested persons concerned only competitors and does not apply to recipients of aid.

109 In any event, WestLB, supported by the Federal Republic of Germany, submits that in the light of the circumstances of the present case it was not adequately involved in the administrative procedure (*British Airways and Others and British Midland Airways* v *Commission*, cited above, paragraph 60, and Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927, paragraph 45). It also submits that the principles of the Commission's administrative practice relating to the right of third parties to be heard in the context of merger control must be transposed by analogy to the framework of State aid. Only in that way is it possible to satisfy the requirement laid down by the Court in its judgment in *British Airways and Others and British Midland Airways* v *Commission*.

110 Furthermore, the applicants submit that it is not for the Commission to decide whether or not specific documents contain information that is useful for the interested parties, but it must make available to the undertakings concerned all inculpatory and exculpatory documents which it has gathered during the investigation, apart from confidential documents (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54; Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 101, and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 111).

111 As regards the right to submit observations in accordance with Article 20 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), WestLB submits that this Article merely expresses the general principle of the right to be heard and cannot restrict its scope in State aid law.

112 The Land submits that it can plead infringement of its own rights of defence because the sole subject-matter of the procedure was a measure which it had adopted and thus, as the sole donor of aid, its position in the procedure differed from that of another party concerned by the procedure.

113 Second, as regards the scope of the right to be heard, the applicants rely on the case-law of the Court of Justice in contesting the argument that a right to be heard can be usefully and effectively exercised if it relates only to the facts but not to the appraisal of those facts by the Commission (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27, and Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 28).

114 The applicants contest the argument that the First Consulting report could not be communicated because it was an internal document and submit that this report should not have been classified in that way. In support of its view WestLB relies on the Commission's Notice on the internal Rules of Procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ 1997 C 23, p. 33), which concerns cases falling within the scope of the law on cartels and merger control.

115 Furthermore, WestLB and the Federal Republic of Germany state that during the meeting of 10 November 1998 Mr Martin Power, Director in DG IV, had promised access to the First Consulting report before the end of the administrative procedure, and they ask the Court to hear evidence in that regard, during the oral procedure, from Mr Peter Fleischer and Mr Gerhard Knoke, in their capacity as participants in that meeting.

116 As regards the two letters from the BdB, referred to in points 9 and 10 of the decision, the applicants and the Federal Republic of Germany stress their importance for the adoption of the contested decision and complain that the Commission did not disclose them.

117 The Land submits that the mere possibility of a negative influence on the procedure suffices for an infringement of the rights of the defence to lead to the annulment of the decision (Case C-301/87 *France* v *Commission* ('*Boussac*') [1990] ECR I-307, paragraph 31, and the Opinion of Advocate General Jacobs in that case, paragraph 24). It submits that only this interpretation is in accordance with the fundamental significance of the principle of rights of the defence, as each interested party in the procedure must be heard on all the main questions and must be able to present its defence in the best possible conditions.

118 The Commission, supported by the BdB, disputes the applicants' argument and submits, first, that they were not entitled to be heard during the State aid procedure; second, that in the present case they were adequately involved in the procedure; and, third, that knowledge of any observations by the applicants or by the Federal Republic of Germany in regard to the First Consulting report and the BdB letters would not have caused it to adopt a decision that differed from the decision contested in this case.

B — *Findings of the Court*

119 First, in accordance with Articles 49 and 65 of the Rules of Procedure it is necessary to consider the application that Mr Fleischer and Mr Knoke be heard in their capacity as participants in the meeting of 10 November 1998, as witnesses

to the question whether, during that meeting, Mr Martin Power, Director in DG IV, promised the applicants and the Federal Republic of Germany that they would receive access to the First Consulting report before the termination of the administrative procedure.

120 The Court considers that if those witnesses were heard that would not introduce any decisive evidence in the review of legality which it must perform, since the relevant question in determining the existence of any infringement of the rights of the applicants or of the Federal Republic of Germany is not whether Mr Power promised access to that document but whether the Commission was obliged to grant them such access (see, by analogy, the case-law cited in paragraph 92 above).

121 According to settled case-law, respect for the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules. That principle requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known in an effective manner its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission (Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 32).

122 The administrative procedure regarding aid is opened only against the Member State concerned. Undertakings that receive aid and the local authorities within that State which grant the aid, such as the applicants, are considered, in the same way as competitors of the recipients of the aid, only to be 'interested parties' in this procedure (see, to that effect, *Acciaierie di Bolzano* v *Commission*, paragraph 42).

123 Moreover, it is settled law that in the context of an examination under Article 88(2) EC, the Commission is required to give notice to the parties concerned to submit their comments (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 59).

124 With regard to that duty, the Court of Justice has ruled that the publication of a notice in the Official Journal is an appropriate means of informing all the parties concerned that a procedure has been initiated (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17), while also pointing out that 'the sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action' (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19, and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256).

125 This case-law confers on the parties concerned the role of information sources for the Commission in the administrative procedure instituted under Article 88(2) EC. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, the parties concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (*British Airways and Others and British Midland Airways* v *Commission*, paragraphs 59 and 60).

126 In the present case the applicants submit that the Commission infringed their right to be heard and that of the Federal Republic of Germany, first, in refusing to grant them access to the First Consulting report, the two BdB letters and the experts report of Professor Schulte-Mattler annexed to one of those letters and, second, because in its decision it adopted a rate of return after tax without having indicated this beforehand.

127 As regards the applicants, the Court finds that despite the restricted nature of their right to participate, and of their right to the above information, they nevertheless had an opportunity to make known their views effectively on the truth and relevance of the facts, objections and circumstances alleged by the Commission in regard to the transaction at issue.

128 The evidence before the Court, relating to the direct and indirect participation of the applicants in the administrative procedure, clearly shows that they were able to submit their comments on the facts and objections raised by the Commission in the contested decision.

129 In particular, the applicants were able to discuss the various aspects of the case at several meetings with representatives of the Commission and to present supporting documents to the Commission. For example, as regards the appropriate return for the transaction at issue, WestLB presented to the Commission the report of an investment bank which it had commissioned to assess that return. Against that background, the applicants, *a fortiori*, have no basis for submitting that the refusal to give them access to the documents in question, or the choice of the rate of return, prevented their involvement in the administrative procedure to an extent which was appropriate to the circumstances of the case.

130 That finding is confirmed by the fact that the contested decision analyses and often refers to the applicants' arguments. It is also confirmed by the fact that, as will be found below, the Federal Republic of Germany's right to be heard was not infringed in this case either.

131 In those circumstances, the present plea must be rejected as regards the objection alleging infringement of the applicants' right to be heard.

132 However, it should be observed that the limited nature of the rights of parties concerned does not affect the Commission's duty under Article 253 EC to provide an adequate statement of reasons for its final decision (*British Airways and Others and British Midland Airways* v *Commission*, paragraphs 64 and 94).

133 As to the Federal Republic of Germany, the objection alleging infringement of its right to be heard will be considered below in the context of the Court's examination of the Commission's compliance with essential procedural requirements.

III — *The third plea: infringement of essential procedural requirements*

134 The applicants submit that the contested decision is vitiated by an infringement of essential procedural requirements within the meaning of the second paragraph of Article 230 EC. The Court will examine that plea under three heads. The first concerns the Federal Republic of Germany's right to be heard; the second, alleged erroneous findings of fact; and the third, alleged infringement of the principle of neutrality.

A — *First head: the Federal Republic of Germany's right to be heard*

1. Arguments of the parties

135 The applicants and the Federal Republic of Germany submit that the latter's right to be heard was infringed since it was refused access to the First Consulting report and to the BdB letters. In that regard, the parties submit the arguments set out in paragraphs 106, 107, 110, 113, 114, 116 and 117 above. WestLB alleges that the

refusal to grant access to the First Consulting report infringes Article 6(2) of Regulation No 659/1999, which provides that the observations of the parties concerned received by the Commission following the publication in the Official Journal of its decision to initiate the procedure are to be communicated to the Member State concerned. That provision ought to be interpreted as meaning that the Member State must be in a position to submit its comments on all the information that is decisive for the adoption of the final decision. WestLB submits that, as beneficiary of the aid, it has its own right to have the Commission comply with the procedure laid down in Regulation No 659/1999, since the proper performance of the State aid procedure is also in the interest of the undertaking concerned. It cannot be ruled out that, on the basis of the comments submitted by the Federal German Government, the Commission might have recognised its errors and would have adopted a decision that differed from the decision ultimately adopted.

136 The Federal Republic of Germany submits that its right to be heard must be examined in the course of the present proceedings before the Court of First Instance and relies on the order of the Court of Justice of 8 February 2000 in Case C-376/99 *Germany* v *Commission* (not published in the ECR) which, pursuant to the third paragraph of Article 54 of the EC Statute of the Court of Justice, suspended the procedure relating to the action which it had brought before the Court of Justice to challenge the contested decision. It submits that it is only on that condition that the present procedure will raise the same issues of interpretation, within the meaning of that provision, as the procedure before the Court of Justice.

137 The Commission, supported by the BdB, submits that the applicants may assert only that their own procedural rights have been infringed and that the exception established by the Court of First Instance in Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, concerning the infringement of essential procedural requirements, is not applicable in the present case because such an infringement has not been established.

138 Furthermore, the Commission disputes that Germany may assert in the present proceedings that it had a right to be heard by relying on the fourth paragraph of

Article 40 of the EC Statute of the Court of Justice, paragraph 3 of Article 116 of the Rules of Procedure of the Court of First Instance, Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR II-4643 and the order of the President of the Court of Justice in Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] ECR I-8343.

2. Findings of the Court

139 As a preliminary point, the Court will examine the existence of a right of the applicants and of the Federal Republic of Germany to rely, in the context of the present proceedings before the Court of First Instance, on that Member State's right to be heard.

140 First, as regards the applicants' right to rely on the Federal Republic of Germany's right to be heard, it must be pointed out that the administrative procedure for the examination of State aid is initiated only against the Member State concerned and that the decisions adopted by the Commission at the end of that procedure are addressed to the Member State concerned (*Commission* v *Sytraval and Brink's France*, paragraph 45). Furthermore, in accordance with Article 88(2) EC, the Member State is responsible for complying with any decision by the Commission requiring the State aid in question to be abolished or altered.

141 In those circumstances, having regard to the Member State's central role in that procedure, it must be held that the Member State's right to be heard in the same procedure constitutes an essential procedural requirement and that failure to comply with that requirement entails the nullity of a Commission decision

ordering that aid be abolished or altered (see, by analogy, Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 17; Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, paragraph 21, and *Air Inter* v *Commission*, paragraph 80).

142 Consequently, the beneficiary of the aid, and the local government body which has granted it, have a legitimate interest in pleading such a defect in the Commission's decision where a failure to comply with the Member State's right to be heard may have a bearing on the legality of the contested measure (see, by analogy, *Oliveira* v *Commission*, paragraph 17).

143 In any event, it is settled case-law that the Court may examine, of its own motion, the infringement of essential procedural requirements (Case 1/54 *France* v *High Authority* [1954] ECR 1; Case 2/54 *Italy* v *High Authority* [1954] ECR p. 37; Case 18/57 *Nold* v *High Authority* [1959] ECR p. 41; *Interhotel* v *Commission*, paragraph 14, and *Oliveira* v *Commission*, paragraph 18).

144 Second, the Court finds that there is no provision of Community law or precedent in the case-law to preclude the Federal Republic of Germany from relying in the present case on its own right to be heard.

145 However, it is settled case-law that the fourth paragraph of Article 40 of the EC Statute of the Court of Justice does not preclude an intervener from submitting arguments which differ from those of the party which he supports, provided that his aim is to support the form of order sought by that party (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1; Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 36,

and Case C-200/92 P *ICI* v *Commission* [1999] ECR I-4399, paragraphs 31 to 33, 37 and 38). In the present case it is clear that the Federal Republic of Germany is not seeking a form of order different from that sought by the applicants. Moreover, as regards the present question, the applicants and the Federal Republic of Germany are submitting exactly the same argument, namely that the Federal Republic of Germany's right to be heard was infringed.

146 The Commission's arguments in that respect are irrelevant. Besides the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, to which reference has already been made, Article 116(3) of the Rules of Procedure of the Court of First Instance merely provides that 'the intervener must accept the case as he finds it at the time of his intervention'. Moreover, the judgment in *Chemie Linz* v *Commission* applies the settled case-law that the intervener may support a form of order sought by an applicant, even with arguments which differ from the latter's arguments, but cannot seek a form of order which does not correspond to the form of order sought by the applicant (see also *ICI* v *Commission*, paragraphs 22 to 33). Finally, the order in *Pfizer Animal Health* v *Council*, paragraphs 92 to 97, merely states that although, in the context of the application for suspension of operation of a measure, an intervener may assert his interests, he may not expand the subject-matter of the dispute by claiming his own right to interim judicial protection.

147 The Court must therefore recognise the right of the applicants and of the Federal Republic of Germany to plead, in the present proceedings, infringement of that Member State's right to be heard, as an infringement of an essential procedural requirement in the administrative procedure at issue.

148 As regards the relevance of the present objection, the Court observes that, as set out in paragraph 121 above, respect for the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting him, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules. That principle requires that the

person against whom the Commission has initiated an administrative procedure be afforded the opportunity during that procedure to make known his views on the truth and relevance of the facts, charges and circumstances relied on by the Commission.

149 In the present case, the applicants and the Federal Republic of Germany submit that the Commission infringed the latter's right to be heard, first, by refusing to grant the German Government access to the First Consulting report, the two BdB letters and the experts report of Professor Schulte-Mattler annexed to one of those letters and, second, because it adopted in its decision a rate of return after tax which was thus much higher than ought to have been expected according to the BdB complaint at the origin of the procedure and the draft decision to initiate the formal investigation procedure, which both mentioned a rate before tax.

150 It is therefore necessary to examine whether the refusal to grant the Federal Republic of Germany access to those documents and the choice of a rate of return after tax prevented the Federal Republic of Germany from making known, in an effective way, its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission in support of its conclusion that there had been an infringement of Community law, as it found in the contested decision.

151 As regards the abovementioned documents, the Court observes that the First Consulting report was drawn up almost at the end of the administrative procedure. It summarised and commented on the positions of the various parties to that procedure and, on various material points, the Commission departed from the view expressed in it. The BdB letter of 30 October 1998 replied to questions put by the Commission at the bilateral meeting which had taken place with the BdB on 16 September 1998 and adopts a position on some aspects of an experts report supplied by WestLB.

152 The BdB letter of 14 January 1999 deals with a question discussed at the meeting of experts on 10 November 1998, submitting for that purpose the report of Professor Schulte-Mattler as an annex. The same letter emphasises very briefly certain points in the analysis of the transaction at issue and repeats the request that the procedure should culminate in a decision. The report of Professor Schulte-Mattler examines in more detail the question of the return on own capital in the context of the analysis of the transaction at issue.

153 The importance of access to those documents must be examined in the context of the administrative procedure as a whole (see the description of that procedure in paragraphs 23 and 25 to 28 above). Even before initiating the procedure under Article 88(2) EC, the Commission requested the German authorities to provide them with information and its representatives met representatives of the German authorities on several occasions. Furthermore, the decision to initiate the procedure set out the Commission's provisional detailed analysis of the transaction at issue, in particular as regards the appropriate return on the capital emanating from WfA, and concluded, provisionally, that the transaction 'probably contained elements of State aid within the meaning of Article [87](1) [EC]' (decision to initiate the procedure, point 11). Following the initiation of that procedure, the Commission sent to the German Government the observations submitted to it by interested parties and the German Government commented on them. The German authorities were also invited to and attended a meeting which took place on 10 November 1998 to discuss various aspects of the transaction at issue. Following the meeting the Commission also requested and obtained additional information from the German Government.

154 Those contacts between the German authorities and the Commission concerned various aspects of the transaction at issue, including those relating to the questions essentially covered by the documents referred to in paragraphs 151 and 152 above. That finding is confirmed by the detailed analysis, in the contested decision, of the position of the German Government, also in regard to those questions.

155 As regards the use in the contested decision of a rate of return after tax, it must be pointed out, first, that the decision to initiate the procedure refers to a rate of return after tax and states, also by reference to that type of return, that 'it [was] very doubtful whether, in view of the rate of return which he would normally expect from an investment, an investor in a market economy would have accepted a fixed return of 0.6% on the capital introduced by WestLB' and states that 'even without fixing, at this stage, definitive criteria for a comparison, the view may be taken that the amount is clearly lower than the amount which would be required by any investor operating in a market economy for a similar investment' (point 7.2).

156 Furthermore, as the Commission correctly observes, neither the BdB complaint nor the draft decision to initiate the formal investigation procedure constitutes a measure which can give rise to legally relevant expectations which the Commission would be obliged to take into consideration when drawing up the final decision. Lastly, the Federal Republic of Germany was in fact able to submit its comments regarding the appropriate return for the transaction at issue and cannot plead infringement of its right to be heard simply because it was not aware, before the adoption of the contested decision, of the type of rate of return which the decision applied.

157 Nor was Article 6(2) of Regulation No 659/1999 infringed, since the observations which the Commission received from interested parties in the present case following publication in the Official Journal of the decision to initiate the procedure were in fact sent by the Commission to the German Government and since the documents referred to by the applicants in support of their complaint were submitted to the Commission in a subsequent phase of the administrative procedure. Moreover, those documents, in essence, were merely a development or clarification of views already expressed by the parties to the administrative procedure, as set out in paragraphs 151 and 152 above.

158 It follows from all of the foregoing that the Federal Republic of Germany was able to make known, in an effective way, its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission in support of its conclusion that the infringement of Community law found in the contested decision had taken place.

159 It follows that the contested decision is not vitiated by an infringement of an essential procedural requirement, namely the Federal Republic of Germany's right to be heard. The objection of the applicants and of the Federal Republic of Germany in that regard must therefore be rejected.

B — *Second head: erroneous findings of fact*

1. Arguments of the parties

160 The Land submits that in certain respects the Commission's description of the facts in the contested decision is incomplete or erroneous. It states, first, that the Commission's statements in paragraph 13 et seq. of the contested decision are incomplete as regards the structure of the German banking system, the tasks and function of WestLB and the public interest tasks which it is to perform. Second, the Land submits that the contested decision contains erroneous findings of fact which play a decisive role in the error of appraisal committed in the present case. They dispute that WestLB is an undertaking requiring rehabilitation, that the transfer of WfA to WestLB is irrevocable and that the transfer of the assets of WfA was the only means by which WestLB could satisfy the new prudence requirements without reducing its weighted-risk assets.

161 The Commission disputes that, if it had taken into account in the contested decision the matters referred to by the Land, its legal assessment would have differed from that contained in the decision. As regards the allegations of erroneous findings of fact, the Commission disputes that it stated in the contested decision that WestLB was a failing enterprise. It explains why it is legitimate to assert that the Land loses, at least partially, its right to dispose of the assets of WfA and restates that WestLB had no choice but to integrate the assets of WfA in order to satisfy the new solvency criteria without reducing its weighted-risk assets.

2. Findings of the Court

162 Inasmuch as the complaint is of a misstatement of the facts, the Court points out that it is clear from the case-law that even if one recital of a contested measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that measure if the other recitals in themselves supply a sufficient statement of reasons (Case 119/86 *Spain* v *Council and Commission* [1987] ECR 4121, paragraph 51, and Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 160). The question of the statement of reasons for the contested decision will be considered below in the context of the examination of the fifth plea.

163 Furthermore, inasmuch as the objection criticises the presentation of the facts supporting the application, in the present case, of the market economy investor principle, the Court finds, first, that the Land has not shown how the alleged erroneous presentation of the facts by the Commission led to an erroneous legal or economic assessment of the transaction at issue and, second, that question falls within the scope of the examination of the substance of the case, which is carried out below in the context of the examination of the sixth plea (see, in particular, paragraphs 336, 350 and 351, 405 and 419 below).

C — *Third head: infringement of the principle of neutrality*

1. Arguments of the parties

164 The Land submits that the Commission infringed its obligation of impartiality in treating the BdB more advantageously during the procedure and in misleadingly describing the facts. The Commission infringed its obligation of impartiality because, apart from its request to the German authorities, it requested only the BdB to supply it with documents and refused to disclose to other interested parties the documents supplied by the BdB. As regards the misleading presentation of the facts, WestLB challenges in particular the fact that the contested decision treats it as an independent commercial bank.

2. Findings of the Court

165 The objection relating to the alleged misleading description of the facts is in essence the same as the objection relating to the erroneous findings of fact just analysed in the context of the second head of this plea.

166 The objection that the Commission did not disclose certain documents of the BdB is in essence the same as the objection relating to the infringement of the rights of the defence which has already been analysed and rejected above, or the same as the infringement of the obligation to state reasons, which will be examined below in the context of the fifth plea.

167 As regards the obligation of impartiality, it is true that the Commission is under a duty to examine a case diligently and impartially, in particular in the context of Article 88 EC. That obligation is associated with the right to sound administration, which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States (to that effect, Case T-54/99 *max.mobil Telekommunikation Service* v *Commission* [2002] ECR II-313, paragraphs 48 and 49, and the case-law cited there).

168 In the present case, however, the argument alleging infringement of the obligation of impartiality cannot be upheld. The Commission did not treat the BdB more advantageously during the administrative procedure. First, on several occasions it requested information from the Federal Republic of Germany and, second, the applicants were not prevented from supplying documents and information, but, on the contrary, were able to set out and substantiate their positions. Moreover, the administrative procedure in matters of State aid is not an *inter partes* procedure in regard to the applicants.

169 Having regard to the foregoing, the first and third heads of the present plea must be rejected. The second head will be considered below when the fifth and sixth pleas are examined.

IV — *Fourth plea: infringement of Articles 87(1) EC and 295 EC as regards interpretation of the concept of 'State aid'*

170 The applicants submit that the contested decision infringes Articles 87(1) EC and 295 EC since it misinterprets the concept of 'State aid'.

171 By the first head of this plea, the Land submits that the transaction at issue is not aid granted through State resources within the meaning of Article 87(1) EC. By the second head, the applicants complain that the Commission extended the concept of State aid by applying the market economy investor principle to a profitable undertaking and by interpreting that principle in such a way as to require at least an average return in the relevant sector on capital introduced by a public investor.

A — *First head: existence of State resources*

1. Arguments of the parties

172 The Land maintains that the transaction at issue does not constitute aid granted through State resources within the meaning of Article 87(1) EC. It submits that State resources are not involved where the State, without going beyond its role as owner or entrepreneur, introduces capital into an undertaking which is permanently in profit, solely for entrepreneurial purposes. It claims that the transaction took place because, from its point of view as entrepreneur, it allowed WfA's assets to be used most effectively from an economic point of view.

173 The Land submits that it is first necessary to demonstrate the existence of aid granted through State resources before considering the question whether the effect of that measure was to produce favourable treatment.

174 The Land, supported by the Federal Republic of Germany, submits that it is possible to assess whether a capital contribution constitutes aid granted through State resources only by comparing it with transactions carried out by an investor under normal conditions of a market economy, and thus solely by adopting the point of view of the latter investor. In its decision, the Commission nevertheless simply found that the undertaking had received an advantage, wrongly requiring that the introduction of capital for entrepreneurial purposes by public authorities should always be coupled with an appropriate consideration.

175 The Land submits that the Commission's contention that it is necessary to obtain appropriate return is foreign to the very nature of a capital contribution based on entrepreneurial considerations. In the case of such a contribution, there is no reciprocal relationship and no 'return' to be definitely agreed. The investor is counting solely on the fact that the beneficiary undertaking will obtain a benefit from that capital, which will then accrue to the investor. The interim increase in the value of the undertaking is an essential part of the return to the investor for his contribution of capital. The fact that the resources are exposed to some risks and that the return cannot be guaranteed is precisely a feature of a capital contribution for entrepreneurial considerations.

176 The Commission submits that State resources are still State resources even if they are employed in the context of 'entrepreneurial activity' by the State. If the contribution of State resources does not constitute aid, that is not because the contribution is made in the course of entrepreneurial activity by the State, but solely because the State ensures that it obtains an appropriate return on that contribution. It is therefore necessary to verify whether the State, when it introduces financial resources, is in fact acting like a private investor in a comparable situation.

177 The Commission states that its approach to determining the existence of State aid did not rule out a market economy investor's point of view, although the points

of view of the beneficiary undertaking and of its competitors were also taken into consideration. Furthermore, and contrary to the submissions of the Land and the Federal Republic of Germany, that approach is neither contrary to its own previous decisions nor to the case-law (Case T-613/97 *Ufex and Others* v *Commission* [2000] ECR II-4055, paragraph 69).

2. Findings of the Court

178 Article 87(1) EC states 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 or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

179 For advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must be granted directly or indirectly through State resources and be imputable to the State (see Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 24, and the cases cited).

180 However, Article 87(1) does not distinguish between State interventions by reference to their causes or their objectives but defines them by reference to their effects (see Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 19 and 20). It follows that the concept of aid is an objective one, the sole test being whether a State measure confers an advantage on one or more particular undertakings (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 52, and Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraph 78).

181 The Land's argument amounts in essence to a claim that if State resources are used in a manner which is economically the wisest, they cease to be in the nature of State resources. However, as the Commission has observed, the resources do not cease to be so simply because the use of those resources is similar to that by a private investor. The question whether the State has conducted itself like an entrepreneur is a question relating to the existence of State aid and not to the examination of whether the resources in question are public in nature.

182 In the present case, there is no dispute that WfA was a body governed by public law and endowed with public funds and that the Land was sole shareholder. Its capital was incorporated in the capital of WestLB by a law adopted by the Parliament of the Land. In those circumstances, State resources were made available in the transaction at issue.

183 Consequently, this head of the fourth plea must be rejected.

B — *Second head: unlawful extension of the concept of State aid*

184 The applicants complain that the Commission unlawfully extended the concept of State aid, first, in breach of Article 295 EC, second, in applying the principle of the market economy investor to a profitable undertaking and, third, in interpreting that principle in such a way as to require at least an average return in the sector concerned on capital introduced by a public investor.

1. Infringement of Article 295 EC

(a) Arguments of the parties

185 The applicants submit that Article 295 EC restricts competence, in favour of the Member States, and that it is necessary to reconcile Community competition law with the power of the Member States to define their own property systems. Although the freedom which Member States enjoy pursuant to Article 295 EC cannot lead to them avoiding other obligations under the EC Treaty, the provisions of the EC Treaty cannot be interpreted so widely that the scope of protection under Article 295 EC is so limited that the Member States have practically no further latitude in the operation of public undertakings or in the retention of the shareholdings which they possess in them. Article 295 EC therefore imposes implicit limitations on the concept of State aid for the purposes of Article 87(1) EC.

186 The Land submits that it is impossible to distinguish clearly between the public and private areas of activity of public undertakings and that, also by virtue of Article 295 EC, the State may, as investor or entrepreneur, be guided by considerations other than purely profit-making criteria, notably by strategic or long-term considerations such as the strengthening or extension of an existing shareholding and the creation of synergies.

187 The Commission states that the relationship between Article 295 EC and the Community rules on State aid is determined by Article 86 EC. In general, State measures which benefit from the protection of Article 295 EC can be exempted from the application of Article 87 EC only if the conditions laid down in Article 86(2) EC are fulfilled. If those conditions are not fulfilled, the application

of the State aid rules does not interfere with the essential content of Article 295 EC, because the application of those rules does not prevent the State from continuing to manage undertakings governed by public law or to participate in such undertakings.

188 The Commission submits that the fact that a public undertaking also performs public tasks is not considered to be a special feature when appropriate return on the investment is being calculated, because the performance of those tasks is protected adequately and exhaustively by Article 86(2) EC.

189 Commercial considerations justifying a financial measure by the State, such as strategic or long-term considerations, do not benefit from any special protection under Article 295 EC. They are merely one of the factors to be taken into account in order to determine whether the introduction of capital was in accordance with normal market conditions.

(b) Findings of the Court

190 Article 295 EC provides:

'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.'

191 Article 86 EC lays down:

'1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

...'

192 It is settled case-law of the Court of Justice that although systems of property ownership continue to be a matter for Member States by virtue of Article 295 EC, that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (see Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7; Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 38, and Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4756, paragraph 48).

193 Thus, and in accordance with Article 86(1) EC, the competition rules, which are fundamental rules, apply without distinction to public and private undertakings (Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 122).

194 Article 295 EC cannot therefore be held to restrict the scope of the concept of State aid within the meaning of Article 87(1) EC.

195 Moreover, contrary to the applicants' submission, this application of the competition rules to undertakings irrespective of the property systems to which they are subject does not have the effect of restricting the protection under Article 295 EC and of leaving the Member States hardly any latitude in the management of public undertakings, in the retention of shareholdings which they have in those undertakings, or in recourse to considerations other than purely profit-making criteria.

196 Where the interests to which that line of argument relates might conflict with the application of the competition rules, they are taken into account by Article 86(2) EC since it provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly may escape the application of the competition rules if those rules obstruct the performance, in law or in fact, of the particular tasks assigned to those undertakings.

197 In the present case, the applicants have not asserted that the conditions laid down in Article 86(2) EC for the exemption of WestLB from the application of the competition rules were fulfilled.

198 Lastly, the Court observes that the Land's argument that, as an investor or entrepreneur, the State may be guided by considerations other than short-term profit-making criteria, must be analysed not in the light of Article 295 EC but in the context of the examination of the Land's conduct from the point of view of a market economy investor.

199 It follows from the foregoing that the argument alleging infringement of Article 295 EC is unfounded.

2. Application of the market economy investor principle to a profitable undertaking

(a) Arguments of the parties

200 The applicants complain that the Commission applied the market economy investor principle to a profitable undertaking. They state that WestLB has been in profit for years and that it expects to make such profits in the future. That principle, as applied in the context of State measures intended to support undertakings, cannot be transposed indiscriminately to measures directed at profitable undertakings. The question of long-term profitability becomes irrelevant once an undertaking has already proved its economic viability by regularly distributing dividends. Furthermore, an investment in an undertaking which is no longer viable is subject to a greater risk than investment in a healthy undertaking and thus the return expected by a market economy investor differs according to which of those situations applies.

201 The applicants assert that the market economy investor principle was applied by the Commission and accepted by the Court of Justice only in regard to undertakings which are being restructured. The Land denies that the case-law cited by the BdB in that regard is relevant and states that it is for the Commission to establish, when investigating conduct, that no market economy investor would have acted in that way, otherwise the burden of proof would be reversed. It relies

on points 2 and 16 of the 1993 Commission Communication and paragraph 20 of the judgment in Case C-305/89 *Italy* v *Commission* ('*Alfa Romeo*') [1991] ECR I-1603. According to the Land, Article 295 EC precludes a duty of positive verification by public authorities which would require them to establish that any market economy investor would also have acted in that way.

202 The Commission disputes the applicants' arguments and submits that what is important is to determine whether the introduction of capital by the State into the public undertaking must be regarded as a 'normal' commercial transaction or whether the State is exceeding its role as entrepreneur. If the State provides capital to a public undertaking under conditions other than market conditions, it is not acting as an entrepreneur but is favouring that public undertaking by giving it an advantage over its competitors, who are able to obtain additional capital only on market conditions. That advantage is relevant in State aid law, irrespective of any profits made by the public undertaking.

203 The Commission submits that if that principle is not applied to undertakings operating at a profit, the consequence would be that the State could, without any control, make available to its profitable undertakings unlimited financial resources without any appropriate consideration, thereby distorting competition contrary to Article 87(1) EC.

204 However, the Commission accepts that the requirements regarding the evidence which it must produce when applying that principle to profitable undertakings are stricter than where it applies it to undertakings which are operating at a loss or require restructuring.

205 The Commission accepts that the market economy investor principle has mainly been applied, in its previous practice and in the case-law of the Court of Justice,

in cases where the State has injected capital into undertakings which are suffering losses or which require restructuring. It submits, however, that this fact does not preclude its application to profitable undertakings and that this has already been stated both by the Commission and by the Court of Justice.

(b) Findings of the Court

206 As pointed out in paragraph 178 above, the aim of Article 87(1) EC is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

207 In order to determine whether a State measure constitutes aid, it is therefore necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60; Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22, and *SIC* v *Commission*, paragraph 78).

208 In principle, the profitability or unprofitability of the beneficiary it is not in itself decisive in establishing whether such an advantage exists. However, that issue must be taken into account in connection with the question whether the public investor behaved like a market economy investor or whether the beneficiary undertaking received an economic advantage which it would not have obtained under normal market conditions.

209 Moreover, the applicants' argument that the Commission's practice and the case-law of the Court of Justice apply the market economy investor principle only to undertakings that are being restructured is neither correct nor capable of calling into question the legality of the contested decision.

210 As regards the case-law of the Court of Justice, it is pointed out that, apart from the fact that the Court of Justice has never expressly confined the application of that principle to loss-making undertakings, its case-law has often used formulations relating to the concept of State aid which do not exclude, but on the contrary presuppose, the application of the market economy investor principle to profitable undertakings (in that regard, besides the case-law cited in paragraph 207 above, see Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13, and *SFEI and Others*, paragraphs 58 to 62).

211 As regards the Commission's practice, the Commission stated in paragraph 22 of its 1993 Communication that it was necessary to apply Community law to aid 'to public undertakings in all situations, not just those making losses as is the case at present'. Consequently, the argument which the applicants base on points 2 and 16 of that communication cannot rule out the application of the market economy investor principle to profitable undertakings.

212 Moreover, as the BdB observes, in Decision 98/365, relating to SFMI-Chronopost, even though the undertakings benefiting from the measures in question had made taxable profits the Commission examined whether the transactions in question were in accordance with the market economy investor principle.

213 Finally, even if the application of the market economy investor principle to profitable undertakings constituted a change in comparison with the Commission's previous normal practice and Community case-law, the legal basis of its application is not thereby called into question. Application of that principle is not contrary to any Community legal rule but, as explained above, is wholly in accordance with the rules of the Treaty applicable in that area.

214 Consequently, the applicants' argument, alleging that the contested decision is unlawful because it applies the market economy investor principle to a profitable undertaking, must be rejected.

3. Requirement of an average return in the sector concerned on capital injected by a public investor

(a) Arguments of the parties

215 The applicants submit that the requirement laid down by the Commission in the contested decision that there must be a minimum return corresponding to the average return in the sector concerned on capital injected by a public investor is, first, incompatible with Article 87(1) EC, in particular in that it ignores the effect engendered by the status of the owner; second, contrary both to the Commission's 1993 Communication and its previous practice and to the case-law of the Court of Justice; and, third, contrary to Article 295 EC.

(i) Incompatibility with Article 87(1) EC of the requirement for an average return

216 The applicants complain that the Commission exclusively took an average return as its basis for determining the appropriate return on capital injected and found that the market economy investor is solely interested in the best return possible, and thereby failed to take into account the fact that there are private investors who pursue other aims, such as those linked to business strategy, and social, cultural or other considerations. Furthermore, they submit that the application of an average return unlawfully prevents assessment of the specific circumstances of the case with regard to the investor, the undertaking, the transaction at issue and also the comparison of the transaction with the behaviour of other undertakings in a comparable situation. The Land submits that the Commission abused the power of appraisal which it has in complex economic affairs by relying on the average return as a criterion for the comparison, without taking into account the comparability of the undertakings. An average return is very difficult to determine in the banking sector, as there are differences between the banks.

217 WestLB submits that the Commission has painted a wrong picture of a private investor. Even an investor who pursues the principle of profitability will also apply a risk diversification strategy and will spread his capital across the market. He will also make investments at a mid- or lower point on the scale of returns, which for that reason involve a relatively low level of risk. Thus, the State will receive an appropriate consideration for its investment if, within the margin observable on the market, it obtains a return on his investment which corresponds to the risk incurred.

218 The Land submits that many undertakings make lower profits than those of their competitors for years. However, that does not lead to their elimination from the market, but solely to a lower return on capital invested, which is a matter for the investor to assess.

219 According to the applicants, the Commission cannot claim to have used the test of an average return solely as a 'basic figure'. Nor can the Commission find that State aid exists without having established that no private investor in a comparable situation would have made the investment upon the conditions of the transaction at issue. That means, in the present case, that the Commission ought to have shown that the return expected by the Land was manifestly lower than the margin within which a private investor in the same situation would have invested his capital. For the Land, at most only the lower limit — not the mid-point — of that margin can be regarded as a minimum figure.

220 WestLB also submits that the requirement for an average return leads to a monopolisation of the market, contrary to the aims of Community competition law. If investors were to invest solely in undertakings offering at least an average return, any injection of capital in such undertakings would lead to an additional increase in the average return in the sector concerned. Each increase in the average return would reduce the number of undertakings which are still able to offer it and still able to obtain injections of capital. At the end of such a constant increase in average profitability only one undertaking would be left.

221 The Land claims in any event that at no time were its injections of capital coupled with a waiver, in whole or in part, of appropriate remuneration. On the contrary, it is the most important shareholder in WestLB, it received dividends from it, its profits increased with the introduction of WfA and, lastly, it benefited from the agreed advance on profits of 0.6%. Furthermore, the investment gave rise to practically no costs and it derived from it a benefit which it would not otherwise have obtained. Any private investor in a comparable situation would have acted in that way.

222 WestLB and the Federal Republic of Germany also complain that the Commission failed to take 'the owner effect' into account in the contested decision, an

effect which is seen when an investor who is already a shareholder in an undertaking in which he wishes to invest increases the value of his existing shareholding by the introduction of new capital. Often, by virtue of that effect, an investor who has already invested in an undertaking injects further capital into it, even if, when that investment is made, it offers a lower than average profitability.

223 The Land adds in particular that if the investor is a majority shareholder in an undertaking it must be presumed that there is a durable interest in the investment and not a mere search for short-term profit.

224 If the owner effect is taken into account it is also possible to distinguish between aid and capital contributions that do not constitute aid. Where, from the point of view of a potential purchaser, as a result of a contribution the value of an undertaking will increase by at least the value of that contribution, the market economy investor would himself then have made that contribution, at least if he were the owner of the undertaking. If, following the capital contribution, the value of the undertaking increases by less than the value of the contribution, it then constitutes aid. The Federal Republic of Germany adds that in making that calculation it is irrelevant that the Land is not the sole owner of WestLB. Furthermore, it complains that the Commission failed to make that calculation.

225 In response to the observations of the BdB in that regard, the applicants submit that the owner effect does not apply only to some owners, but to all contributions of capital in undertakings in which the investor is already a shareholder.

226 Lastly, WestLB submits that, in a dynamic economy, lucrative new investment opportunities continually arise on which the return is superior to the risk-adjusted

return on the capital market. The owner of a bank who, in view of the more stringent requirements in regard to equity capital, is faced with either contributing new external equity capital or being unable to provide customers with the same loans as in the past, is among those who may obtain a superior return on these new investment opportunities.

227 The Commission disputes the applicants' arguments and contends that the average return does not constitute the ultimate object of an examination of the existence of aid, but is a starting figure from which a specific assessment is made of the other features of the investment, in order to determine an 'appropriate return'. The Commission submits that in the present case it carried out that specific evaluation and considered the features of the transaction at issue. That is clear, for example, from the deduction it made in order to take account of the disadvantages connected with the illiquidity of the capital (points 202 to 205 of the contested decision) or the increase made in order to take account of other factors, such as that relating to the amount of WfA's capital in comparison with WestLB's other guaranteed own funds (points 220 and 221).

228 The Commission also contends that it did not have to take the owner effect into consideration, at least in the manner proposed by WestLB and Germany. Their approach does not take account of investment alternatives outside the undertaking, which any investor would examine in view of the absolute and relative value of the investment in this case. It also submits that it does not suffice that the public authorities have a shareholding in a given undertaking for any new contribution of capital to be automatically considered to be in accordance with market economy principles. A market economy investor will want to know in any event whether his overall investment, made up of the amounts already invested and the new capital contributions, allow him to obtain an appropriate return.

(ii) Contradiction between the contested decision and the 1993 Commission Communication, its previous practice and the case-law

229 First, the applicants and the Federal Republic of Germany submit that the requirement for an average return is inconsistent with the discretion allowed to the public investor that is recognised by paragraphs 27 to 29 of the 1993 Communication. As regards the Commission's arguments that this discretion exists principally when the future return is variable, for example when contributions of own funds are remunerated in the form of dividends and increases in value, the Federal Republic of Germany states that such an approach does not reflect the discretion enjoyed by a market economy investor, who will find on that market, even in the area of investments for fixed return, a range of different returns.

230 Second, WestLB cites several Commission decisions in concluding that, when the Commission finds that there is no aid, it refers mainly to the fact that the undertaking which received the capital contribution is profitable in the long-term (see, in particular, Commission Decision 96/278/EC of 31 January 1996 concerning the recapitalisation of the Iberia company (OJ 1996 L 104, p. 25) and Commission Decision of 22 January 1998 relating to Duferco Clabecq (OJ 1998 C 20, p. 3)).

231 Third, WestLB claims that the requirement for an average return as a minimum rate of return is not compatible with the case-law of the Court of Justice, which has already accepted that when State measures make it possible to ensure the long-term profitability of the undertaking, an investment does not constitute aid. It relies, in particular, on the cases in which the Court of Justice accepted the importance of certain objectives, besides profitability, which might motivate a private investment such as structural, global or sectoral policies influenced by prospects of long-term profitability (*Alfa Romeo*, paragraph 20); or the concern to maintain a brand image or to reorientate business activities (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 21); or considerations

relating to the locality, such as those referred to by Advocate General Van Gerven in point 14 of his Opinion in that case ([1991] ECR I-1451), where he refers to the fact that a private undertaking cannot be wholly insensible to employment and to economic development in the region in which it operates. WestLB asserts that the transaction at issue is also based on local considerations and that, for the Land, a strong Landesbank is an important element for the economy and the brand image of the Land's group of public undertakings.

232 The Land adds that, according to the Court of Justice, it is necessary to assess whether, in similar circumstances, an investor of a comparable size would have made the capital contributions under the conditions in question (Case 40/85 *Belgium* v *Commission*, paragraph 13). In the same sense, the Court has recently stated that the behaviour of the public entity should be clearly distinguishable from that of a private investor in the same situation if it is to be classified as State aid (*DM Transport*).

233 The Commission, supported by the BdB, disputes that there is a contradiction between the contested decision and the Commission's 1993 Communication, because the Member States retain their discretion in matters of capital contributions. Furthermore, the Commission submits that this discretion cannot cover the case of decisions which have clearly not been adopted under market conditions, which is the case of the transaction at issue. That discretion is principally allowed to the Member States where the future return depends on the actual economic results of the undertaking, as where contributions of own capital are remunerated in the form of dividends and increases in value.

(iii) Infringement of Article 295 EC by the requirement for an average return

234 The applicants submit, first, that the requirement for a minimum return in the form of an average return discriminates against public undertakings in

comparison with private undertakings and discriminates against public authorities, as investors, in comparison with private investors.

235 Contrary to the case-law of the Court, which has expressly recognised that the activities of public and private undertakings may be directed at fundamentally different aims (Joined Cases 188/80 to 190/80 *France and Others* v *Commission* [1982] ECR 2545, paragraph 21, relating to Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35)), the Commission has been guided exclusively by the principle of profitability, which it wishes to apply, without distinction, to both public and private undertakings. Furthermore, the introduction of the criterion of an average return, which is determined by reference to the whole of the sector concerned, prevents public undertakings from pursuing other objectives, such as tasks exclusively in the general interest that are outside the scope of State aid control by virtue of Article 86(2) EC.

236 WestLB submits also that the Commission's approach considerably reduces the investment freedom of public authorities in comparison with that of private investors. While a private investor is perfectly entitled to invest in undertakings which are less profitable than average, the public authorities may invest only in undertakings which produce at least an average return. Therefore, as a result of the Commission's approach, private investors can make investments for a wider range of reasons than public authorities. The Land submits that investment decisions taken both by public investors and by private investors are not solely guided by the expected return, but also by other considerations, such as strategic objectives, for example an improvement or strengthening of existing shareholdings.

237 Second, WestLB submits that the requirement of an average return for public undertakings amounts to indirect pressure towards privatisation. Public under-

takings with lower than average profitability are unable to cover their needs for additional capital, unlike private undertakings with the same level of profitability. The Member States are thereby put under pressure to privatise those undertakings in order to prevent their disappearance from the market.

238 The Commission, supported by the BdB, also contests the applicants' argument that the requirement for an average return infringes Article 295 EC. First, the Commission rejects the argument that the use of an average return in order to calculate the 'appropriate return' leads to discrimination against public undertakings and public authorities as investors.

239 First, with regard to public undertakings, the Commission disputes that the use of the criterion of an average return prevents them from pursuing public tasks.

240 Second, as regards the public authorities, the Commission states that the State's investment freedom is not reduced in comparison with private investors. It is merely a question of assessing the investments in the light of the conditions existing on the market in question where the investments concern a part of a public undertaking which is subject to competition.

241 With regard to the comparable commercial interests of public and private investors, the Commission submits that the use of the criterion of an average return does not involve any discrimination. Even if its investment is influenced by strategic or long-term considerations, a public investor, just like any contributor of private capital, ultimately hopes for an appropriate return. Furthermore, it

would not examine solely the question whether the undertaking in question is profitable but also whether the return corresponds to the usual market rate. The application of those same criteria to a public investor does not therefore constitute discrimination but solely reflects the application of the market economy investor principle.

242 Second, the Commission rejects the argument that the correct use of the criterion of an average return results in an obligation to privatise. That rate of return is applied, as a reference figure, solely to the competing activities of a public undertaking. The public part of the activities of public undertakings receives the specific protection of Article 86(2) EC. There is no obligation to privatise, but an obligation to behave in accordance with the market in the sector of activities which is open to competition.

(b) Findings of the Court

243 As observed in paragraphs 206 and 207 above, the object of Article 87(1) EC is to prevent trade between Member States from being affected by advantages conferred by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. In order to assess whether a State measure constitutes aid, it is therefore necessary to determine whether the beneficiary undertaking is receiving an economic advantage which it would not have obtained under normal market conditions.

244 Moreover, it is settled case-law that action taken by public authorities in respect of the capital of an undertaking, in whatever form, may constitute State aid where the conditions set out in Article 87 EC are fulfilled.

245 In order to determine whether such action is in the nature of State aid, it is necessary to assess whether, in similar circumstances, a private investor operating in normal conditions of a market economy ('a private investor') of a comparable size to that of the bodies operating in the public sector could have been prompted to make the capital contribution in question (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 29, and *Alfa Romeo*, paragraphs 18 and 19). In particular, the relevant question is whether a private investor would have entered into the transaction in question on the same terms and, if not, on which terms he might have done so (Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 51).

246 Lastly, the comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time (*Cityflyer Express* v *Commission*, paragraph 76).

247 In the present case, the Court observes, as a preliminary point, that, in the context of this plea, the relevant question is whether, generally, the Commission is authorised to use the average rate of return in the sector concerned as an analytical tool to determine the conduct of a private investor.

248 On the other hand, the question whether, in the present case, the application of the private investor principle is unlawful, in particular as regards the actual fixing of the average rate of return taken into account by the Commission, is a matter falling within the scope of the fifth plea, which will be examined later.

249 First, the applicants submit essentially that the use of an average return is contrary to Article 87(1) EC. They complain that the Commission relied exclusively on an average return in determining the appropriate return for the transaction at issue and failed to take into account the particular circumstances of the case. The Commission took the view that a private investor is solely interested in an optimal return, and failed to take the owner effect into account.

250 First of all, the Court observes that the average return is merely an analytical tool used in applying Article 87(1) EC.

251 Thus, the average return cannot be an automatic criterion for determining the existence and amount of State aid. It does not relieve the Commission of its obligation to make a complete analysis of all factors that are relevant to the transaction at issue and its context, including the situation of the beneficiary undertaking and of the relevant market, in order to verify whether that undertaking is receiving an economic advantage which it would not have obtained under normal market conditions.

252 Moreover, the use of the average return as an analytical tool is subject to all the rules of Community law concerning State aid. For example, the use of an average return cannot relieve the Commission of its obligation to take into account the possibility that the aid in question might satisfy the conditions for exemption under Article 86(2) EC.

253 Furthermore, the use of an average return does not affect the Commission's obligation under Article 253 EC to give sufficient reasons in its final decision with regard to the existence and amount of the State aid in question.

254 Upon those conditions, the use of an average return in the sector concerned as one analytical tool, amongst others, may be justified in the course of applying the private investor principle in order to determine whether and, if so, to what extent the beneficiary undertaking is receiving an economic advantage which it would not have obtained under normal market conditions.

255 The conduct of a private investor in a market economy is guided by prospects of profitability (Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 84). Thus, the use of an average return must be consistent with the notion that an informed private investor, that is, an investor who wishes to maximise his profits but without running excessive risks in comparison with other participants in the market, would, when calculating the appropriate return to be expected for his investment, in principle require a minimum return equivalent to the average return for the sector concerned.

256 In the present case, the average return was used in applying the private investor principle to a profitable undertaking. Moreover, in order to calculate the existence and the amount of the aid, it was necessary for the Commission to use a reference rate in its comparison between the transaction at issue and the conduct of a private investor.

257 As regards the arguments alleging that a private investor is not solely interested in optimising the rate of return on his investment and that the Commission did not

take the owner effect into account, the Court points out again that the use of an average return does not relieve the Commission of its obligation to analyse all factors that are relevant to the transaction at issue and its context. That question will be analysed below in the course of examining the application in this case of the private investor principle.

258 Consequently, the Court finds that the mere use by the Commission of a minimum return corresponding to the average return in the sector concerned as an analytical tool, used in the course of considering all factors relevant to the case before it, does not infringe Article 87(1) EC.

259 Second, the applicants claim that the contested decision is inconsistent with the Commission's 1993 Communication, previous practice and the case-law.

260 As regards paragraph 27 of that communication, the Commission recognises in it that some discretion must be left to the investor in analysing the investment risk, but states that in making that analysis 'public undertakings, like private undertakings, [must] exercise entrepreneurial skills'. In paragraph 29 it reiterates that 'a wide margin of judgment must come into entrepreneurial investment decisions' but it incorporates that notion into its more general analysis of the manner of determining whether or not State aid exists. That does not therefore support the applicants' argument either.

261 Furthermore, as the Commission observes, a distinction may be made between an estimate of the probable return on a project, where there is a certain margin of

assessment for the public investor, and the examination which that investor makes in order to determine whether the return seems to it to be sufficient in order to make the investment in question, where the margin of assessment is narrower, since it is possible to compare the transaction in question with other possibilities for investing the capital.

262 As regards the alleged contradiction between the requirement for an average return and the Commission's practice and the case-law, based on the fact that neither the Commission nor the Community Courts had previously required such a return when determining whether or not State aid exists, the Court finds that in any event neither the Commission's practice nor the case-law have ruled out the possibility of such a requirement. On the contrary, the case-law on the concept of State aid adopts a material test which implies that it is possible to use an average return when applying the private investor principle (see the case-law cited in paragraph 207 above and, for example, *Banco Exterior de España*, paragraph 13, and *SFEI and Others*, paragraphs 58 to 62).

263 Lastly, the Court points out that, even if the use of an average return when applying that principle constituted a change in comparison with the Commission's previous practice and Community case-law, the legal basis for its use would not thereby be called in question. Within the abovementioned limits (see paragraphs 250 to 253 and 255), that use is not contrary to any rule of Community law and, as just explained, is consistent with the rules applicable in this area.

264 Consequently, it must be held that the Commission's 1993 Communication, its previous practice and the case-law are not capable of calling into question the legality of the use of an average return when applying the private investor principle, provided that the conditions set out above are observed.

265 Third, the applicants submit that the Commission's use of an average return is contrary to Article 295 EC, in particular because it discriminates against public undertakings in comparison with private undertakings and discriminates against public authorities, acting as investors, in comparison with private investors.

266 It must be found in that regard that, as noted in paragraph 193 above, the competition rules apply without distinction to public and private undertakings and that Article 295 EC does not contradict that principle.

267 Furthermore, it is settled case-law that, pursuant to the principle that the public and private sectors are to be treated equally, capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid (Case C-303/88 *Italy* v *Commission*, cited in paragraph 231 above, paragraph 20, and Case C-482/99 *France* v *Commission*, paragraph 69).

268 In that context, the use of the average return, as an analytical tool when applying the private investor principle, is aimed precisely at determining whether the transaction at issue was carried out in circumstances corresponding to normal market conditions.

269 Inasmuch as the use of the average return complies with the conditions set out in paragraphs 250 to 253 and 255 above, it does not infringe the principle of equal treatment of public and private undertakings or of public and private investors.

270 Since the Commission must always examine all the relevant features of the transaction at issue and its context, it must take into account the question whether an informed private investor, in the place of the public investor in question, would have accepted a lower return than the average return in the sector concerned as an appropriate return because of economic considerations other than the optimisation of his return. The same observation applies to the argument alleging discrimination between public and private undertakings inasmuch as the specific features of the transaction at issue relating to the beneficiary undertaking must also be taken into account when the principle of the private investor is applied.

271 Furthermore, the requirement that the behaviour of an informed private investor be taken into account in order to assess the behaviour of a public investor, when the behaviour of a private investor is not subject to such a constraint, cannot be regarded as discriminating against the public investor.

272 The principle of equal treatment prohibits like cases from being treated differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences (Case T-106/96 *Wirtschaftsvereinigung Stahl* v *Commission* [1999] ECR II-2155, paragraph 103). However, a public investor is not in the same situation as a private investor. The private investor can count only on his own resources in order to finance his investments and is liable, up to the limits of those resources, for the consequences of his decisions. The public investor, on the other hand, has access to resources flowing from the exercise of public power, in particular from taxation. Consequently, as the situations of those two types of investors are not the same, there is no discrimination against the public investor if the conduct of an informed private investor is taken into account in order to assess the conduct of the public investor.

273 Lastly, contrary to the applicants' claims, the use of an average return does not prevent public undertakings from pursuing their tasks of general interest protected by Article 86(2) EC, because the Commission must always take into account the possibility that the aid in question may satisfy the conditions for authorisation laid down by that provision.

274 Consequently, it must be held that, in the circumstances set out above, the use of an average return when applying the private investor principle is not contrary to Article 295 EC.

275 It follows that the Court cannot uphold the applicants' complaint that the Commission's use, in the contested decision, of an average return in applying the private investor principle was illegal.

276 It follows from all the foregoing that the Court must reject the second head of the plea, alleging that in the contested decision the Commission illegally extended the concept of State aid.

277 In the circumstances, the Court must reject the whole of the applicants' plea alleging that the Commission infringed Article 87(1) EC and Article 295 EC by misinterpreting the concept of State aid in the contested decision.

V — *The fifth and sixth pleas: infringement of the obligation to state reasons and infringement of Article 87(1) EC and Article 295 EC as regards, first, the existence of State resources, second, the fact that, according to the Commission, the transaction at issue distorts competition and affects trade between Member States and, third, the Commission's application of the market economy investor principle*

278 As a preliminary point, with regard to the obligation to state reasons, the Court observes that it has been consistently held that this statement must be appropriate to the measure concerned and the context in which the measure was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the Court to carry out its review and to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded (*Skibsværftsforeningen and Others* v *Commission*, paragraph 230, and *EPAC* v *Commission*, paragraph 34).

279 It is not necessary for the statement of reasons to specify all the relevant matters of fact or of law, since the question whether the statement of reasons for a measure satisfies the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Skibsværftsforeningen and Others* v *Commission*, paragraph 230, and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 175).

280 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the

decision (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31, and *EPAC* v *Commission*, paragraph 35).

281 With regard, for example, to the characterisation of a measure as aid, the obligation to state reasons requires that the reasons which led the Commission to consider that the measure concerned falls within the scope of Article 87(1) EC should be stated (*EPAC* v *Commission*, paragraph 36).

282 As regards the analysis of the merits of the contested decision, it must be remembered that the assessment by the Commission of the question whether an investment satisfies the market economy private investor test involves a complex economic appraisal. When the Commission adopts a measure involving such a complex economic appraisal it enjoys a wide discretion, and judicial review of that measure, even though it is in principle a 'comprehensive' review of whether a measure falls within the scope of Article 87(1) EC, is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 81, and *Alitalia* v *Commission*, paragraph 105, and the case-law cited there).

283 The purpose of the Court's analysis of the present pleas is to determine whether the contested decision is vitiated by a lack of reasoning or whether it infringes Article 87(1) EC and Article 295 EC. The Court will examine in particular whether the Commission committed a manifest error of appraisal with regard to its application, to the transaction at issue, of the market economy investor principle.

A — *First head: infringement of the obligation to state reasons as regards the existence of State resources*

1. Arguments of the parties

284 The Land submits that the Commission has not provided sufficient reasons in law to show that State resources were employed in the course of the transaction at issue.

285 The Commission disputes that it failed to state reasons regarding the use of State resources in the transaction at issue. It states that it explained that WfA is a public undertaking using public funds and that the contribution of such assets in the form of capital to an undertaking necessarily means that State resources are made available.

2. Findings of the Court

286 As already stated in paragraph 182 above and as set out in points 27 to 30 and 38 of the contested decision, it is common ground that WfA was a body governed by public law which was endowed with public funds, that the Land was sole shareholder and that it was incorporated in WestLB by a law adopted by the Parliament of the Land. In those circumstances, it is evident that the transaction at issue involved State resources. The statement of reasons provided in that regard by the contested decision is therefore sufficient.

B — *Second head: infringement of the obligation to state reasons and infringement of Article 87(1) EC as regards the fact that the transaction at issue distorts competition and affects trade between Member States*

1. Arguments of the parties

287 WestLB, relying on the judgment in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 24, claims that the Commission also infringed its obligation to state reasons as regards the existence of a distortion of competition and a restriction of trade between Member States. The decision merely makes general findings regarding the liberalisation of financial markets and refers to WestLB's presence abroad.

288 In the alternative, WestLB claims that, if the interpretation of the concept of State aid in the contested decision is correct, the transfer of WfA to WestLB does not distort competition or affect trade between Member States. Even if the measure in question were State aid, the Commission must prove that it distorts competition and affects trade between Member States. It has failed to do so. The mere fact that WestLB carries on business not only in Nordrhein-Westfalen but also abroad does not suffice for a presumption that competition will be distorted. Furthermore, the reference to the statement of reasons for the Law adopted by the Land for the transfer of WfA to WestLB cannot in itself establish that there is restriction of trade between Member States. The restriction of trade must be shown objectively and the legislature's reasons are not relevant in the present context.

289 The Commission contends that it gave a sufficient statement of reasons in the contested decision for the existence of a distortion of competition and an effect on trade between Member States. It states that it referred to the existence of a very close link between a credit institution's own funds and its banking activities and the fact that WestLB 'offers services in competition with other European banks'. The BdB adds that the applicants took part in the procedure and thus knew all the details of the Commission's position in regard to the point at issue (Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraphs 76 et seq. and 100 et seq.).

290 Furthermore, the Commission submits that the transaction at issue is likely to restrict competition, since it has given WestLB advantages which have allowed it to reduce its expenses whilst at the same time complying with stricter solvency criteria. It also strengthened its position in comparison with that of other competitors, both as regards national business and in intra-Community trade, which suffices for a presumption of a distortion of competition and an effect on trade between Member States (Opinion of Advocate General Saggio in Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, point 24, and of Advocate General Cosmas in Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, point 106). The BdB adds that, as WestLB is paying a non-market rate for the capital of WfA, it is receiving operating aid. According to the case-law of the Court of Justice, operating aid is deemed in itself to distort competition, and the applicant has not rebutted that presumption.

291 As regards the effect on trade between Member States, the Commission refers to the reasons given for the Land's law relating to the transfer of WfA to WestLB, which state that the transaction at issue was intended to strengthen 'the national and international competitiveness' of WestLB.

2. Findings of the Court

292 As regards the statement of reasons in question, the Court points out, in addition to the case-law cited in paragraphs 278 to 281 above, that even in cases where it is clear from the circumstances in which the aid has been granted that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 15, and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 52, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 64).

293 In the contested decision the Commission referred, in particular, to the fact that WestLB was a general commercial bank dealing with international business; that outside Germany it is strongest in Europe; that in 1997 its foreign business represented 48% of its non-consolidated revenues; that it offers services in competition with other European banks and that there is a very close link between the own funds of a credit institution and its banking activities (points 17 to 20, 55 to 66 and 157 to 160 of the contested decision).

294 In so doing, the Commission set out sufficiently clearly the facts and legal considerations of essential importance in the scheme of the decision. That statement of reasons allows the applicants and the Court to ascertain the reasons for the Commission's view that the transaction at issue led to a distortion of competition and affected trade within the Union.

295 Moreover, it was not necessary for the Commission to give an extremely detailed economic analysis supported by figures, since it had indicated the way in which the effects on competition and on trade between Member States were manifest.

296 Lastly, the Commission was not required to demonstrate the real effect of that aid on competition and trade between Member States. If it were required to do so, that would ultimately favour those Member States which grant aid in breach of the duty to notify laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage (*Vlaams Gewest* v *Commission*, paragraph 67, *CETM* v *Commission*, paragraph 103, and Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 85).

297 Consequently, this head of the fifth and sixth pleas must be rejected in so far as concerns the alleged failure to state reasons.

298 As regards the correctness of the Commission's decision with regard to the present question, the Court observes that it is settled case-law that even aid of a relatively small amount is liable to affect trade between Member States where there is strong competition in the sector in which the recipient operates (Cases 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 24, and C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27; *Vlaams Gewest* v *Commission*, paragraph 49).

299 Moreover, when financial aid granted by a State or from State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11, *Vlaams Gewest* v *Commission*, paragraph 50, *CETM* v *Commission*, paragraph 86).

300 Lastly, aid intended to relieve undertakings of all or part of the expenses which they would normally have had to bear in their day-to-day management or usual activities, in principle distorts competition (*Siemens* v *Commission*, paragraphs 48 and 77, and *Vlaams Gewest* v *Commission*, paragraph 43).

301 In the present case, the transaction at issue strengthened WestLB's position in comparison with that of its competitors. Given the size of the transaction and of WestLB and WestLB's significant presence on the international markets, it is clear in the light of the case-law cited that the Commission was entitled to conclude that the transaction at issue was liable to distort competition and affect trade between Member States.

302 That finding is confirmed by the reasons given for the Land's law relating to the transfer of WfA to WestLB, which states that the transaction at issue was intended to strengthen 'the national and international competitiveness' of WestLB.

303 It follows from the foregoing that this head of the plea must be rejected in its entirety.

C — *Third head: infringement of Article 87(1) EC and Article 295 EC as regards the application by the Commission of the market economy investor principle, and infringement of the obligation to state reasons for certain factors taken into account in calculating the appropriate return*

304 The applicants, supported by the Federal Republic of Germany, claim that there was an infringement of the obligation to state reasons for certain factors taken into account in the calculation of the appropriate return on the capital contribution in question and, in the alternative, should the Court uphold the interpretation of the concept of State aid, they dispute the contested decision's application of the market economy investor principle. First, they claim that the contested decision does not take into account the specific features of the transaction at issue. Second, as regards the own capital which cannot be used by WestLB in order to extend its business activities, they claim that the Commission fails to state the reasons for fixing the return on that capital at a rate of 0.3% after tax, and that the asset advantage received by WestLB does not relate to that capital. Third, as regards the capital of WfA that could be used in order to guarantee WestLB's business operations, the applicants submit that there is a failure to state reasons in regard to several factors relating to the calculation of the appropriate return and dispute the correctness of the return calculated by the Commission.

1. Failure to take into account specific features of the transaction at issue

(a) Arguments of the parties

305 The applicants, particularly the Land, submit that the Commission committed a manifest error of appraisal in its application in the contested decision of the private investor principle in that it failed to take into account some specific features of the transaction at issue.

306 They claim that, first, as regards the investor, the transaction at issue was the only measure by which WfA's profitability could be improved and the State bank concept implemented in the light of the new prudence provisions. Second, given WfA's task of general interest, no profit could be made on its assets. Given that, through the transaction at issue, the Land was able to obtain significant revenue while retaining the restrictions on WfA's assets, the transaction was the most judicious economic use of those assets.

307 Third, in the event of the demerger or dissolution of WestLB, the Land alone would benefit from the — possibly increased — value of WfA. Fourth, as the assets of WfA are a second-rank guarantee internally, action against the assets of WfA in respect of a guarantee is highly unlikely, even in the improbable case of losses by WestLB. Fifth, the transaction has produced synergies of DEM 30 million per year, which are part of the expected return.

308 Sixth, the applicants observe that the assets of WfA are not in the form of liquid capital but have a specific function which the transaction at issue has not altered and which reduces their value. They submit that the Commission wrongly assessed the disadvantages associated with the illiquidity of WfA's assets. The applicants submit that, when calculating the appropriate return, solely the point of view of the investor is relevant. Consequently, contrary to the Commission's claims in the contested decision (see paragraph 45 above), the deductibility for tax purposes of the refinancing costs of WestLB is not relevant to that calculation and the refinancing rate of 8.26% must be deducted as a whole from the rate of return on liquid own capital. Moreover, a saving on corporation tax is fiscally neutral, because it results in the investor having a reduced credit from the offsetting procedure for corporation tax in force in Germany at the time of the transaction at issue. Lastly, owing to the non-transfer of liquidities, the Land's risk is considerably reduced and this should have led the Commission to make an additional reduction in the appropriate return.

309 The Commission, supported by the BdB, submits that it correctly took into account the specific features of the transaction at issue and explains why they did not lead it to a different assessment from that in the contested decision. First, it submits that it took into account the initial situation of the Land, as investor, but states that its assessment of that situation differs from that of the applicants. Second, it contests the relevance of the applicants' arguments relating to WfA's public interest task and submits that the applicants are confusing the role of the State as entrepreneur and its role as holder of sovereign power.

310 Third, the Commission submits that the Land's priority right to remuneration in respect of the transaction at issue is more the necessary consequence of the fact that the Land did not enjoy extended property rights as a result of the transfer of assets. Fourth, it disputes the relevance of the argument that WfA's assets constitute merely a second-rank guarantee internally, observing that the guarantee available before the transaction amounted to DEM 5.1 billion and

that the assets of WfA were valued in WestLB's balance sheet at DEM 5.9 billion, DEM 4 billion of which were recognised by the Bundesaufsichtsamt für das Kreditwesen. Fifth, it contends that the synergies must not be regarded as part of the remuneration for the capital of WfA, since they do not entail any cost for WestLB.

311 Sixth, as regards the specific nature of WfA's funds, it submits that the fact that the capital of WfA was accepted as basic own funds shows that it is actually available to WestLB in order to absorb any losses. Those funds thus give a competitive advantage to WestLB on the financial services market.

312 The Commission also submits that it correctly took into account the disadvantage of the illiquidity of the funds when it calculated the appropriate return. It submits that in order to establish the appropriate return on the basis of the market economy investor principle, the decisive factor is the way in which the beneficiary considers the specific advantage conferred on it. Thus, only the net financing costs (namely, the costs which are not compensated for by lower taxation) are to be taken into account as additional costs justified by the specific nature of the capital transferred. Moreover, the Commission observes that it took the view that the tax credit inherent in the offsetting procedure has no bearing on the calculation of the appropriate return. It also submits that there is no basis for an additional reduction on the ground of a reduced risk incurred by the Land.

(b) Findings of the Court

313 As regards the applicants' first and second arguments, it must be observed as a preliminary point that, when applying the private investor principle, it is not

sufficient to compare the return which the Land obtains through the transaction at issue with the return which it obtained on WfA's assets before the transaction. This is because there is no dispute that the assets of WfA, which has the sole task of encouraging housing construction, were not subject to the logic of a private investor. On the other hand, it is necessary to compare the return obtained by the Land under the transaction at issue with the return which a notional private investor, as far as possible in the same situation as the Land, would have required for that transaction (see to that effect *DM Transport*, paragraph 25).

314 Normally, a private investor is not content merely with the fact that an investment does not cause him a loss or that it produces only limited profits. He will seek to achieve the maximum reasonable return on his investment, according to the particular circumstances and the satisfaction of his short-, medium- and long-term interests, even where he is investing in an undertaking of which he is already a shareholder.

315 Thus, as regards the position of the Land as investor, the fact that the transaction at issue is reasonable for the Land does not preclude the application of Community law on State aid. It does not obviate the need to ascertain whether that transaction strengthens WestLB's position by giving it an advantage which it would not have obtained under normal market conditions.

316 The same observation applies to the applicants' second argument, namely that, economically, the transaction constituted the most judicious use of WfA's assets. Furthermore, the Court considers that the Commission did not commit a manifest error of assessment in not taking into account, in its calculation of the return that a private investor would expect for the transaction at issue, the benefits which the Land would receive from its share of the increased volume of WestLB's business. The applicants have not alleged that such an increase exceeded that obtained by other banks over the same period in similar circumstances. Since that has not been shown, the view cannot be taken that the benefits for the Land resulting from the increase in the volume of WestLB's business are a specific consequence

of the transaction at issue, so that they should be taken into account when calculating the return which a private investor would expect from the transaction at issue. In any event, the Court notes that the alleged increase also generated profits for other members of WestLB, without their contributing in any way to them, which is not consistent with the conduct of a market economy investor either.

317 Lastly, as regards the Land's argument based on increased tax revenue, the Court observes that the Land's position as a public body and its position as the owner of a business must not be confused. The line of argument based on an increase in tax revenue would be wholly irrelevant for a private investor.

318 As regards the third argument, that in the event of the demerger or dissolution of WestLB the — possibly increased — value of WfA would accrue solely to the Land, the Court observes that the increase in value is uncertain and that the argument presupposes an event which the applicants do not desire and which runs counter to the objectives of the transaction at issue. Such an argument in fact presupposes that WestLB is liquidated or that the assets of WfA are demerged from those of WestLB. In both cases, the transaction by which WfA was integrated into WestLB would be defeated. Furthermore, the fact that the — possibly increased — value of WfA would accrue solely to the Land in the event of a separation, in no way reduces the distortion of competition which the transaction at issue is likely to produce in the meantime, nor does it preclude the possibility that the transaction might constitute an economic advantage granted by the Land to WestLB which it would not have obtained under normal market conditions.

319 As regards the applicants' fourth argument, relating to the fact that WfA's assets constitute a second-rank guarantee in the internal relations between shareholders

of WestLB, it cannot be held that the Commission committed a manifest error of assessment in taking the view that this did not justify a reduction in the return demanded for the transaction at issue. First, that guarantee exists only in relations between the shareholders. On the other hand, as regards external relations, WfA's assets are not protected in dealings between WestLB and its creditors. Moreover, even with regard to internal relations, the size of the capital injection constituted by WfA in comparison with WestLB's total own capital (DEM 5.9 billion as against the DEM 11 billion of WestLB's total own capital after the transaction at issue, that is, approximately 53.63% of the total amount) considerably reduces the significance of the allegedly low guarantee risk affecting the investment made through the transaction at issue.

320 As regards the fifth argument, alleging synergies which ought to have been taken into account when calculating the expected return, the Court observes that, as stated in paragraph 314 above, normally a private investor is not content with avoiding losses or obtaining a limited return on his investment and will attempt to maximise the return on his assets according to the circumstances in question and his interests. It must be pointed out, first, that those synergies in no way represent a cost or a disadvantage for WestLB, for which it ought to receive compensation in the form of lower return on the capital invested. It is thus plausible that a private investor in the same situation as the Land would not accept a lower return on his investment on account of an indirect advantage which he would derive from it but which would entail no disadvantage for WestLB. Furthermore, if WestLB, instead of concluding the transaction at issue with the Land, had had to obtain finance from a private investor who could not have benefited from those synergies, it would still have had to provide a return in accordance with the market rate. In those circumstances, it cannot be held that the Commission committed a manifest error of assessment in taking the view that the existence of any synergies indirectly benefiting the Land constituted an additional advantage for it as a result of the transaction at issue which did not justify a reduction in amount of the State aid element calculated by the Commission.

321 As to the sixth argument, relating to the relevance of the limitations affecting the assets of WfA transferred to WestLB, the Court observes that the issue here is to ascertain the precise significance of the illiquidity of WfA's capital for the purpose of calculating the appropriate return on the transaction at issue. More specifically, the parties disagree as to whether, in making such a calculation, it is necessary to take into account the fact that the refinancing costs of WestLB, as operating expenses, reduce its taxable income and consequently the corporation tax payable by it.

322 It must be recalled that the aim of Article 87(1) EC is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

323 In order to determine whether action by public authorities in regard to the capital of an undertaking is in the nature of State aid, it is necessary to assess whether, in similar circumstances, a private investor operating in normal conditions of a market economy, of a size comparable to that of bodies managing the public sector, might have been prompted to contribute the capital in question. In particular, it is relevant to ask whether a private investor would have carried out the transaction in question under the same conditions and, if he would not, to examine the conditions on which he might have done so (see the case-law cited in paragraph 245 above).

324 In the present case, in accordance with the line of reasoning set out in paragraph 313 above, it is necessary to determine the return which a hypothetical private investor, as far as possible in the same situation as the Land, would have required for the transaction at issue.

325 As mentioned in paragraphs 180, 207 and 243 above, the ultimate aim is to determine whether the beneficiary undertaking receives an economic advantage which it would not have obtained under normal market conditions.

326 Contrary to the applicants' contentions, they cannot contest the fact that the deductibility for tax purposes of WestLB's refinancing costs was taken into consideration by arguing that, when calculating the appropriate return, only the investor's point of view is relevant.

327 In the application of Community law on State aid, it cannot be held that the exercise of ascertaining whether the transaction took place under normal conditions of a market economy must necessarily be made by reference to the single investor or to the single undertaking benefiting from the investment, when it is the interaction between the various economic operators which is precisely the feature of a market economy.

328 Thus, in the course of negotiations under normal conditions of a market economy, a private investor in the same situation as the Land could not have ignored the non-liquidity of WfA's capital. Such an investor would have had to take WestLB's point of view into consideration and the fact that, for WestLB, the capital of WfA was of a restricted utility. He could not have required the same return on that capital as for liquid capital.

329 Likewise, in particular in a transaction such as the transaction at issue, which concerned a large capital sum, it is justifiable to conclude that a private investor would have taken into account the actual costs for WestLB of the non-liquidity of WfA's capital and thus of the partial deductibility for tax purposes of the resulting refinancing costs.

330 Furthermore, as regards the argument that a saving on corporation tax is neutral overall because it leads to a reduction, in the hands of the investor, of the credit resulting from the offset of taxes, it must be observed that, as will be shown below (see paragraphs 388 to 393), the Commission's failure to take into account the offsetting procedure for corporation tax in force in Germany at the time of the transaction at issue cannot call into question the legality of the calculation in this case of the appropriate return.

331 In conclusion, it must be found that the contested decision is not vitiated by a manifest error of assessment inasmuch as, in the course of its assessment of all the relevant features of the transaction at issue in order to calculate the appropriate return on it, the Commission found that the non-liquidity of the capital of WfA ought to be taken into account by reference to the net refinancing costs relating to it and, therefore, to reflect the fact that the refinancing costs lead to a reduction in corporation tax to be paid by WestLB. Consequently, the applicants' sixth argument must be rejected.

332 Lastly, it is necessary to examine the argument submitted by the applicants in the context of their challenge to the use of the average return, namely that the Commission did not take account of the fact that private investors may pursue aims other than the optimisation of the return on their capital, for example on account of the owner effect (see paragraphs 216 and 222 to 226 above).

333 In that regard, it must be found that the applicants merely state in general terms, first, that the fact that private investors may pursue aims other than the optimisation of the return on their investment is significant and, second, that this consideration should apply to the Land in the present case.

334 However, they do not explain specifically how that consideration calls into question the legality of the contested decision. In particular, they do not explain why and to what precise extent it justifies a reduction in the State aid element calculated by the Commission in the light of the return which the Land could expect on the capital of WfA pursuant to the private investor principle. Consequently, it must be held that the applicants have not shown the relevance of that consideration in the present case and cannot therefore validly complain that the Commission failed to take it into account.

335 Moreover, as regards in particular the argument relating to the owner effect, it must be pointed out, as stated in paragraph 314 above, that normally a private investor is not content to avoid losses or to obtain a limited return on his investment, but attempts to maximise the return on his assets in accordance with the circumstances and his interests, even in the case of an investment in an undertaking in which he already has a shareholding.

336 In addition, with regard to the Commission's obligation to take into account all the relevant features of the transaction at issue and its context, it must be stated, as set out in paragraph 197 above, that the applicants have not pleaded that the contested decision is illegal by virtue of the fact that the conditions laid down in Article 86(2) EC are satisfied for the exemption of WestLB from the competition rules.

337 It follows from the foregoing that review of the Commission's examination of the specific features of the transaction at issue has not disclosed a manifest error of assessment. Therefore, the Court must reject the complaint that the contested decision is for that reason illegal.

2. Appropriate return in respect of the DEM 3.4 billion of WfA's assets that could not serve as a guarantee for WestLB's own transactions

(a) Arguments of the parties

338 The Land submits that the contested decision contains an inadequate statement of reasons for the fixing of the appropriate return at 0.3% after tax for the own capital allocated to the credit guarantee that cannot be used by WestLB. It is not possible to understand why the Commission takes into consideration certain factors — in particular the size of that amount and the fact that WfA's special reserves are made available to WestLB for an unlimited duration — and how those factors were taken into account in the calculation of the appropriate rate of return.

339 Furthermore, the applicants dispute the correctness of the contested decision in that regard. They submit that no remuneration had to be paid in respect of the DEM 3.4 billion that could not be used by WestLB in order to extend its activities. They consider that this part of the contribution does not provide any economic advantage to WestLB, since, of that amount, DEM 1.5 billion constitutes guarantee capital for WfA's transactions and not for WestLB's transactions, and that the remainder, namely DEM 1.9 billion, is not taken into account by the bank's creditors either; their concern is only with its rating in the long-term, which has not been altered by the transaction at issue.

340 The Commission states that in point 221 of the contested decision it adequately indicated how it reached the rate of 0.3% after tax in determining the appropriate return on the capital which could not be used by WestLB. It states that the rate of 0.3% which was indicated by the German Government, during the formal examination procedure, as being an appropriate commission for WestLB, was increased in order to take into account the specific features of the capital (its size and availability for an unlimited period) and was then reduced to a figure after tax.

341 Moreover, the Commission submits that the DEM 3.4 billion that was not available as a guarantee for WestLB's own transactions is of economic utility to WestLB, since it is included in WestLB's balance sheet as additional own funds and thus increases its credibility by constituting an additional guarantee for creditors. Furthermore, it disputes the argument based on the significance of WestLB's rating. It therefore submits that this amount should also be taken into consideration when determining the appropriate return for the transfer of WfA.

(b) Findings of the Court

342 As regards the statement of reasons for the contested decision on this question, first, the Commission indicates in point 220 of the contested decision that the capital in question is of material value to WestLB, that its economic function may be compared to that of a guarantee, and that a private investor would demand appropriate return for his exposure to a risk of this sort.

343 Second, with regard to the 0.3% rate of return, it suffices to note that, as the Commission indicates in point 221 of the contested decision, and as was confirmed by the applicants at the hearing, that rate had been indicated by the German Government as the appropriate commission on a bank guarantee for a bank like WestLB.

344 It must therefore be concluded that the contested decision clearly explained the reasons which prompted the Commission to take the view that a return on that capital was warranted, and set out the information which enables the applicants and the Court to ascertain the reasons for the Commission's choice concerning the calculation of the return on that capital. The applicants' objection alleging lack of reasoning in that regard must therefore be rejected.

345 As regards the correctness of that choice, it must be observed that since the capital in question conferred an advantage on WestLB by increasing its creditworthiness, the view can justifiably be taken that a private investor would have required a return on that capital. As regards the rate applied by the Commission, it suffices to reiterate that the rate had been indicated by the Federal Republic of Germany and that it is irrelevant in that regard that the Commission, in arriving at that rate, considered it appropriate to apply an increase and then a reduction. Moreover, the applicants claim that WestLB did not have to pay any remuneration in relation to the capital in question, but do not explain why the final rate fixed by the Commission as an appropriate rate of return on that capital ought to be a different rate.

346 In those circumstances it cannot be held that the Commission's decision is vitiated by a manifest error of assessment in regard to the return calculated for the DEM 3.4 billion of the assets of WfA that could not be used as a guarantee for WestLB's own transactions. Consequently, the objection that the contested decision is illegal in that regard must be rejected.

3. Appropriate return on the DEM 2.5 billion of the assets of WfA that could serve as a guarantee for WestLB's own transactions

347 The applicants, supported by the Federal Republic of Germany, submit, first, that the return should have been calculated by taking into account the specific risk profile of the assets of WfA, which is comparable to that of hybrid instruments relating to own funds. Second, they submit that it was not necessary to increase the Land's shareholding in WestLB in order to prevent the transaction at issue from constituting State aid. Third, they submit that the 9.3% final rate of return required by the Commission in respect of that amount of WfA's assets is not supported by reasons with regard to some factors and is unfounded in several respects.

(a) Comparability of the transfer of WfA's assets to instruments relating to own funds

Arguments of the parties

348 WestLB submits that the risk profile of WfA's assets is not comparable to that of equity capital but to that of hybrid instruments relating to own funds, such as passive holdings, 'perpetual preferred shares' and participating stock. Thus the appropriate return for the transaction at issue must be calculated not by comparing the transfer of WfA to an increase of equity capital but by comparing it to those hybrid instruments and to the return provided in respect of them, the rate for which (between 9.3 and 10.3%) differs from that required by the

Commission in the contested decision as a basic return (12%). Furthermore, WestLB disputes the correctness of the Commission's observations in that regard in the contested decision.

349 The Commission, supported by the BdB, disputes that argument and submits that on account of the specific features of WfA's assets, the comparison with hybrid instruments relating to own funds does not constitute an adequate basis for determining the appropriate return for the transaction at issue. It explains why the assets of WfA display a number of differences in comparison with each of the instruments to which WestLB refers.

Findings of the Court

350 The Commission's choice of comparative criteria in order to fix an appropriate rate of return on the part of WfA's assets at issue cannot be classified as manifestly erroneous. In points 193 to 201 of the contested decision the Commission explains why it took the view that the differences between the hybrid instruments and the transaction at issue are such that a comparison of that transaction with those instruments is of only limited value. In particular, it drew attention to the fact that the hybrid instruments to which the applicants refer generally constitute only a small part of the own funds of a bank, unlike the assets of WfA, which represented almost half of the basic own funds of WestLB.

351 In those circumstances, since the comparability of WfA's assets with those hybrid instruments concerns an area of some economic complexity, in which the Commission enjoys a wide margin of assessment, it must be held that, given the limits on the Court's review of it, examination of the contested decision has not disclosed any manifest error of assessment which could call the legality of that decision into question.

(b) Need to increase the Land's shareholding in WestLB

Arguments of the parties

352 WestLB alleges that in order to avoid the transaction at issue from being classified as State aid it was not necessary to increase the Land's shareholding in WestLB's equity capital, where the Land receives appropriate return on the assets of WfA.

353 The Commission agrees with the principle of WestLB's statement and explains that it merely stated in points 182 and 184 of the contested decision that such an increase in the Land's shareholding in WestLB's capital would have been one means of obtaining an appropriate return on the capital contribution in question, failing which the Land ought to obtain an appropriate return in some other way.

Findings of the Court

354 This argument of the applicants serves no purpose. The applicants and the Commission agree that in order to prevent the transaction at issue from being classified as State aid it was not necessary to increase the Land's participation in WestLB's equity capital provided the Land received an appropriate return on WfA's assets. Therefore, it is only necessary to determine whether the Commission committed a manifest error of assessment in taking the view that the return for the transaction at issue was inappropriate in a context in which the Land had not increased its shareholding in WestLB.

(c) The 9.3% final rate of return

355 The applicants submit that the Commission has failed to state reasons for certain aspects of the 9.3% final rate of return required by it as the appropriate return for the transaction at issue and that the rate is unfounded in several respects.

356 First, the applicants claim that there is a lack of reasoning as regards the fixing of the 12% basic rate of return after tax used in order to calculate the appropriate final return ('the basic rate of return') and they submit that the rate is erroneous. Second, they submit that there is a lack of reasoning concerning the 1.5% increase for risk which the Commission made when calculating the appropriate final return and they submit that such an increase is not justified.

(i) The 12% basic rate of return

Arguments of the parties

357 The applicants submit that the contested decision does not disclose the criteria applied in order to fix the basic rate of return of 12% after tax. They also submit that the Commission had no grounds for requiring such a high rate.

358 First, as regards the type of basic rate of return used by the Commission, the applicants submit that the contested decision is ambiguous as to whether the rate indicated corresponds to the Return on Equity ('the RoE') or the Return on Investment ('RoI'), which are different. It also submits that the contested decision does not disclose why the Commission adopted a discounted rate after tax. The Land adds that, although the Commission finally explained in its defence that the rate of return expected by an investor could not but be a discounted rate of return 'after tax' paid by the undertaking but 'before tax' paid by the investor, that is not clear from the contested decision itself.

359 The applicants dispute the relevance in that regard of the Commission's interpretation of the contested decision put forward in its defence. WestLB adds that the fact that the Commission actually took the return after tax as a basis in its decision is also clear from a draft of the contested decision and requests the Court to order the Commission to produce all the draft versions of the contested decision.

360 Second, the applicants, supported by the Federal Republic of Germany, claim that the Commission ought to have taken into consideration the existence of a tax credit resulting from the corporation tax offsetting procedure in force in Germany at the time of the transaction at issue. They submit that the Commission wrongly equates the investor's return after tax with the return after tax paid by the undertaking. They submit that, as that treatment does not take account of the consequences for the parties of the tax regime applicable to them, the results of the Commission's comparison of the returns are altered to the detriment of the applicants, which distorts the application of the market economy investor principle in the present case.

361 They observe that, unlike other investors, when the Land pays tax on dividends it is not entitled to a tax credit so that it can deduct from its income tax debt an amount corresponding to the tax on profits already paid by the undertaking from which the Land receives the dividends. By virtue of that offsetting procedure, the RoE after tax paid by the undertaking always differs from the RoI before tax of the investor, by an amount at least equal to the amount of the tax credit in respect of corporation tax.

362 The applicants conclude that in order to ensure the comparability of returns it is necessary to allow a notional credit to investors who are not entitled to such a tax credit. Thus, according to WestLB, having fixed the basic rate of return of 12%, the Commission ought to have taken into account a notional tax credit of 5.5% as an element of the Land's revenue. Alternatively, it could have reduced the RoI before tax from 12 to 6.45%. The Land submits that distribution of a dividend of at most 6.48% could be required of WestLB.

363 As regards the argument of the BdB and of the Commission that the offsetting procedure does not apply to the return agreed in respect of the capital of WfA, the applicants submit that their observations essentially apply the approach adopted by the Commission to the tax situation of the market economy private investor which the Commission takes as its model.

364 Third, the applicants submit that there is a lack of reasoning for fixing the figure for the basic rate of return adopted by the Commission.

365 In that regard the applicants dispute the relevance of the matters taken into account in point 209 of the contested decision and observe in particular that the mere reference to Commission Decision 98/490/EC of 20 May 1998 concerning aid granted by France to the Crédit Lyonnais Group (OJ 1998 L 221, p. 28), without an explanation of the similarities between the two cases, cannot constitute an adequate statement of reasons.

366 The Land submits that the lack of reasoning for the contested decision is all the more evident in that the Commission relies exclusively, apparently for the first time in that decision, on future expected rates of return, from which it derives a requirement for a minimum return. It does not rely, for example, on returns offered by comparable undertakings that have actually been achieved in the economically comparable sector of the Member State concerned. The projections for determining the expected returns and the decisive parameters in that regard are not apparent from the grounds of the decision. Furthermore, in reply to the Commission's observations, the Land observes that, despite the fact that, according to the Commission, the passages in the contested decision cited by the Commission actually set out what are the expected returns which principally guide an investor's choice, those passages do not include the projections and the parameters which an investor would take into account for that purpose.

367 WestLB adds that the Commission did not deal with the question of determining what is the relevant market or 'the sector concerned' within which the average return on which it based its decision can be expected; however, that is a fundamental question to be determined in a procedure that brings within the scope of State aid law the average return which may be offered within a given branch of the economy.

368 The Land also submits that, in failing to accept certain essential analytical arguments and the data and information produced by the Federal Republic of Germany in regard to the basic rate of return, the Commission failed to offer any statement of reasons in that regard (Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraphs 44 and 45).

369 The Commission disputes that the contested decision is vitiated by a failure to state reasons for the basic rate of return of 12% after tax and submits that this rate is well founded.

370 First, the Commission disputes that the contested decision failed to state reasons regarding the type of basic rate of return which it used.

371 Second, the Commission, supported by the BdB, disputes the argument that the tax credit resulting from the offsetting procedure must be taken into account as a factor in the remuneration of an investor. The Commission submits that this tax credit is intended solely to compensate the loss which may result from double taxation. It also disputes the correctness of the applicants' observations regarding the tax position and explains why the calculation of the overall tax burden cannot be taken into account in order to determine the average return of an investor operating in a market economy.

372 The BdB and the Commission also state that the corporation tax credit procedure does not apply at all to the return agreed in respect of the capital of WfA, because that return is fixed, whereas the credit procedure applies in Germany only when the investor receives from the undertaking a return in the form of participation in profits.

373 Third, as regards the lack of reasoning for the figure which the Commission adopted for the basic rate of return, the Commission states that in point 209 of

the contested decision it expressly set out the basis for calculating the rate, namely its own experience, several statements and studies by investment banks and consultancies regarding actual and expected returns on equity and investments, as well as the statements submitted by the different parties involved in the case and a previous decision of the Commission relating to capital made available by a Member State to a public bank.

374 The Commission, supported by the BdB, submits that the explanations given in points 206 to 209 of the contested decision must be read in the context of their scheme and above all in the context of the multiple exchanges that took place on the subject between the Commission and the participants in the administrative procedure. Account must also be taken of the fact that the Commission referred to criteria of which WestLB was aware as an economic operator in the sector.

375 The Commission submits that the case-law does not impose on it an obligation to supply the applicants with a detailed list of the methods and sources of information or a statement of the mathematical reasoning followed in the specific case and to indicate all the factors taken into account in the calculation (Case C-466/93 *Atlanta Fruchthandelsgesellschaft and Others* [1995] ECR I-3799, paragraph 16; Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 29; and Case C-352/96 *Italy* v *Council* [1998] ECR I-6937, paragraph 41).

376 The Commission claims that in the course of applying the market economy investor principle it has acquired significant experience of capital contributions by public authorities, the returns which investors expect and capital transactions in the financial services sector. It submits that it took into account in the contested decision the considerations set out in the First Consulting report, which therefore served as a statement of reasons for the decision, and that it took into account documents submitted by the Federal Republic of Germany, as is proved by the detailed statement relating to the Lehman Brothers report.

377 The Commission submits that the contested decision refers to Decision 98/490 on Crédit Lyonnais only inasmuch as that decision is an example showing that an in-depth analysis of the European banking sector and application of the market economy investor principle had also given grounds for finding a rate of 12% for the return expected for an investment in a bank. It explains that it did not merely transpose the figure mentioned in Decision 98/490. It referred to it only in order to stress the appropriateness of the rate of return found in the contested decision. Moreover, the Commission disputes the relevance of the reference by the Federal Republic of Germany to the judgment in *Alitalia* v *Commission*, stating that in the present case the rate of return used in Decision 98/490 was merely one of the sources of information to which the Commission referred. Furthermore, that rate was not used to examine whether the investment constituted aid, as in the decision at the origin of the judgment in *Alitalia* v *Commission*, but was used solely to establish whether Crédit Lyonnais was viable after the rehabilitation proceedings.

378 As regards the 12% figure calculated as being the minimum expected rate of return, after tax paid by the company, which an investor would have expected from his capital in 1991, point 209 of the contested decision shows that the Commission relied on the average return obtained in the banking sector because 'in practice, companies... have to convince investors that they will at least be able to generate average returns on the equity injected'. In that context, 'if a company cannot satisfy these expectations of at least average returns, the investor will consider investing in another company with better prospects'.

379 The Commission claims that, on the basis of the documents whose content is examined in the contested decision, the applicants could understand why the minimum expected return was fixed at a rate of 12% after tax to be paid by the undertaking. It adds that this figure did not differ from the figures proposed in the Lehman Brothers report commissioned by WestLB.

380 The Commission also rejects the Land's criticism that it did not take into account the real return of comparable undertakings but referred, for the first time in its practice, to a future expected return, inferring a minimum return, without having indicated the projections which had to be established and the essential parameters used for that purpose. It accepts that it took into account essentially the expected return because it is that return which guides the choice of an investor, but it claims that it gave a detailed explanation of that factor (in, for example, points 162, 167, 171, 208 and 209 of the contested decision).

381 Lastly, the Commission denies that it failed to take into account essential arguments submitted by the Federal Republic of Germany. The decision shows that it carried out an extremely detailed and in-depth examination of all the essential submissions and arguments of the interested parties (see, in particular points 121 to 138 of the decision).

Findings of the Court

382 First, as regards the statement of reasons for the Commission's choice of a basic rate of return calculated after tax, the Court observes that the actual return paid by WestLB to the Land corresponds to a return after tax on the undertaking but before tax on the investor. The return actually paid annually by WestLB was 0.6% after tax on the undertaking or 1.1% before tax on it.

383 In the present case the Commission fixed the aid element by reference to the return to the Land after tax on the undertaking, as provided for in the transaction

at issue, which it compared with the return it considered to be appropriate for that transaction. This is apparent, first of all, from Table No 7 in the contested decision (point 232), in which 'actual remuneration (after tax)' is subtracted from 'remuneration in line with market conditions', and the explanation that the rate in question corresponds to an 'expected minimum remuneration of 12% after tax' in point 209 of the contested decision. It also follows from point 69 and the last sentence of point 121 of the contested decision.

384 Thus, if the actual return fixed by the parties to the transaction at issue, which serves as the basis for the Commission's comparison, corresponds to a return after tax on the undertaking and before tax on the investor, the appropriate return calculated by the Commission had to correspond to the same type of return in order to be used as a basis for calculating the aid element. It is a factor of which the applicants and the Federal Republic of Germany could not have been unaware, as the Commission not only explained its position in theoretical terms but, in consequence, also calculated the precise amount of the aid to be repaid by WestLB in accordance with the same criterion.

385 Furthermore, in the context of the decision, the reference made in footnote 45 to 'net returns' is also relevant. The fact that 'net returns' must be understood as a return after tax payable by the undertaking but before tax payable by the investor follows logically from the use of that term in the course of the analysis carried out in the contested decision. The decision analyses the transaction at issue from the point of view of a private investor for whom the relevant return in choosing his investment is the return after tax payable by the undertaking.

386 In conclusion, the Court finds that the terms of the contested decision themselves enable the applicants and the Federal Republic of Germany to understand that the basic rate of return used by the Commission is a return after tax payable by

the undertaking but before tax payable by the investor. The applicants' argument alleging a failure to state reasons owing to the fact that the rate is a rate after tax must therefore be rejected.

387 The Court must also reject WestLB's request for production by the Commission of all the draft versions of the contested decision in order to ascertain what type of basic rate of return was used by the Commission. They are in no way decisive for the Court's review of legality, since an analysis of the text of the contested decision suffices to verify whether the Commission fulfilled the obligation to state reasons in that regard (see the case-law cited in paragraph 92 above).

388 Second, as regards the substantive argument relating to the corporation tax credit procedure in force in Germany at the time of the transaction at issue ('the tax credit procedure'), it is necessary to determine whether the tax credit resulting from the procedure must be taken into account as part of the investor's remuneration when the appropriate return for the transaction at issue is calculated.

389 The essence of that procedure is that, initially, in order to avoid double taxation of company profits, in determining the taxable income of each investor the amount paid by the undertaking by way of tax on company profits is imputed to the shareholder as income, pro rata to his shareholding, and is thus added to the amount of dividends actually received by him. The income tax to be paid by the investor is then calculated by reference to the sum of those amounts, but the investor receives, upon payment of the tax due, a tax credit corresponding to the sum paid by the undertaking as tax on company profits which is then deducted from his tax liability.

390 The applicants claim that the results of the Commission's comparison between the returns are distorted to their detriment and are contrary to the market economy investor principle because they fail to take into account the tax credit as part of the investor's return.

391 In the present case, first, as has just been explained (see paragraph 386 above), it is clear from the very terms of the contested decision that the type of return used by the Commission is a return after tax payable by the undertaking but before tax payable by the investor, and so covers solely dividends actually paid to the investor. The return chosen by the Commission as a starting point for its calculation does not therefore include the tax credit from which a private investor might have benefited at the time of the transaction at issue.

392 That choice by the Commission cannot be regarded as manifestly erroneous. Unlike the case of private investors, the tax credit procedure does not apply to the Land. The tax credit procedure aims solely to compensate any double taxation of company profits. However, as the Land is not liable to taxation on dividends received from WestLB, those dividends are not subject to double taxation.

393 In those circumstances, the fact that the tax credit was not taken into account in order to determine the appropriate return on the Land's investment is not likely to distort the Commission's comparison. Consequently, the applicants' argument must be rejected.

394 Third, as regards the statement of reasons for the figure for the basic rate of return chosen by the Commission, the Court observes that the only reference in that regard in the contested decision is in point 209, which is worded as follows:

'The Commission has taken into consideration, alongside its own experience, several statements and studies by investment banks and consultancies regarding actual and expected returns on equity and investments, as well as the statements submitted by the different parties involved in the case. On the basis of this information, its own relevant experience, market statistics and decisions taken in the past on capital provided by the State, the Commission assumes an expected minimum remuneration of 12% after tax for this type of equity investment at the time of the transfer....'.

395 First, the Court finds that the wording of the contested decision in itself does not make it possible to understand the facts and considerations that were of essential importance for the Commission's choice, in the contested decision, of the basic rate of return used to calculate the appropriate return. In the contested decision the Commission merely lists the sources of information on which its choice was based, but does not set out their content in such a way as to explain the extent to which, and in respect of which considerations, it took those sources into account when it adopted its decision.

396 Nor, second, do the references made by the Commission explain its choice in that respect. As regards the 'statements and studies by investment banks and consultancies' and 'the statements submitted by the different parties involved in the case', the Court observes that such a general reference to documents and views put forward from opposing standpoints, with different results, cannot be regarded as an appropriate means of explaining the grounds for the Commis-

sion's choice. Moreover, the First Consulting report, which came closest to the figure for the basic rate of return chosen by the Commission, was disclosed to the applicants and the Federal Republic of Germany only just before the oral procedure in the present cases.

397 The reference to the Commission's 'own experience' does not provide reasons for the measure adopted which enable the Court to carry out its review of legality and the parties concerned to defend their rights.

398 As regards the Commission's 'decisions taken in the past on capital provided by the State', the only specific reference made by the Commission in the contested decision is to Decision 98/490 relating to Crédit Lyonnais. However, as the Commission states, that case is merely an example which supported the Commission's approach to the fixing of the basic rate of return in the present case. In any event, the Commission in no way explains in the contested decision how a return required in another context is relevant in the present case.

399 Third, it is necessary to consider the Commission's argument that the applicants and the Federal Republic of Germany could have understood the Commission's choice because they participated in the administrative procedure and WestLB had knowledge as an economic operator in the sector. The Commission stresses that its choice of figure for the basic rate of return could be understood in the light of the various experts' reports exchanged during the administrative procedure and states, in particular, that the rate did not differ from the figure mentioned in the Lehman Brothers report commissioned by WestLB.

400 However, the Court finds that the fact that the applicants participated in the procedure, or that WestLB is an economic operator in the sector concerned, does

not mean in the present case that they are able to understand the reasons for the Commission's choice of figure for the basic rate of return. In the same way, the fact that WestLB produced a report which mentioned a rate of return similar to that of the Commission does not in itself suffice for a finding that the contested decision states reasons in that regard. The mere existence of that report, which adopted an analytical approach and proposed a final rate of return, both of which differed from those in the contested decision and whose content is not reproduced in the contested decision, cannot relieve the Commission of its obligation to state reasons for the figure which it chose for that rate.

401 Fourth, as regards the Commission's argument that the case-law does not require it to provide the applicants with a detailed list of its methods and sources of information or a statement of the mathematical reasoning followed in the present case, the Court observes that although this is true, this particular requirement is not at issue here and the case-law cited cannot therefore support a finding that the contested decision contained a sufficient statement of reasons for the figure chosen in respect of the rate of return.

402 The criticism of the Commission with regard to the contested decision lies not in its failure to include an exhaustive account of the mathematical reasoning followed in the present case but, quite simply, in its failure to explain the essential considerations which led it to choose the figure for the rate of return in question.

403 Lastly, the importance of the obligation to state reasons is all the more fundamental in the present case because the figure for the basic rate of return required by the Commission constituted a central element of its calculation of the appropriate return for the transaction at issue, which it carried out in the course of applying the private investor principle.

404 It follows from the foregoing that the statement of reasons for the contested decision does not satisfy the requirements of Article 253 EC in so far as it concerns the figure of 12% fixed for the basic rate of return used in order to calculate the appropriate return. The applicants' objection alleging a failure to state reasons in that regard must therefore be upheld.

405 Consequently, the Court is not able to rule on the various arguments challenging the correctness of the contested decision that relate to the figure for that rate.

(ii) The increase of 1.5% for risks

Arguments of the parties

406 The applicants submit that the statement of reasons for fixing the increase for risks at 1.5% is inadequate. The decision merely refers to the First Consulting report and does not explain the Commission's interpretation of that report. Nor does the decision explain why, with respect to the range of rates indicated by the Commission in footnote 49 of the decision as being justified, it is necessary to take the average figure for that range as a minimum figure. Moreover, the applicants dispute that the Commission's letter concerning the firm Sidmar, mentioned in footnote No 48 of the contested decision, is relevant in regard to the fixing of the increased rate. They state that they were unaware of that letter before the present proceedings before the Court and dispute its relevance to the present case.

407 The applicants also dispute the correctness of the reasons given by the Commission to justify an increase in the basic rate for the appropriate return. WestLB requests the Court to order the Commission to disclose the name of the United States bank and the specific circumstances of the capital contribution which is referred to in footnote No 47 of the contested decision.

408 The Commission, supported by the BdB, disputes that there is a lack of reasoning and submits that its decision in that regard is well founded.

409 It states that in points 210 and 215 of the contested decision it set out in detail the factors to be taken into account in determining the 1.5% rate of increase for risks, and their importance for and effect on the return which a market economy investor would require for his capital contribution. It submits that the fact that it chose an average value from the two upper and lower figures indicated by its expert is immediately comprehensible in the light of the considerations set out in the contested decision. The Commission also submits that the factors requiring the application of an increase are also the parameters for determining the rate of that increase and that, as there is no mathematical model by which to calculate the precise rate of increase, the Commission must use its power of assessment.

410 The Commission also submits that, since it carried out all its calculations to determine the appropriate return on the basis of after-tax figures, it is logical that the 1.5% increase for risks must also be a figure after tax payable by the undertaking.

411 Furthermore, the Commission submits that in footnote No 48 of the contested decision it referred to the letter which had been sent to the Belgian State on 25 July 1984 concerning Sidmar. It states that this letter explains that, because non-voting shares ought to bear a dividend higher than the normal rate, any

contribution of capital without voting rights justifies an increase of 2%. The Commission adds that during the administrative procedure it informed the applicants of the practice it had followed in the contested decision. It concludes that, having regard to the low rate applied, the reference to the abovementioned letter and the detailed discussions concerning the conditions which had to be taken into account, experienced investors such as WestLB and the Land could understand the Commission's decision without difficulty, even if the Commission had not explained the path followed.

412 Lastly, it refers to the case-law cited in paragraph 375 above as support for its position concerning the statement of reasons for the contested decision with regard to the increase in question.

Findings of the Court

413 As regards the statement of reasons for the 1.5% increase in the basic return, the Court finds that points 210 and 215 of the contested decision set out the reasons which prompted the Commission to take the view that the basic rate of return ought to be increased. Moreover, the reason for the fact that the rate of increase was a rate after tax follows logically from the fact that the Commission had also calculated a basic rate of return after tax.

414 However, as regards the statement of reasons for the figure for the rate of increase itself, the Court observes that footnote No 49 to the contested decision refers to the First Consulting report. The footnote merely states that this report, which is presented as 'a study by the Commission's outside experts', stresses that 'a market economy investor would expect a premium to be paid for each of the special circumstances[, mentioned in the decision,] and proposes for all three aspects together a premium of 1 to 2 percentage points'.

415 Furthermore, footnote No 48 in the same decision states:

'The principle that non-voting shares should yield a preferential dividend above the normal level has been established by the Commission in past decisions (see, for example, the Commission's letter to Belgium dated 25 July 1984 regarding the firm Sidmar).'

416 It is manifest that the wording of the contested decision does not permit a clear understanding of the Commission's reasons for the figure chosen for the increased rate that it applied in this case. Moreover, prior to the proceedings before the Court, the applicants did not have access to the First Consulting report or to the letter concerning Sidmar, which they were able to consult just before the oral hearing in the present cases. Furthermore, that letter, which dates from July 1984, concerns a Belgian steel firm and it is not possible to understand why reasoning used for that firm at that time could apply to the transaction at issue.

417 The Commission's argument based on the case-law cited in paragraph 375 above must be rejected for the same reasons as those set out in paragraphs 401 and 402 above. Furthermore, the extent of the reasoning required by that case-law was not satisfied in the present case with regard to the fixing of the increased rate.

418 It follows from the foregoing that the statement of reasons for the contested decision does not satisfy the requirements of Article 253 EC so far as it concerns the increase of 1.5% in the basic rate of return used to calculate the appropriate return. The applicants' objection of a failure to state reasons in that regard must therefore be upheld.

419 Consequently, the Court is not in a position to rule on the arguments relating to the correctness of the contested decision in regard to that issue. In those circumstances, it is unnecessary to rule on the request of the applicants in Case T-228/99 for disclosure by the Commission of the name of the United States bank referred to and the specific circumstances of the capital contribution referred to in footnote No 47 of the contested decision.

VI — *Conclusion*

420 Examination of all the pleas raised in the present disputes has shown that the contested decision is vitiated by a lack of reasons as regards two of the factors used to calculate the appropriate return for the transaction at issue, namely those relating to the 12% figure for the basic rate of return and to the 1.5% figure for the increase in that basic rate of return (see paragraphs 394 to 404 and 414 to 418 above). The Court considers that those two factors are of essential importance in the general scheme of the contested decision. Consequently, that decision must be annulled.

Costs

421 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the unsuccessful party's pleadings. Since the Commission has been unsuccessful and the applicants asked for an order on costs, it must be ordered to bear, in addition to its own costs, those incurred by the applicants.

422 Pursuant to Article 87(4) of the Rules of Procedure, the Federal Republic of Germany must bear its own costs. The BdB, intervening, has been unsuccessful and must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. Annuls Commission Decision 2000/392/EC of 8 July 1999 on a measure implemented by the Federal Republic of Germany for Westdeutsche Landesbank — Girozentrale (WestLB);

2. Orders the Commission to pay the costs of the applicants and to bear its own costs;

3. Orders the Federal Republic of Germany and the Bundesverband deutscher Banken eV to bear their own costs.

Moura Ramos Tiili Pirrung

Mengozzi Meij

Delivered in open court in Luxembourg on 6 March 2003.

H. Jung R.M. Moura Ramos

Registrar President

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