

## II

(Non-legislative acts)

## DECISIONS

## COMMISSION DECISION

of 29 September 2010

**on State aid C 32/09 (ex NN 50/09) implemented by Germany for the restructuring of Sparkasse KölnBonn**

(notified under document C(2010) 6470)

(Only the German text is authentic)

(Text with EEA relevance)

(2011/526/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on Member States and other interested parties to submit their comments pursuant to those provisions <sup>(1)</sup>,

Whereas:

## 1. PROCEDURE

- (1) Germany notified the measures on 21 October 2009.
- (2) By Decision of 4 November 2009 <sup>(2)</sup> ('the opening Decision'), the Commission reached the preliminary conclusion that the recapitalisation measures of Sparkasse KölnBonn ('the Bank') constituted State aid and raised doubts as to whether the measures provided to Sparkasse KölnBonn could be found compatible with the internal market pursuant to Article 107(3) TFEU. Further, the Commission required the submission of a restructuring plan by the German authorities.
- (3) On 6 January 2010 the opening Decision was published in the *Official Journal of the European Union* and interested parties were requested to submit their comments.

<sup>(1)</sup> Commission Decision in Case C 32/09 (ex NN 50/09), *Restructuring of Sparkasse KölnBonn* (O) C 2, 6.1.2010, p. 13).

<sup>(2)</sup> See footnote 1.

- (4) On 11 February 2010 Germany submitted a restructuring plan which was discussed in a series of meetings and teleconferences during the period from December 2009 to September 2010.

- (5) Germany submitted further information and updates to the restructuring plan on 15 January, 10, 12 and 24 February, 10 and 26 March, 21 and 28 May, 8 and 11 June, 23 July, and 10 and 23 August 2010. The final version of the restructuring plan was submitted on 1 September 2010.

## 2. DESCRIPTION OF THE BENEFICIARY

- (6) Sparkasse KölnBonn is a German savings bank. It was created in its current form in 2005 as a result of the merger of Stadtparkasse Köln and Sparkasse Bonn, whose owners ('Träger', responsible public institutions, hereinafter 'owner') were, respectively, the cities of Cologne and Bonn. The city of Cologne indirectly holds a 70 % stake in the new bank, the city of Bonn 30 %. Subsequent to this merger the role of owner of Sparkasse KölnBonn is performed by the association Zweckverband Sparkasse KölnBonn ('Zweckverband'). The Zweckverband, which is incorporated under public law, is a special purpose association. The sole participants in the Zweckverband are the city of Cologne (70 %) and the city of Bonn (30 %).
- (7) At the end of 2008 Sparkasse KölnBonn was the second largest savings bank in Germany with a balance sheet of EUR 31 billion. At this point, Sparkasse KölnBonn had an Aa2 rating from Moody's. This was changed to A1 on 15 March 2010.

- (8) Sparkasse KölnBonn provides banking services for retail clients (*Privatkundengeschäft*) and corporate clients (*Firmenkundengeschäft*). The Bank is, with a regional focus, active in project finance and capital markets (*Kapitalmarktgeschäft*), as well as in other financial activities such as asset management.
- (9) The Bank is active only in the Cologne-Bonn region, where it held a market share of approximately [30-35] (\*) % in private customer deposits, around [20-25] % in loans to private customers and [15-20] % in credits to corporate clients in 2008 (3).

### 3. THE AID MEASURES

- (10) The capital of Sparkasse KölnBonn was strengthened by a total of EUR 650 million
- (i) by the issuance of certificates of participation (*Genussrechte*) at the end of 2008; and
- (ii) by a silent participation (*Stille Einlage*) at the beginning of 2009.

#### 3.1. Certificates of participation (*Genussrechte*)

- (11) In December 2008 Rheinische Sparkassen-Förderungsgesellschaft ('Förderungsgesellschaft') subscribed nominal participation certificates in Sparkasse KölnBonn amounting to EUR 300 million in two tranches of EUR 150 million.
- (12) Förderungsgesellschaft is a wholly-owned subsidiary of Rheinischer Sparkassen- und Giroverband (Rhine saving banks association — 'RSGV'). RSGV is the public-law association (*Körperschaft des öffentlichen Rechts*) of all savings banks and their public owners located in the Rhineland and represents the Sparkassen and their (public) owners. According to its statute the objective of Förderungsgesellschaft is the promotion of savings banks belonging to RSGV. Förderungsgesellschaft can contribute to the capital of saving banks for the sole purpose of developing further credit-granting activities and can be granted loans.
- (13) The coupon of the certificates is 8 %. The lifetime of the certificates is until 31 December 2013. From a regulatory point of view the certificates of participation are Tier-2 capital.
- (14) The certificates of participation participate in yearly losses proportionately to the total of loss-absorbing equity. A [...] carry forward of the payments on the

participation certificates is attached to them, i.e. foregone payments on the participation certificates must be paid up to [2-6] years after they were due. The same applies to payments to top up the nominal value of the participation certificates if it is depleted due to absorption of losses.

- (15) In order to finance the certificates, Förderungsgesellschaft subscribed two loans with [...]. These loans bear a fixed interest of [4-5] % over the lifetime of the certificates of participation. The loan is guaranteed to [...] by RSGV, which will receive from Förderungsgesellschaft a guarantee remuneration of [1,8-2,5] %.

#### 3.2. Silent participation

- (16) The silent participation contracts were concluded on 2 January 2009 and on 27 February 2009 between Sparkasse KölnBonn and the Zweckverband setting up a '*Stille Gesellschaft*' for a total of EUR 350 million, paid out in two tranches, EUR 300 million on 2 January and EUR 50 million on 1 April 2009. The silent participation is a device by which the investor does not obtain any voting rights but receives a remuneration. The instrument is perpetual and acknowledged as Tier-1 core capital. The silent participation is held by the Zweckverband.
- (17) To finance the silent participation, the Zweckverband has contracted a loan of EUR 300 million for the first tranche. 50 % of the loan is provided by [...] and the remaining 50 % by [...]. The remuneration of the loan payable by the Zweckverband amounts to 12-month EURIBOR plus [0,7-1,1] %. The second tranche of EUR 50 million was refinanced using a loan from [...], remunerated at EURIBOR plus [0,7-1,1] %. Whilst there is no specific guarantee by either Cologne or Bonn, there exists an unlimited statutory liability of both cities for all liabilities of the Zweckverband pursuant to the statute of incorporation of the Zweckverband.
- (18) The remuneration paid by Sparkasse Köln Bonn for the silent participation is 12-month EURIBOR plus 7,25 %. That remuneration was set in line with a Fairness Opinion from Deutsche Bank. The payment of remuneration is subject to a balance sheet profit, and is foregone if Sparkasse KölnBonn reports no profit for the year. A payment is excluded if, at the time it is due, the capital ratio is below 9 % and in so far as the payment would lead to or increase a loss for the relevant accounting year. In case of deferral of the payment there is no carry-forward obligation to pay the foregone amount at a later point in time. Furthermore, the silent participation absorbs balance sheet losses in proportion to the total loss-absorbing capital.

(\*) Subject to professional secrecy.

(3) Its market share in the total German banking sector is too small to be meaningful.

#### 4. THE RESTRUCTURING PLAN

(19) According to the restructuring plan, Sparkasse KölnBonn will focus on its statutory business model of a regional savings bank. The Bank will concentrate on providing typical retail banking services to its traditional customer segments, being private customers and SMEs, and withdraw from other activities such as proprietary trading or investments in structured products and divest non-core subsidiaries. Further, the Bank will significantly reduce its administrative expenses.

##### 4.1. Description of the restructuring plan

(20) Sparkasse KölnBonn will focus on the services to customers located in the Cologne-Bonn region in the segments for private customers, private banking, SMEs, and corporate and institutional clients. The Bank will focus on corporate clients with a yearly turnover below EUR 250 million.

(21) Sparkasse KölnBonn will reduce its largest credit exposures by limiting the credit lines, requesting additional collateral or transferring risks to other credit institutions. In the corporate clients segment, Sparkasse KölnBonn has already achieved a EUR 551,5 million reduction and will further decrease the exposure by EUR [900-1 100] million by the end of 2013 from the original level of EUR 2,8 billion in 2008. In addition credit exposure in the amount of EUR [800-900] million granted to institutions not connected with the Cologne-Bonn region will be reduced by the end of 2013 using the same instruments (see Annex I, point 4).

(22) Sparkasse KölnBonn has already decreased its proprietary trading portfolio from originally EUR 550 million to currently EUR [20-23] million, which will be further reduced to 0. The Bank will cease all proprietary trading activities in the future and considers giving up its status as trading book institute, thus accounting all remaining limited trading activities in the banking book. They will be qualitatively limited to certain products and have to respect a quantitative daily exposure limit (market risk < EUR [3-5] million, see Annex I, point 2).

(23) One of the main sources of Sparkasse KölnBonn's losses in 2008 was its investments in so-called ABS and Strategic Assets Allocation ('SAA') portfolios. At the time of investment in ABS portfolio, Sparkasse KölnBonn acquired geographically diversified<sup>(4)</sup> and

predominantly AAA-rated assets, including RMBSs<sup>(5)</sup>, CDO<sup>(6)</sup>s, CMBs<sup>(7)</sup>, ABSs<sup>(8)</sup> and CLOs<sup>(9)</sup>. As per the end of 2007 the ABS portfolio amounted to EUR 1,05 billion in Sparkasse KölnBonn's accounts. SAA is an investment in special funds, through which Sparkasse KölnBonn held a diversified portfolio consisting among others of international equity shares, REIT<sup>(10)</sup> and bonds including High Yield and Emerging Markets. As per the end of 2007 this portfolio was accounted for at EUR 2,2 billion in Sparkasse KölnBonn's books. Although Sparkasse KölnBonn aimed at widespread diversification of its ABS and SAA portfolios, they were significantly affected by the financial crisis. Both portfolios mainly contributed to the write-downs of EUR 249 million<sup>(11)</sup> that Sparkasse KölnBonn had to recognise on its investment portfolio in 2008, in addition to EUR 108 million already recorded in 2007.

(24) In its restructuring plan Sparkasse KölnBonn classified the ABS and SAA investments as not in line with the risk profile and its strategic reorientation towards a traditional savings bank. As a result, the Bank decided to completely sell off or run down those commitments by 2014. Sparkasse KölnBonn reduced its SAA investment by half in March 2008 in order to limit its exposure to equities. Further divestments took place in 2009, resulting in the reduction of the SAA portfolio to EUR 468 million as per 30 September 2009. The impact of the remaining ABS exposure (nominally EUR 970 million as per 30 September 2009) on the Sparkasse KölnBonn's accounts will be absorbed by provisioning and hedging in 2010. Finally in [2012-2014] the whole remaining portfolio is to be sold.

(25) Sparkasse KölnBonn has started implementing a comprehensive cost-cutting programme, including staff reduction, internal processes optimisation and closure of 22 out of 131 existing branches by mid-2011. As a result, its administrative expenses will be gradually reduced by [5-8] % by 2014<sup>(12)</sup>.

(26) Germany commits that the Bank will respect restrictions on coupon payments (Annex I, point 7), advertisement (Annex I, point 9) and acquisition bans (Annex I, point 8) and a price leadership ban which stipulates that until the end of 2014 Sparkasse KölnBonn will not offer better rates for deposits and mortgages than the best out of its 10 largest competitors (for deposits in terms of market shares of competitors active in the relevant

<sup>(5)</sup> Residential mortgage-backed securities.

<sup>(6)</sup> Collateral debt obligation.

<sup>(7)</sup> Commercial mortgage-backed securities.

<sup>(8)</sup> Asset-backed securities.

<sup>(9)</sup> Collateralised loan obligation.

<sup>(10)</sup> Real estate investment trust.

<sup>(11)</sup> Thereof ABS portfolio: EUR 104,5 million write-down in 2008.

<sup>(12)</sup> Taking into consideration price and salary increases.

<sup>(4)</sup> As per the end of September 2009 64 % of the ABS portfolio volume was related to Germany and other European countries, a further 17 % to the USA.

market in the Cologne-Bonn region and for mortgages in terms of market share in new production in Germany, see Annex I, point 5).

#### 4.2. Restructuring of subsidiaries

- (27) Sparkasse KölnBonn plans to reduce its holding of subsidiaries by one third. From the portfolio of subsidiaries, held at EUR 635 million in the Bank's accounts as per 31 December 2008, EUR [20-40] million were sold or liquidated by the end of 2009 and a further EUR [180-250] million are to be divested. By implementing this measure, Sparkasse KölnBonn follows two aims depending on the type of the subsidiary. First, the divestments of non-core subsidiaries<sup>(13)</sup>, which are active in regional development projects or communal and social housing, aim at reducing Sparkasse KölnBonn's risk exposure and vulnerability. Second, the sale of stakes in entities which are only indirectly related to Sparkasse KölnBonn's activities, aims at generating profits to finance the restructuring of Sparkasse KölnBonn (see Annex I, point 10). A complete list of subsidiaries to be divested is given in Annex I, points 10 and 13.
- (28) Examples of divestments in the second group are stakes in companies such as RW Holding AG, S ProFinanz Versicherungsmakler GmbH, Schufa Holding AG and neue leben Pensionsverwaltung AG. Those sales have already been completed and have resulted in proceeds totalling approximately EUR [25-35] million.
- (29) For some subsidiaries, which account for approximately EUR [70-100] million, Sparkasse KölnBonn expects little interest from private third-party purchasers. That low interest is mainly due to the character of those entities, as they are small, involved in social housing and regional development in cooperation with the City of Cologne, or their ownership structure, which is already dominated by the City of Cologne. Therefore, the Bank is considering selling those activities to [the City of Cologne or a company associated with the City of Cologne]. The transfer would take place at market value, assessed by

an independent expert. The assets held by the subsidiaries to be sold to the City of Cologne are mainly related to real estate activities.

- (30) In consequence of the implementation of the restructuring measures, the Bank will reduce its risk-weighted assets (RWA) by EUR [2-5] billion to EUR [15-20] billion (i.e. by [15-20] %) (without taking into account future growth in the core business over the restructuring period). If growth in the core business is taken into account, the reduction of RWA will amount to [10-15] % by 2014. Sparkasse KölnBonn's [...] will be reduced by EUR [4-6] billion to [20-30] billion (i.e. by [15-20] %) (without taking into account future growth in the core business over the restructuring period). When growth in the core business is accounted for, the restructuring measures will result in a total assets reduction of 5 %.

#### 4.3. Ability to return to viability in base and stress case

- (31) Germany has submitted a base and a stress scenario with the aim of demonstrating Sparkasse KölnBonn's ability to restore its long-term viability.

##### *Base case*

- (32) In the base case the submitted financial projections are based on assumptions which are in line with projections for Germany published by acknowledged economic institutes. It is assumed that GDP growth will remain at the same moderate level for the whole restructuring period. The unemployment rate is expected to continue rising until 2011 and fall slowly thereafter. Finally, it is expected that the currently unfavourable, low-interest rates environment will improve in 2010 and then remain unchanged for the rest of the restructuring period.
- (33) As illustrated in Table 1 below, in the base case Sparkasse KölnBonn is expected to return to profitability in 2010 and continuously improve its results until 2014. In 2014 the Bank will achieve a return on equity (ROE) of [9-10] %. Chart 1 below illustrates the main financial performance indicators of Sparkasse KölnBonn for the years 2008-2014.

<sup>(13)</sup> An important source of Sparkasse KölnBonn's difficulties was its engagement in projects and subsidiaries unrelated to its core business. These activities have generated a major part of the losses in the past. In order to attract new industries to Cologne, in the past the Bank engaged in development of commercial and office spaces or granted rent guarantees to facilitate real estate developments. The Bank is renegotiating the guarantees and rent contracts with the aim to ceasing such arrangements and, where possible, is proceeding with the sale of the activities to third parties.

Table 1

**Sparkasse KölnBonn's pre-tax profit 2010-2014 in base case**

Scenario	2009	2010	2011	2012	2013	2014
Base case	-98,8	[5-10]	[80-100]	[125-150]	[150-175]	[20-225]

Chart 1

**Sparkasse KölnBonn's main financial performance indicators for 2008-2014 — base case**

	2008	2009	2010	2011	2012	2013	2014
<b>RWA <sup>(1)</sup> (EUR bn)</b>	20,2	19,1	[17,5-20]	[...]	[...]	[...]	[15-20]
<b>Tier-1 ratio <sup>(2)</sup></b>	6,4 % (5,5 %)	6,9 % (6,1 %)	[7-8] % ([6-7] %)	[8-9] % ([7-8] %)	[8-9] % ([7-8] %)	[8-9] % ([7-8] %)	[8-10] % ([8-9] %)
<b>ROE</b>	-13,5 %	-6,5 %	[0-3] %	[4-6] %	[7-9] %	[7-9] %	[9-10] %
<b>CIR</b>	73,0 %	70,0 %	[65-75] %	[60-70] %	[55-65] %	[50-60] %	[50-60] %
<b>FTE</b>	3 824	3 672	[3 500- 3 750]	[3 250- 3 500]	[3 000- 3 250]	[3 000- 3 250]	[2 750- 3 000]

<sup>(1)</sup> Figure for Sparkasse KölnBonn only.

<sup>(2)</sup> Tier-1 capital ratio for Sparkasse KölnBonn, figure in brackets: Tier-1 ratio for the Group. CIR — cost income ratio, FTE — full-time equivalents (of full-time workers).

*Stress case and sensitivity analysis*

- (34) In the stress case the macroeconomic assumptions are those of a continuation of the crisis until 2011 and slow recovery in 2012. The stress case assumes two additional years of unfavourable low interest rates compared with the base case.
- (35) In the stress case Sparkasse KölnBonn is expected to return to profitability in 2012 and continuously improve its results until 2014. In 2014 the Bank will achieve an ROE of [10-12,5] %. According to the stress case scenario, the capital ratios for Sparkasse KölnBonn and for the whole consolidated group will remain well above the minimum regulatory requirements throughout the restructuring period. Table 2 and Chart 2 below illustrate the main financial performance indicators of Sparkasse KölnBonn for the years 2008-2014 in the stress case.

Table 2

**Sparkasse KölnBonn's pre-tax profit 2010-2014 in stress case**

Scenario	2009	2010	2011	2012	2013	2014
Stress case	-98,8	-[125-150]	-[25-50]	[50-75]	[125-150]	[175-200]

Chart 2

**Sparkasse KölnBonn's main financial performance indicators for 2008-2014 — stress case**

	2008	2009	2010	2011	2012	2013	2014
<b>RWA <sup>(1)</sup> (EUR bn)</b>	20,2	19,1	[17-20]	[17-19]	[17-19]	[17-19]	[16-18]
<b>Tier-1 ratio <sup>(2)</sup></b>	6,4 % (5,5 %)	6,9 % (6,1 %)	[6-7] % ([5-6])	[6-7] % ([6-7])	[6-7] % ([6-7])	[6-7] % ([6-7])	[7-8] % ([6-7])

	2008	2009	2010	2011	2012	2013	2014	
Indicators	ROE	-13,5 %	-6,5 %	-[8-9] %	-[1-3] %	[3-5] %	[8-10] %	[10-12] %
	CIR	73,0 %	70,0 %	[70-75] %	[65-70] %	[60-65] %	[55-60] %	[50-55] %
	FTE	3 824	3 672	[3 500-3 750]	[3 250-3 500]	[3 000-3 250]	[3 000-3 250]	[2 750-3 000]

(<sup>1</sup>) Figure for Sparkasse KölnBonn only.

(<sup>2</sup>) Tier-1 capital ratio for Sparkasse KölnBonn, figure in brackets: Tier-1 ratio for the Group. CIR — cost income ratio, FTE — full-time equivalents (of full-time workers).

- (36) Because the current low level of short-term interest rates constitutes the main constraint on the Bank's earnings, an additional sensitivity analysis of the interest rates has been conducted (scenario 1: upward shift of the interest curve by 100 bps, scenario 2: its downward shift by 50 bps). The analysis confirmed that further increasing interest rates would improve Sparkasse KölnBonn's profitability, whereas decreasing interest rates would reduce its profitability, i.e. a linear decrease of 50 bps of the short-term interest rates would lead to a reduction of EUR [20-25] million of profits per year. Overall the sensitivity analysis provided by Germany demonstrates that Sparkasse KölnBonn's vulnerability to major interest rate shocks is limited.

#### 4.4. Corporate governance

- (37) Germany submitted information showing that the politically driven investments which contributed to Sparkasse KölnBonn's difficulties were decided in the period 1997-2004, prior to the merger of Stadtsparkasse Köln with Sparkasse Bonn in 2005 which created Sparkasse KölnBonn in its current form. Those investments were also decided under a different legal framework, defined mainly by the Savings Banks Act of North Rhine-Westphalia (<sup>14</sup>). Since then, improvements to the corporate governance of Sparkasse KölnBonn have been implemented.
- (38) Due to the change in the structure of the Bank's responsible public institution (Träger) after the merger of 2005, important decisions in the Zweckverband are taken by qualified majority of shareholder's votes, which is set at 85 % at least, a level exceeding the participation held by any single city.
- (39) The number and size of the institute's bodies have been reduced, including major reductions in the size of the Supervisory and Management Boards (<sup>15</sup>). The Parti-

ipation Committee consisting of three members of the Management Board, which in the former Stadtsparkasse Köln was entitled to pre-decide on investment in subsidiaries, was dissolved. The Management Board took over responsibility for investment policy in respect of equity engagements, which are to be assessed according to economic criteria. Additionally, any new investment entered into by Sparkasse KölnBonn requires the approval of the Supervisory Board.

- (40) The changes in the Savings Banks Act obliged the Bank to establish risk and accounting committees and provide them with far-reaching control powers. The law also requires members of the Supervisory Board to possess qualifications necessary to assess and control operations of a savings bank. The Management Board bears sole and comprehensive responsibility for management of the Bank and is not bound by any instructions of the Supervisory Board or the shareholders.
- (41) In addition to the already implemented improvements to the corporate governance structure, Sparkasse KölnBonn will further strengthen its governance by increasing the number of independent (<sup>16</sup>) members of the Supervisory Board from two (at present) to four out of 18. The members of the Accounting Committee will be reduced from nine to seven and of the Risk Committee from nine to six respectively starting from 1 January 2011. The Participation and the Strategy Committees will be dissolved by the end of 2011 and the end of 2010 respectively. The former will naturally lose its importance once Sparkasse KölnBonn has divested the major part of its subsidiaries. The duties of the latter will be performed by the Management Board. Finally, the decision-making processes regarding acquisitions of companies will be amended and will involve unanimous decision-making in the Management Board and require investments that exceed EUR [2-5] million to have already been positively assessed by an independent expert, in the course of a due diligence or business valuation.

(<sup>14</sup>) Sparkassengesetz Nordrhein-Westfalen, <http://www.wlsgv.de/download/spkg28112008.pdf>, current version effective since 29 November 2008.

(<sup>15</sup>) From nine members in 2005 to five in 2010 in the case of the Management Board and from 27 to 18 in the case of the Supervisory Board.

(<sup>16</sup>) In this context 'independent' means that the member of the Supervisory Board does not belong to the City Council of the city which appointed him/her.

#### 4.5. Hybrids

- (42) Sparkasse KölnBonn holds hybrid capital placed with third-party investors (private certificates of participation) in the amount of EUR 224 million. According to the information provided by Germany, the *Genussrechte* and the private certificates of participation rank *pari passu*. The silent participation is junior to both certificates. As shown in Table 3 below, since 2008 no coupon payments on hybrids have been made. In 2008 and 2009 the *Genussrechte* participated in the losses in the amount of EUR 57,4 million. The silent participation and the private certificates participated in the losses in 2009. Starting from 2010 the hybrid instruments will be topped up and from 2011 cancelled cumulative coupon payments will be caught up with by 2012. In 2013 all hybrids will be topped up, all cancelled coupon payments will be caught up with and a full coupon will be paid on each instrument. Given that the coupon payments are triggered either by a positive P&L or balance sheet result, Sparkasse KölnBonn does not have any discretion to suspend coupon payments if it operates profitably and any capital depletion has been replenished.

Table 3

#### Sparkasse KölnBonn's profit distribution in 2009-2014 (base case)

		2008	2009	2010	2011	2012	2013	2014
Profit before tax			-98,8	[5-10]	[80-100]	[125-150]	[150-175]	[200-225]
Profit distribution according to capital instruments								
State's certificates of	Loss absorption	40,6	16,8	0	0	0	0	0
	Principal replenishment	0	0	[...]	[...]	[...]	[...]	[...]
	Coupon	0	0	[...]	[...]	[...]	[...]	[...]
Private certificates of	Loss absorption	0	12,5	0	0	0	0	0
	Principal replenishment	0	0	[...]	[...]	[...]	[...]	[...]
	Coupon	0	0	[...]	[...]	[...]	[...]	[...]
Silent participation	Loss absorption	0	19,5	0	0	0	0	0
	Principal replenishment	0	0	[...]	[...]	[...]	[...]	[...]
	Coupon	0	0	[...]	[...]	[...]	[...]	[...]

- (43) Germany has provided the commitment that the Bank will not proceed with any coupon payments on the hybrid capital held by private investors, except for what it is contractually obliged to pay (see Annex I, point 7).

#### 4.6. WestLB

- (44) Another source of Sparkasse KölnBonn's difficulties was its participation in WestLB. In the past Sparkasse KölnBonn incurred losses amounting to EUR [...] million, because as a member of the regional savings banks association it contributed to the reserve fund established by the savings bank association as a safety net for its members and the Landesbanks. In the context of the WestLB rescue in 2008 the fund had to intervene. The remaining risk exposure is linked to Sparkasse KölnBonn's indirect holding in WestLB and remaining indirect liability for WestLB's bad bank via RSGV.

- (45) Although Sparkasse KölnBonn has not invested directly in WestLB, it is exposed to the stake in it held by RSGV, in which Sparkasse KölnBonn holds a direct stake of about 19 %. According to information provided by Germany, the risk that any impairment of RSGV's book value for WestLB will have an impact on Sparkasse KölnBonn is very limited. First, WestLB has been valued by an independent party recently and its book value in RSGV accounts was reduced accordingly as per 31 December 2009 from the historic cost of EUR [...] billion to EUR [...] million as per 31 December 2009. Therefore the indirect stake of Sparkasse KölnBonn in WestLB amounts currently to approximately EUR [...] million. Further, as Sparkasse KölnBonn is exposed to WestLB only by its stake in RSGV, only the intrinsic value of the latter is relevant for Sparkasse KölnBonn. This is influenced not only by the value of WestLB, but also other subsidiaries and investments held by RSGV. Valuation of other RSGV subsidiaries conducted

at the end of 2009 disclosed significant latent reserves, which would suffice to cover even the potential worst case scenario write-down of WestLB to 0.

- (46) Sparkasse KölnBonn's obligation to contribute [to the ...] created to cover potential losses of the recently created WestLB bad bank amounts to EUR [...] million over 25 years. However, this commitment will not impact the capacity of the Bank to meet its regulatory requirements in the future because the contributions [to the ...] are to be made only out of future profits.

#### 4.7. Partial early exit

- (47) Germany has provided a commitment that Sparkasse KölnBonn will repay part of the received capital earlier than provided for in the terms of the instruments (see Annex I, point 27). The repayment will take place starting in 2011 and involve two steps.
- (48) The first step consists of the sale of a EUR 150 million tranche [...] to the Zweckverband. The transaction, and in particular the level of the purchase price, will leave Förderungsgesellschaft no better off than if it kept the instrument<sup>(17)</sup>. The Zweckverband will then convert the *Genussrechte*, which are currently acknowledged as Tier-2 capital, into Tier-1 capital instruments. In particular, the new instrument would be subordinated, not be redeemed for at least 30 years and have non-cumulative coupon payments. That step will result in the improvement of Sparkasse KölnBonn's Tier-1 capital ratio by [0,8-1,0] %.

<sup>(17)</sup> Germany proposes a solution with a so-called 'improvement clause', which would be valid for the same period as the cumulating feature of the original instrument. This way Förderungsgesellschaft would at first receive from the Zweckverband a payment based on the book value of the instrument (nominal value minus losses absorbed, which have not been topped up). Then, according to the 'improvement clause', Förderungsgesellschaft would receive from the Zweckverband similar cash flows to what it would have received had it kept the instrument, related to the period up to the sale of the instrument. Sparkasse KölnBonn refers to similar cash flows, because the suspended coupon payments, related to the period during which Förderungsgesellschaft held the instrument, would be paid to Förderungsgesellschaft only with a discount of up to 25 %. Germany considers such a reduction to be an appropriate instrument to compensate the Zweckverband for taking over the interest and funding risk and account for the advantage Förderungsgesellschaft achieves by receiving its capital sooner than contractually provided for. For example, if Förderungsgesellschaft sells the instrument worth nominally EUR 150 million, depleted by EUR 25 million losses, to the Zweckverband in 2011, it would be paid EUR 125 million initially. If in 2012 Sparkasse KölnBonn generates profits, which would trigger the obligation to top up the instrument's capital (if Förderungsgesellschaft had kept the instrument), the corresponding amount will be paid to Förderungsgesellschaft by Zweckverband. Should the 2012 profits suffice to pay any coupons suspended in 2009-2011, this would also result in a comparable payment being made to Förderungsgesellschaft by Zweckverband.

- (49) The increase in the Tier-1 capital ratio allows for the second step, which is the buy-back by Sparkasse KölnBonn of the remaining tranche of the *Genussrechte* held by Förderungsgesellschaft in 2011 worth nominally EUR 150 million. Overall both steps will result in a decrease in the Tier-2 capital ratio by [0,5-1,0] %. Additionally, RSGV or another member of the savings bank sector will buy at market price the stakes of Sparkasse KölnBonn in two savings-bank-related [...] <sup>(18)</sup> and [...]. The sale of the indirect stake in the two entities would result in a further [0,2-0,5] % decrease in the Bank's total assets. The sale of the two entities is closely linked to the repayment of the second tranche of the *Genussrechte* as RSGV will buy the two entities with the proceeds from the sale of the *Genussrechte*.

#### 5. GROUNDS FOR INITIATING THE PROCEDURE ON THE RECAPITALISATION MEASURE

- (50) The Commission recalls that in this case it opened the formal investigation procedure on the recapitalisation measure regarding its compatibility with the internal market pursuant to Article 107(3) TFEU <sup>(19)</sup> as restructuring aid on 4 November 2009.
- (51) Further, the Commission expressed doubts as to whether adequate burden-sharing was ensured in any way and whether the distortion of competition was limited, as required by the State aid rules (paragraph 50 of the opening Decision).
- (52) Finally, given the uncertainty as to whether the difficulties of Sparkasse KölnBonn were due to investment decisions taken well before the crisis or rather to the crisis itself, the Commission did not conclude whether the recapitalisation measures would fall under Article 107(3)(b) TFEU or under Article 107(3)(c) TFEU. The Commission decided to proceed with an investigation of the facts in order to identify the proper legal basis to be applied and to take a position later in the process.

<sup>(18)</sup> Sparkasse KölnBonn is bound to sell its participation to RSGV or other members of the savings banks sector due to the contractual arrangements regarding its indirect stake in these entities.

<sup>(19)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.



## 6. COMMENTS FROM INTERESTED PARTIES

- (53) The Commission notes that no comments from interested third parties have been received with regard to the opening Decision on the recapitalisation measure.

## 7. COMMENTS FROM GERMANY

- (54) Germany indicated that it had reviewed the Commission's Decision of 4 November 2009, in which the Commission decided to initiate the procedure laid down in Article 108(2) TFEU. It informed the Commission that it upheld its opinion that the recapitalisation measures received by Sparkasse KölnBonn in the form of a silent participation and certificates of participation at the end of 2008 and the beginning of 2009 did not constitute State aid within the meaning of Article 107(1) TFEU. Germany considered the measures to be in conformity with the market economy investor principle in accordance with the reasoning provided prior to the opening Decision (see paragraphs 24-28 of the opening Decision).

- (55) Germany disagreed with the Commission's assessment that at the time the recapitalisation measures were executed, i.e. end 2008/beginning 2009, the market for hybrid instruments had completely dried up<sup>(20)</sup>. More specifically, it disagreed with the Commission's conclusion that no market economy investor or owner would have engaged in such an investment at the time, even at a higher price (see paragraph 38 of the opening Decision). It argued that market developments did not affect Sparkasse KölnBonn, which was able to issue junior debt both in the last 4 months of 2008 (totalling EUR [10-15] million) and in the first quarter of 2009 (totalling EUR [35-40] million) in tranches of up to several hundred thousand euro.

- (56) Finally, Germany contested whether the recapitalisation of Sparkasse KölnBonn by Förderungsgesellschaft involved any state resources.

- (57) Germany expressed, however, its confidence, that were the Commission to confirm its preliminary assessment regarding the State aid character of Sparkasse KölnBonn's recapitalisation, the measures would be compatible with the internal market under Article 107(3)(b) TFEU.

- (58) Germany argued that the restructuring plan complied with all the conditions set forth in the Commission's Communication of 23 July 2009 on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules<sup>(21)</sup> ('Restructuring Communication').

- (59) In Germany's opinion the restructuring plan ensures that Sparkasse KölnBonn's long-term viability is restored, Sparkasse KölnBonn provides a sufficient own contribution to the restructuring costs and distortions of competition are limited by substantial structural and behavioural measures.

- (60) The commitments provided by Germany are set out in Annexes I to III and form an integral part of this Decision. In order to ensure that the commitments will be implemented, a monitoring trustee will be appointed. The appointment procedure and the responsibilities of the monitoring trustee are set out in Annex II. Further, Germany has committed itself to a timeline for divestments (see Annex I, points 10 and 13). Should the committed timeline for divestiture not be met, a divestiture trustee will be appointed and will perform his duties in accordance with the conditions stipulated in Annex III.

## 8. ASSESSMENT

### 8.1. Existence and amount of the aid

- (61) The Commission must assess whether the measures concerned constitute State aid. Article 107(1) TFEU provides that any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings is, in so far as it affects trade between Member States, incompatible with the internal market.

- (62) In the opening Decision (section 5.1) the Commission reached the preliminary conclusion that the recapitalisation measures of Sparkasse KölnBonn constituted State aid. The Commission cannot agree with Germany's reasoning according to which the measures did not constitute aid inasmuch as the conditions of both instruments were in line with what a market economy investor would have accepted. Even if the remuneration on both instruments was in line with the interest paid on comparable instruments until the beginning of 2008, it was too low in the case of Sparkasse KölnBonn given the high risk resulting from the lack of profitability of the Bank. At the time of the recapitalisation, the market for hybrid instruments had even completely dried up. Therefore, in the context of the case and in particular the situation of the market, the Commission could not accept the argument that a market economy investor would have made the investment at the time, not to mention investing on equivalent terms.

- (63) The investigation did not reveal any information which would have altered this assessment. Junior debt issuances by Sparkasse KölnBonn at the end of 2008 and in the first quarter of 2009 do not provide reliable evidence that the markets for hybrid instruments were active owing to the very limited amount of single tranches involved. Tranches of hybrid instruments worth several hundred thousand euro represent a considerably different

<sup>(20)</sup> With the exception of inter-group issuances or the State being the purchaser of the instruments.

<sup>(21)</sup> OJ C 195, 19.8.2009, p. 9.

level of risk from an instrument worth nominally EUR 150 million and are therefore much easier to absorb by the private markets. Therefore, the Commission upholds its view that no market economy investor would have acquired a hybrid instruments issue of comparable size and characteristics as Sparkasse KölnBonn's recapitalisation measures at that time.

- (64) As regards the nature of the resources used to recapitalise Sparkasse KölnBonn by Förderungsgesellschaft, the Commission recalls that it has already established in its case practice that means provided by RSGV are resources directly or indirectly controlled by public authorities<sup>(22)</sup>. The Commission considers that this also applies to Förderungsgesellschaft, which is a wholly-owned subsidiary of RSGV. Therefore, these resources are state resources within the meaning of Article 107(1) TFEU.
- (65) In the light of the above, the Commission confirms the provisional conclusion reached in the opening Decision that the recapitalisation measures in favour of Sparkasse KölnBonn constitute State aid within the meaning of Article 107(1) TFEU.
- (66) The Commission furthermore notes that the rescue aid measures have been converted into restructuring aid which continues to constitute an advantage for the Bank. The measures allowed the Bank to obtain financing in a situation where it was unable to raise capital on the market, especially in the financial and economic crisis. This gives an economic advantage to the Bank and strengthens its position compared with that of its competitors in Germany and other Member States that are not benefiting from the same support. The measures must therefore be regarded as liable to distort competition and affect trade between Member States.
- (67) The aid element in the capital injections amounts to EUR 650 million and represents 3,3 % in relation to the Bank's risk weighted assets (end of 2008).

## 8.2. Compatibility of the aid with the internal market

### 8.2.1. Legal basis for the compatibility assessment

- (68) In its opening Decision of 4 November 2009, the Commission did not conclude what would be the

<sup>(22)</sup> See point 29 of the Commission Decision of 30 April 2008 in Case NN 25/2008, *WestLB risk shield*; Commission Decision of 1 October 2008 in Case C 43/08, *WestLB risk shield* (OJ C 322, 17.12.2008, p. 16), Commission Decision of 12 May 2009 in Case C 43/08, *WestLB risk shield*. In the context of the current court case regarding WestLB risk shield, Germany has not challenged the Commission's assessment of the support provided by savings banks associations RSGV and WLSGV to WestLB as being based on state resources within the meaning of Article 107(1) TFEU.

proper legal basis for the analysis of the recapitalisation measures. Based on the information available at that time, the decisions to invest in regional development projects taken in the period considerably before the financial crisis seemed to be the major source of Sparkasse KölnBonn's difficulties. As the crisis appeared only to have exacerbated existing problems of the Bank, the application of Article 107(3)(c) TFEU was not excluded. On the other hand, the implementation date of the recapitalisation measures at the peak of the financial crisis and the Commission's financial crisis banking case practice suggested the application of Article 107(3)(b) TFEU.

- (69) Further, even if previous decisions made reference to the Guidelines on State aid for rescuing and restructuring firms in difficulty<sup>(23)</sup> ('Restructuring Guidelines'), the Commission has clarified in point 49 of the Restructuring Communication that all aid notified to the Commission before 31 December 2010 will be assessed as restructuring aid to banks pursuant to the Restructuring Communication instead of the Restructuring Guidelines.
- (70) Given the continuing sensitivity of the banking sector in Germany the Commission concludes that the potential dissolution of one of the biggest saving banks in Germany due to the [...] would have had systemic implications and therefore threatened financial stability in Germany.
- (71) Therefore, Article 107(3)(b) TFEU is the appropriate legal basis for assessing whether the aid received by Sparkasse KölnBonn is compatible with the internal market as restructuring aid in order to preserve financial stability.

### 8.2.2. Compatibility of the restructuring aid with the internal market

- (72) According to the Restructuring Communication, first, the restructuring plan has to demonstrate that the restructuring process which a beneficiary of State aid is undergoing is suitable to restore its long-term viability. Second, the aid amount must be limited to the minimum necessary and both the beneficiary and its capital holders should contribute to the restructuring as much as possible with their own resources. Third, measures need to be in place to limit distortion of competition created by artificially supporting the market power of the beneficiary and to ensure a competitive banking sector. Finally, monitoring and procedural issues need to be addressed.

<sup>(23)</sup> OJ C 244, 1.10.2004, p. 2. Reference was made explicitly in point 42 of the Commission Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('Banking Communication').

## (i) Restoration of long-term viability

- (73) In line with points 9 to 11 of the Restructuring Communication, Germany submitted a comprehensive and detailed restructuring plan which provides complete information on the business model. The plan also identifies the causes of the difficulties faced by the Bank.
- (74) As regards its business model, Sparkasse KölnBonn intends to refocus on the traditional regional savings bank business activities. It will provide a full range of retail banking products to its core customer segments in the Cologne-Bonn region: retail, SMEs as well as smaller corporate customers and institutional clients located in the region. As a consequence, Sparkasse KölnBonn will concentrate on its statutory activities and capitalise on its core competence, while withdrawing from those areas which have been at the origin of its financial difficulties. In particular, Sparkasse KölnBonn ceases proprietary trading, all non-core subsidiaries and investments in SAA and ABS portfolios. The Commission considers that the new business model of the Bank is viable and sustainable in the long term.
- (75) Sparkasse KölnBonn's difficulties were mainly attributable to three activities: (i) regional development projects, (ii) investments in ABS and SAA portfolios and (iii) the Bank's investment in WestLB.
- (76) Already in 2008 Sparkasse KölnBonn initiated the sale or liquidation of non-core subsidiaries related to regional development. The full cessation of these activities constitutes a necessary and appropriate measure to remove the Commission's concerns as the divestments set an ultimate limit to any future losses or risk exposure resulting from the subsidiaries. Additionally, the measure frees up capital as well as management capacities, which can be re-employed in the core business of the Bank. Furthermore the divestments will also reduce the Bank's balance sheet by approximately EUR [180-230] million ([0-2] %) <sup>(24)</sup>.
- (77) As the activities of the subsidiaries to be sold to the City of Cologne are mainly real estate development and real estate-related services, the Commission does not consider that the application of the Communication on the treatment of impaired assets in the Community banking sector <sup>(25)</sup> ('Impaired Assets Communication') is necessary or appropriate in this case. The book values of these subsidiaries have been significantly written down in the past years in order to bring them in line with their market values. Therefore significant further losses for the Bank due to the sale of the subsidiaries are not expected.

Furthermore, the commitment of Germany that the Bank will sell at market value, which will be determined by an independent expert, ensures that no additional State aid is involved in the transactions.

- (78) Another source of the Bank's problems was the ABS and SAA portfolios. Those investments have already been significantly reduced. Sparkasse KölnBonn will withdraw completely from those portfolios by the end of 2014. As those investments are outside the scope of the new business model of the Bank, the withdrawal from those portfolios is a necessary step in the implementation of Sparkasse KölnBonn's strategy. The current book values of the remaining assets in the ABS and SAA portfolios are overall in line with their market value. Therefore the remaining risk exposure stemming from those portfolios is limited and does not affect the viability of the Bank.
- (79) Finally, the Bank's remaining exposure to WestLB, which in the past resulted in Sparkasse KölnBonn's losses of EUR [...] million, is limited in size and compensated by reserves in the investment portfolio of RSGV. Further, the contribution of the Bank [to the ...] is to be made only out of future net profits. Therefore, the obligation of Sparkasse KölnBonn to contribute [to the ...] will not endanger Sparkasse KölnBonn's long-term viability. Additionally, the Commission views positively the fact that the Bank's contributions can take place only once the State's capital has been remunerated in line with the recapitalisation terms.
- (80) The Commission notes that the Bank has already addressed and will further address the weaknesses of its corporate governance. The change in the shareholders structure and the qualifying majority voting introduced in the light of the merger of Stadtparkasse Köln with Sparkasse Bonn in 2005 ensures that the political interests of the owners do not overrule the economic interests of the Bank. Further, the changes in the structure and size of Sparkasse KölnBonn's bodies as well as in the decision-making process lead to improved accountability of the top management. Fewer divided responsibilities, as well as a higher proportion of personnel who are not politically driven and who are [external ...] experts in the Bank's bodies, will increase the transparency and efficiency of the decision-making process. Together with the change in the shareholder structure, those measures address the sources of Sparkasse KölnBonn's difficulties as they minimise the risk that Sparkasse KölnBonn will engage in politically-driven projects conflicting with the economic interests of the Bank. Further, the independence of the Bank's management seems to be sufficiently anchored in the existing law. The fact that Sparkasse KölnBonn provided evidence that since 2004 the Bank has not engaged in new politically-driven projects shows that the implemented measures are effective. Overall, the new corporate governance code is in line with what

<sup>(24)</sup> The balance sheet reduction of the divestments only reflects the book value of the entities.

<sup>(25)</sup> OJ C 72, 26.3.2009, p. 1.

was achieved in comparable cases<sup>(26)</sup>. Therefore, the implemented and committed changes of the corporate governance of Sparkasse KölnBonn can be considered adequate and sufficient to contribute to the restoration of the Bank's long-term viability.

- (81) The Commission considers that Sparkasse KölnBonn's restructuring plan meets the requirements set out in points 9 and 12-15 of the Restructuring Communication, namely that the restructuring plan should also demonstrate how the Bank will restore its long-term viability without State aid as soon as possible. In particular, the Bank should be able to generate an appropriate return on equity, while covering all the costs of its normal operations and complying with the relevant regulatory requirements.
- (82) First, Sparkasse KölnBonn has provided financial projections for the period 2008-2014, giving information on the revenues, costs, impairments, profits and capital position of the Bank. The Commission finds that the base case projections provided are based on reasonable underlying macroeconomic assumptions. The Bank expects to generate profits again in 2010 and continuously improve its yearly results over the whole restructuring period. Further, in 2014 ROE will reach a level of [9-10] %, which appears to be an adequate level of remuneration for a retail bank in normal market conditions. Furthermore, starting from 2013 Sparkasse KölnBonn will fully remunerate the aid measures. The Bank's capital ratios remain well above the minimum regulatory requirements with the Tier-1 ratio improving from 6,1 % in 2009 to [8-9] % in 2014.
- (83) Second, Sparkasse KölnBonn demonstrated that it is able to withstand a stress scenario. The assumptions of the stress scenario have been assessed as reasonable. As the stress scenario demonstrates that Sparkasse KölnBonn will exceed its regulatory capital requirements, the Bank can be regarded as meeting the requirements of paragraph 13 of the Restructuring Communication. Further, the sensitivity analysis shows that the Bank is capable of withstanding a significant change in interest rates in the future.
- (84) Finally, Sparkasse KölnBonn presented a partial early exit strategy. The partial repayment of the state capital should be possible without depleting the capital base of the institution, as Sparkasse KölnBonn's Tier-1 capital ratio is projected to reach [6-7] % in 2010 and will exceed this level afterwards in the base case scenario and also remain well above the regulatory minimum in a stress case scenario in the restructuring plan. The partial early exit does not involve additional aid either to Sparkasse KölnBonn or to other entities which are part of the transaction. First, due to the design of the purchase price to be paid for the first EUR 150 million tranche of the *Genussrechte*, which closely simulates the cash flow

Förderungsgesellschaft would receive had it kept the instrument, Förderungsgesellschaft would be left no better off. Second, the transaction takes place between two public entities. Further, as the instrument to be converted into Tier-1 capital already qualifies as aid and Sparkasse KölnBonn will pay the same remuneration to the Zweckverband after the conversion, the Commission does not see any additional aid involved in the conversion. Finally, the buy-back by Sparkasse KölnBonn of the second EUR 150 million tranche will also closely simulate the cash flow Förderungsgesellschaft would have received had it kept the instrument.

- (85) Consequently, the Commission considers that the restructuring plan submitted by Sparkasse KölnBonn fulfils the requirements of the Restructuring Communication with regard to the restoration of the long-term viability and thereby allays the doubts expressed in the opening Decision.

(ii) Own contribution/burden-sharing

- (86) As stated in the Restructuring Communication, banks and their stakeholders need to contribute to the restructuring as much as possible in order to ensure that aid is limited to the minimum necessary. This implies that banks use their own resources to finance the restructuring, for instance by selling assets, while the stakeholders should absorb the losses of the bank where possible. The measures committed to by Sparkasse KölnBonn ensure that own resources are used and that private investors holding hybrid capital of the Bank contribute to the restructuring.
- (87) The restructuring plan does not contain any elements that suggest that the aid exceeds the means required to cover those costs which are triggered by the restoration of viability. The aid received is required to ensure that Sparkasse KölnBonn will have reasonable capital buffers in the base case and will be able to comply with regulatory capital requirements in a stress scenario.
- (88) In respect of the contribution to restructuring costs through internal resources generated by Sparkasse KölnBonn, the Commission notes that the Bank is implementing cost-cutting measures. The cost-cutting measures will result in a reduction of annual costs by EUR [25-35] million by the end of the restructuring period, which represents about [5-8] % of the total costs in 2009.
- (89) Further, the divestments of profitable non-core subsidiaries will generate proceeds which can be used to finance the restructuring costs.
- (90) The Bank has no discretion to suspend or delay the payment of a coupon on the hybrid instruments if it generates a profit in a given year. However, the holders of hybrid instruments also bear to the extent possible the

<sup>(26)</sup> Commission Decision of 15 December 2009 in case C 17/09, *Restructuring of LBBW* (OJ L 188, 21.7.2010, p. 1).

losses incurred by Sparkasse KölnBonn, as both coupon payment and principal of the hybrid capital were suspended or participated in the absorption of Sparkasse KölnBonn's losses. Therefore, the Commission considers that the maximum possible burden-sharing from its private hybrid investors is ensured and therefore the requirements of the Restructuring Communication for the contribution to the restructuring costs by the private investors are met.

(91) Point 24 of the Restructuring Communication states that an adequate remuneration of the state capital is also a means of achieving burden-sharing. In this respect the Commission considers the level of remuneration set in the terms of recapitalisation measures is appropriate in association with the other burden-sharing measures described above. The projected profits will allow the Bank to remunerate the state capital and pay suspended coupons in line with the terms of the recapitalisation starting from 2011 for *Genussrechte* and from 2013 for silent participation, after the nominal capital of the instruments has been topped up. It should be noted that the interest on the *Genussrechte* held by the State is cumulative for [2-6] years and the capital depleted due to loss absorption is to be topped up in the case of both recapitalisation instruments. Therefore, according to the financial projections in the base case the unpaid interest on the *Genussrechte* and depleted principal of both instruments will subsequently be recovered by the State.

(92) In the light of the above, the Commission considers that the restructuring plan submitted by Germany provides for a sufficient own contribution to the restructuring and therefore allays the doubts expressed in the opening Decision.

(iii) Measures limiting the distortion of competition

(93) The Restructuring Communication requires that the restructuring plan proposes measures limiting distortions of competition and ensuring a competitive banking sector. Moreover, they should also address moral hazard issues and ensure that State aid is not used to fund anti-competitive behaviour.

(94) The package of measures sufficiently addresses the issue of moral hazard. Sparkasse KölnBonn is committed to implementing a comprehensive sale of profitable non-core businesses. These include the stake in [...], [...], RW Holding AG, S ProFinanz Versicherungsmakler GmbH, Schufa Holding AG and Neue Leben Pensionsverwaltung AG, which are significant [...] of Sparkasse KölnBonn.

(95) The German authorities have provided a detailed timeline for planned divestments and committed to the appointment of a monitoring trustee in order to ensure that the commitments will be carried out in a timely

manner. A divestiture trustee would be appointed for the divestments if the committed timeline is not met.

(96) The restructuring of the Bank includes a reduction of Sparkasse KölnBonn's presence in certain customer segments. Those measures will allow competitors to access parts of the Bank's large corporate and institutional clients. Since it affects mainly large entities, which generally have access to the capital markets, the Commission considers the risk of negative impact on the real economy of this measure to be negligible.

(97) Further, as a consequence of the implementation of the restructuring measures, Sparkasse KölnBonn will reduce its total assets by [15-20] % in terms of RWA ([15-20] % in terms of total assets) on a pro forma basis and by [10-15] % including future growth (5 % in terms of total assets). The reduction will be mainly driven by the withdrawal from the SAA and ABS investments, the cessation of proprietary trading ([6-8] % in RWA terms, [6-8] % in terms of total assets) and the reduction of large credit exposures and credit lines to institutional clients (RWA: [5-7] %, total assets: [5-7] %).

(98) In view of the amount of aid in the present case (3,3 % of RWA), these measures can be considered to be sufficient and proportionate in terms of the reduction of the Bank's size and scope of activities. Sparkasse KölnBonn is active only in the Cologne-Bonn region, where it has a significant ([18-23] % — [30-35] % depending on the product), but not dominant market position. Moreover, the Bank does not act as a price leader in its core business segments. For this reason, additional measures aiming at further reducing the Bank's market share in its core retail market do not appear to be appropriate in the case of Sparkasse KölnBonn. First, the Commission notes that the core activity was not the source of the Bank's difficulties. Further, Germany provided sufficient evidence showing that such measures would be difficult and disproportionately costly to implement, thereby negatively affecting the underlying earning ability of the Bank, and would constitute a threat to the long-term viability of Sparkasse KölnBonn. Furthermore such measures would adversely affect Sparkasse KölnBonn's core business segments, SMEs and private customers, which, however, were not the source of the Bank's difficulties. Finally, given the limited alternative sources of financing for those customer groups and Commission's case practice, which is aimed at maintaining lending to the real economy, the Commission finds that further constraints to Sparkasse KölnBonn's scope of activities would impact its core business and would therefore be harmful both to the Bank and to the markets it serves.

(99) The Commission also notes the behavioural commitments provided by Sparkasse KölnBonn and Germany. Those commitments include a price leadership ban and an advertisement ban on the state support, thus preventing Sparkasse KölnBonn from using the aid to fund anti-competitive market conduct. In line with

point 40 of the Restructuring Communication, the acquisition ban furthermore ensures that the State aid will not be used to take over competitors.

- (100) On the basis of the above, the Commission considers that the scale and nature of the measures proposed by Sparkasse KölnBonn are sufficient and adequate to address any distortions of competition. Therefore, the restructuring plan of Sparkasse KölnBonn fulfils the requirements of the Restructuring Communication in terms of viability, burden-sharing and measures to mitigate the distortion of competition and hence allays the doubts expressed in the opening Decision.

#### 8.2.3. Monitoring

- (101) Pursuant to section 5 of the Restructuring Communication, regular reports are required to allow the Commission to verify that the restructuring plan is being implemented properly. Germany will appoint a monitoring trustee who will provide semi-annual monitoring reports. The first report is due in February 2011. The Commission, therefore, finds that proper monitoring of the implementation of the restructuring plan is ensured.

#### Conclusion on the restructuring plan

- (102) The Commission finds that the restructuring plan set out in chapter 4 of this Decision is compatible with Article 107(3)(b) TFEU.

### 9. CONCLUSION

- (103) The Commission concludes that the restructuring measures are apt to enable Sparkasse KölnBonn to

restore its long-term viability, sufficient in respect to burden-sharing and appropriate and proportional to offset the market-distorting effects of the aid measures in question. It therefore considers that the submitted restructuring plan fulfils the criteria of the Restructuring Communication and the restructuring measures can therefore be considered compatible with the internal market pursuant to Article 107(3)(b) TFEU. The capital injection measures can therefore be approved in accordance with the restructuring plan,

HAS ADOPTED THIS DECISION:

#### Article 1

The restructuring aid provided to Sparkasse KölnBonn by its public shareholders constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

The aid is compatible with the internal market, subject to implementation of the restructuring plan and fulfilment of the commitments set out in Annexes I, II and III.

#### Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 September 2010.

For the Commission  
Joaquín ALMUNIA  
Vice-President

## ANNEX

European Commission — Financial Crisis Taskforce  
DG Competition  
Rue Joseph II/Jozef II-straat 70  
1000 Brussels  
Belgium

**Case C 32/09 — Sparkasse KölnBonn**

## COMMITMENTS TOWARDS THE EUROPEAN COMMISSION

Pursuant to Article 7(3) of Council Regulation (EC) No 659/99 <sup>(1)</sup>, as amended, Germany hereby provides the following commitments concerning Sparkasse KölnBonn in order to enable the European Commission ('the Commission') to find the recapitalisation of Sparkasse KölnBonn compatible with the internal market by decision under Article 107(3)(b) of the Treaty on the Functioning of the European Union.

The commitments are to take effect on the date of the decision's adoption.

This text is to be interpreted within the general framework of EU law and with reference to Regulation (EC) No 659/99, and also taking into consideration the Decision to which the commitments are attached.

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<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1.

## ANNEX I

**Section A — Commitments**

1. **Corporate governance:** The Federal Government and Sparkasse KölnBonn undertake that Sparkasse KölnBonn will make the following amendments to its corporate governance:
  - (a) The number of external members of the Supervisory Board is to be increased from the current two members to four as of 1 January 2011. The total number of Supervisory Board members is to be restricted to 18.
  - (b) The Supervisory Board of Sparkasse KölnBonn is to appoint only the following committees in future and to reduce their members to the number stipulated no later than on 1 January 2011.
    - Accounting committee (seven members)
    - Risk committee (six members)
    - Main committee (three members)
  - (c) The Strategy committee and the Investment committee are to be abolished no later than on 31 December 2010 and 31 December 2011 respectively.
  - (d) All members of the Supervisory Board are to possess the abilities stipulated in the first sentence of §36(3) of the German Banking Act.
  - (e) With effect from 1 January 2011 the Management Board of Sparkasse KölnBonn is to tighten the guidelines for investment decisions as follows: The Management Board will be able to take investment decisions only if there is unanimity and — in the case of investments over a nominal value of EUR [2-5] million — following a due diligence check involving an auditor, if necessary.
2. **Proprietary trading:** Sparkasse KölnBonn is to cease trading for its own account. This means that Sparkasse KölnBonn is only to carry out transactions that either
  - (a) are necessary to receive, transmit and carry out its clients' orders to buy and sell; or
  - (b) help the savings bank perform liquidity or risk management.

Under no circumstances is Sparkasse KölnBonn to create positions on its own account, unless they arise because Sparkasse KölnBonn, for example, does not carry out certain customer orders straight away. Positions of this kind and the liquidity/risk management positions are allowed only if they do not jeopardise the Bank's viability and/or liquidity. Sparkasse KölnBonn is therefore to limit the market risk of its trading portfolio to EUR [3-5] million (Value at Risk at a confidence level of 99 %).
3. **Lending to the economy:** Through its lending and investment activities, conducted under normal market conditions that meet supervisory and banking industry requirements, Sparkasse KölnBonn is to meet the borrowing needs of the business sector, particularly of SMEs.
4. **Reduction of large and cash credit exposures**

As part of its reorientation, Sparkasse KölnBonn is to gradually reduce its large credit exposures in the area of corporate banking in order to reduce the associated risks. The measures include, among other things, limiting the credit lines, requesting additional collateral or transferring risks to other credit institutions.

By the end of 2013 Sparkasse KölnBonn is to reduce its large credit exposures by EUR [900-1 100] million, of which EUR [400-550] million should already be achieved by the end of 2010. Cash credits granted to institutional clients, who are not connected to the Cologne-Bonn region, are to be reduced by EUR [800-900] million by the end of 2013.
5. **Price leadership ban:** Until 31 December 2014 Sparkasse KölnBonn is not, without the prior authorization of the Commission, to offer more favourable prices on the relevant markets for deposit-taking [...] and for long-term mortgage loans [...] than its best-priced competitor among the top 10 market players in terms of market share <sup>(1)</sup> in the relevant market.

<sup>(1)</sup> [...].



6. As soon as Sparkasse KölnBonn becomes aware that it is offering more favourable prices than its best-priced competitor, it will immediately adjust its prices accordingly.
7. **Dividend and coupon ban:** Germany undertakes, with regard to coupon payments and call options on capital instruments, that
- (a) Sparkasse KölnBonn or any other of its entities is not to use the capital or reserves of Sparkasse KölnBonn to pay any coupons on capital instruments, unless (a) there is a legal obligation to do so, or (b) where the payment of the relevant coupon will be covered by the current profits of Sparkasse KölnBonn. In the case of doubts as to the existence of a legal obligation or sufficient current profit for the purpose of this commitment, Sparkasse KölnBonn is to submit the proposed coupon payment to the Commission for approval;
- (b) No entity of Sparkasse KölnBonn is to exercise a call option in respect of these hybrid capital instruments if Sparkasse KölnBonn's total regulatory capital would be reduced as a result.
- During the implementation of the restructuring plan, until 31 December 2014 at the latest, Sparkasse KölnBonn is to pay coupon on and avoid loss absorption by the subordinated capital only if it is obliged to do so, and provided it does not require the release of reserves and of the special items pursuant to §340 f and g of the Commercial Code.
8. **Acquisition ban:** Upon the Decision coming into effect, Sparkasse KölnBonn is not to acquire more than 20 % of the shares in other financial institutions during a period of 3 years. Other participation transactions that are not related to Sparkasse KölnBonn's original customer business in its business model may still be carried out, provided they do not jeopardise the Sparkasse's viability and have been approved by the European Commission. In addition, Sparkasse KölnBonn is to refrain from acquiring participations that are not necessary for its core business, or that entail excessive risks.
9. **No reference to state support in advertising:** Sparkasse KölnBonn is not to use the European Commission's authorisation of the measures, which the European Commission has assessed as constituting State aid, or other competitive advantages resulting therefrom, for advertising purposes.

#### Section B — The business to be divested

10. Sparkasse KölnBonn is to sell the following participations (referred to together as the business to be divested), in so far as they have not already been sold, by no later than the dates indicated and at the best possible prices. This should enable the essential, valuable elements of the current business to be retained until they are put up for sale.

Participation	To be sold by no later than
Golfclub Gut Lärchenhof GmbH	Already sold in 2009
TA Triumph Adler AG	Already sold in 2009
RW Holding AG	Already sold in 2009
S ProFinanz Versicherungsmakler GmbH	Already sold in 2009
Schufa Holding AG	Already sold in 2009
Sparkassen Servicegesellschaft für Zahlungssysteme und elektronische Vertriebskanäle mbH & Co KG	Assets sold/Liquidation by the end of 2010
[...]	[...]
Campus Grundstückentwicklungs GmbH	Assets already sold/liquidation in 2011
[...]	[...]
[...]	[...]
[...]	[...]
neue leben Pensionsverwaltung AG	End of 2010
[...]	[...]
[...] <sup>(2)</sup>	[...]
[...] <sup>(3)</sup>	[...]

<sup>(2)</sup> [...].

<sup>(3)</sup> [...].

11. In order to avoid undue distortions of competition, Sparkasse KölnBonn undertakes to sell, or procure the sale of the above-mentioned businesses to be divested as going concerns under the terms of sale approved by the Commission in accordance with the procedure described in paragraph 26. Sparkasse KölnBonn undertakes to enter into a final, binding purchase agreement for the sale of the business to be divested within the first divestiture period <sup>(4)</sup>. If Sparkasse KölnBonn has not entered into such an agreement by the end of the first divestiture period,
- (a) the deadline will be extended by a further [...] if Sparkasse KölnBonn can prove that [...]. Sparkasse KölnBonn undertakes to enter into a final, binding purchase agreement [...] within the extended divestiture period for the sale of the business to be divested;
- (b) if Sparkasse KölnBonn has not entered into such an agreement by the end of the extended divestiture period, it is to grant the divestiture trustee an exclusive mandate to sell the business to be divested within the trustee divestiture period <sup>(5)</sup>. The procedure for the nomination of the divestiture trustee, and his duties are set out in Annex III.
12. The commitment to divest will be considered fulfilled if Sparkasse KölnBonn enters into a final, binding purchase agreement by the end of the period under paragraph 10 or of the extended period under paragraph 11 with a buyer that fulfils the conditions in paragraphs 25 and 26, and if the transfer of the business to be divested is effected no later than 6 months after the conclusion of the purchase agreement.
13. Sparkasse KölnBonn is to sell the following participations by no later than 31 March 2011 to the city of Cologne, a company connected with the city of Cologne or a third party:
- [...]
  - [...]
  - [...]
  - [...]
  - [...]
  - [...]
  - [...]
  - [...]
  - [...]
  - [...]
  - [...]
14. The individual transactions with the city of Cologne are to be carried out under normal market conditions. For this purpose, the current market value of the sales object at the time of transfer is to be determined by an independent expert. The monitoring trustee is to monitor the individual transactions.
- In the context of the transaction it is also permitted to transfer the assets and business activities of a company, instead of the company in question, if this serves the intended business purpose.
15. An auditing company is to verify the valuation of the assets and the contractually agreed general business data on behalf of the purchaser.
16. Before the transaction takes place, the monitoring trustee is to be informed of its details.
17. In order to maintain the structural effect of the commitments, Sparkasse KölnBonn may not, for a period of [...] after they become effective, acquire direct or indirect influence over the whole or part of the business to be divested, unless the Commission has previously found that the structure of the market has changed to such an extent that protecting the business to be divested from such influence is no longer necessary in order to render the restructuring measures compatible with the internal market.
18. In the future Sparkasse KölnBonn is to grant no more than [30-60] % of the financing to its subsidiaries that are to be divested. An exception is made for existing loans until the due date under the loan agreement.

<sup>(4)</sup> Period from the Decision's entry into force until the dates stated in paragraph 10.

<sup>(5)</sup> [...].

19. The profits from the sale of Sparkasse KölnBonn's participations are to be used entirely to fund the restructuring plan.

### Section C — Divestment-related commitments

#### *Preservation of the viability, marketability and competitiveness of the business to be divested*

20. From the date on which the commitments become effective until transfer, Sparkasse KölnBonn is to preserve, in accordance with good business practice, the economic viability, marketability and competitiveness of the business to be divested and is to minimise as far as possible any risk that may reduce its competitive potential. Sparkasse KölnBonn undertakes, in particular
- (a) not to carry out any activity that might have an adverse impact on the value, management or competitiveness of the business to be divested, or that might alter the nature and scope of its activity, its industrial or commercial strategy or its investment policy;
  - (b) to make available sufficient resources for the development of the business to be divested, on the basis of and by implementing the existing business plans;
  - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all key personnel to remain with the business to be divested.

#### *Hold-separate obligations of Sparkasse KölnBonn towards the business to be divested*

21. Sparkasse KölnBonn undertakes, from the date on which the commitments become effective until transfer, to keep the business to be divested separate from the businesses it is retaining and to ensure that the managers of the subsidiaries who are operating the business to be divested have no involvement in the management of any business retained and vice versa.
22. Until the transfer, Sparkasse KölnBonn is to assist the monitoring trustee in ensuring that the business to be divested is managed as a distinct and saleable entity.

#### *Non-solicitation clause*

23. Sparkasse KölnBonn undertakes, subject to the customary limitations, not to solicit the key personnel transferred with the business to be divested for a period of 12 months after closure, and will ensure that the affiliated undertakings do not solicit them either.

#### *Due diligence*

24. In order to enable potential purchasers to carry out a reasonable due diligence check of the business to be divested, Sparkasse KölnBonn undertakes, subject to the customary confidentiality assurances and depending on the stage of the divestiture process, to:
- (a) provide potential purchasers with sufficient information on the business to be divested;
  - (b) give potential purchasers sufficient information on and reasonable access to the personnel.

### Section D — The purchaser

25. In order to ensure the immediate restoration of effective competition,
- (a) the purchaser must be independent of and unconnected to Sparkasse KölnBonn. This does not apply, however, to the sale of [...], [...] and the participations listed in paragraph 13 to the responsible municipalities, their affiliated companies, and members of the Sparkassen financial group;
  - (b) the purchaser must have the financial resources, proven expertise and incentive to maintain and develop the business to be divested as a viable and active competitive force in competition with Sparkasse KölnBonn and other competitors;
  - (c) in the light of the information available to the Commission, the purchaser must not give rise to prima facie competition concerns, nor to a risk that the fulfilment of the commitments will be delayed, and can, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested.
26. As soon as Sparkasse KölnBonn reaches an agreement with a purchaser, it is to submit a fully documented and reasoned proposal, including a copy of the final agreement, to the Commission and the monitoring trustee. Sparkasse KölnBonn must be able to demonstrate to the Commission that the purchaser meets the relevant requirements and that the business to be divested is being sold in a manner consistent with the commitments. The Commission is to verify that the purchaser meets the relevant requirements and that the business to be divested is being sold in a manner consistent with the commitments.

**Section E — Other commitments**

27. **Early partial repayment and partial conversion of the certificates of participation:** The Federal Government and Sparkasse KölnBonn hereby commit to the following successive and integrated measures for improving Sparkasse KölnBonn's core capital ratio:
- (a) Zweckverband Sparkasse KölnBonn (Sparkasse KölnBonn special-purpose association) will purchase by 31 December 2011, to be effective as of 1 January 2011, a first tranche of EUR 150 million in certificates of participation of the Rheinische Sparkassen-Förderungsgesellschaft and convert them into an instrument recognised as regulatory core capital (tier 1 capital).
  - (b) By 31 December 2011 Sparkasse KölnBonn will repurchase a second tranche of EUR 150 million in certificates of participation of the Rheinische Sparkassen-Förderungsgesellschaft, provided that this is compatible with Sparkasse KölnBonn's risk-bearing capacity and has been approved by the Federal Financial Supervisory Agency.
28. Germany undertakes that the conditions of the partial conversion and partial repurchase of the certificates of participation will be formulated in such a way that further State aid is ruled out.
29. **Reduction of the total assets:**
- In addition to the measures already carried out to reduce the total assets, Sparkasse KölnBonn undertakes to reduce other assets (large-scale lending activities, short-term lending, investments) by EUR [2,5-4] billion by the end of 2014. On the other hand, however, Sparkasse KölnBonn is to develop its core business activities (in particular, regional retail and corporate lending) while ensuring that the net total assets do not exceed EUR [25-30] billion at the end of 2014. In line with this, the Sparkasse KölnBonn's risk weighted assets are not to exceed EUR [16-19] billion at the end of 2014.
30. The complete and correct implementation of all the conditions contained in this document is to be fully monitored on an ongoing basis and checked in detail by an adequately qualified and independent monitoring trustee. The appointment and duties of the monitoring trustee are laid down in Annex II.

.....  
Duly authorised for and on behalf of

[Indicate the name of the MS]

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## ANNEX II

**APPOINTMENT AND DUTIES OF THE MONITORING TRUSTEE****I. The Monitoring Trustee**

1. The Federal Republic of Germany shall appoint a Monitoring Trustee.
2. The Monitoring Trustee shall be one or several natural or legal person(s) independent of Sparkasse KölnBonn who will be approved by the Commission and appointed by the Federal Republic of Germany, and will have the duty to monitor whether Sparkasse KölnBonn complies with its obligations towards the Commission and implements the restructuring plan.
3. The Monitoring Trustee must be independent of Sparkasse KölnBonn and must possess the necessary qualifications to carry out its mandate, for example as an investment bank, consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Monitoring Trustee shall be remunerated by Sparkasse KölnBonn, which shall not impede the independent and effective fulfilment of its mandate.

**II. Appointment of the Monitoring Trustee***Proposal by the Federal Republic of Germany*

4. No later than 4 weeks after the date of delivery of the Decision, the Federal Republic of Germany shall submit for the Commission's approval the names of two or more persons as Monitoring Trustees and shall indicate which of those is its first choice. The proposal must contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 3 and shall include:
  - (a) the full terms of the proposed mandate together with all the provisions necessary to enable the Monitoring Trustee to carry out its duties in accordance with these commitments;
  - (b) the outline of a work plan describing how the Monitoring Trustee intends to carry out its assigned tasks.

*Approval or rejection by the Commission*

5. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustees and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. The Monitoring Trustee shall be appointed within 1 week of the Commission's approval, in accordance with the mandate approved by the Commission.

*New proposal by the Federal Republic of Germany*

6. If all the proposed Monitoring Trustees are rejected, the Federal Republic of Germany shall, within 1 week of being informed of the rejection, submit the names of at least two other persons or institutions, in accordance with the conditions and according to the procedure in paragraphs 1 and 5.

*Monitoring Trustee nominated by the Commission*

7. If all further proposed Monitoring Trustees are also rejected by the Commission, the Commission shall nominate a Monitoring Trustee(s), whom the Federal Republic of Germany shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

**III. The duties of the Monitoring Trustee**

8. It is to be the duty of the Monitoring Trustee to ensure compliance with the conditions and obligations attached to the Decision and guarantee implementation of the restructuring plan.

*Duties and obligations of the Monitoring Trustee*

9. The Monitoring Trustee shall
  - (i) propose to the Commission within 4 weeks of appointment a detailed work plan describing how it plans to monitor compliance with the commitments towards the Commission and implementation of the restructuring plan;
  - (ii) oversee the ongoing management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness;

- (iii) monitor compliance with all obligations towards the Commission and implementation of the restructuring plan;
  - (iv) propose measures, which the Monitoring Trustee considers necessary to ensure compliance by the Federal Republic of Germany with all commitments towards the Commission, in particular the preservation of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
  - (v) submit to the Commission, Sparkasse KölnBonn and the Federal Republic of Germany within 30 days after the end of each half year the draft of a written report in German or English. The report shall cover the Monitoring Trustee's fulfilment of its obligations under the Mandate, compliance with all conditions and obligations and the implementation of the restructuring plan. All recipients of the draft report shall be able to submit their observations within 5 working days. Within 5 working days of receipt of the comments, the Monitoring Trustee shall prepare a final report and submit it to the Commission, taking into account, if possible and at his sole discretion, the comments submitted. The Trustee will also send a copy of the final report to the Federal Republic of Germany and to Sparkasse KölnBonn. Should the draft report or the final report contain any information that must not be disclosed to Sparkasse KölnBonn or the Federal Republic of Germany, Sparkasse KölnBonn or the Federal Republic of Germany shall only be provided with a non-confidential version of the draft report or the final report. The Monitoring Trustee shall submit no version of the report to the Federal Republic of Germany and/or Sparkasse KölnBonn before submitting it to the Commission.
10. The Commission can give the Monitoring Trustee instructions or directions in order to ensure that the commitments towards the Commission are met and the restructuring plan implemented.
11. For the duration of the mandate, the cities of Cologne and Bonn and Sparkasse KölnBonn shall undertake to give instructions to the Monitoring Trustee only following the approval of the Commission.
12. The Federal Republic of Germany shall provide for all such cooperation, support and information which the Monitoring Trustee may reasonably require in order to perform its tasks. The Monitoring Trustee shall have unlimited access to the books, records, documents, managers and other staff members, to files, locations and technical information of Sparkasse KölnBonn or the Divestment Business, which are necessary in order to perform its tasks in accordance with the obligations.
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## ANNEX III

**APPOINTMENT AND DUTIES OF THE DIVESTITURE TRUSTEE  
THE DIVESTITURE TRUSTEE****I. The Divestiture Trustee**

1. The Federal Republic of Germany shall appoint a Divestiture Trustee.
2. The Divestiture Trustee shall be one or several natural or legal person(s) independent of Sparkasse KölnBonn who will be approved by the Commission and appointed by the Federal Republic of Germany, and will have the duty to divest the Divestment Business in accordance with the obligations towards the Commission.
3. The Divestiture Trustee must be independent of Sparkasse KölnBonn and must possess the necessary qualifications to carry out its mandate, for example as an investment bank, consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Monitoring Trustee shall receive normal market remuneration from Sparkasse KölnBonn that does not impede the independent and effective fulfilment of its mandate.

**II. Appointment of the Divestiture Trustee***Proposal by the Federal Republic of Germany*

4. If Sparkasse KölnBonn has not entered into a binding sale and purchase agreement 1 month before the end of the extended Divestiture Period, the Federal Republic of Germany will submit for the Commission's approval two or more persons as Divestiture Trustees and shall indicate which of those is its first choice. The proposal must contain sufficient information for the Commission to verify that the proposed Divestiture Trustee meets the conditions laid down under paragraph 3, and must in particular include:
  - (a) the full terms of the proposed mandate together with all the provisions necessary to enable the Divestiture Trustee to fulfil its duties in accordance with these commitments;
  - (b) the outline of a work plan describing how the Divestiture Trustee intends to carry out its assigned tasks.

*Approval or rejection by the Commission*

5. The Commission shall have the discretion to approve or reject the proposed Divestiture Trustees and to approve the proposed mandate subject to any modifications it deems necessary for the Divestiture Trustee to fulfil its obligations. The Divestiture Trustee shall be appointed within 1 week of the Commission's approval, in accordance with the mandate approved by the Commission.

*New proposal by the Federal Republic of Germany*

6. If all the proposed Divestiture Trustees are rejected, the Federal Republic of Germany shall, within 1 week of being informed of the rejection, submit the names of at least two other persons or institutions, in accordance with the conditions and according to the procedure in paragraphs 1 and 5.

*Divestiture Trustee nominated by the Commission*

7. If all further proposed Divestiture Trustees are also rejected by the Commission, the Commission shall nominate a Divestiture Trustee(s), whom the Federal Republic of Germany shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

**III. The duties of the Divestiture Trustee**

8. It shall be the duty of the Divestiture Trustee to fulfil the conditions and obligations laid down in the Decision regarding the business to be divested. The Divestiture Trustee shall prepare and carry out the purchase so that a sale and purchase agreement is signed [...]. The Divestiture Trustee shall be authorised to carry out the sale of the Divestment Business on behalf of Sparkasse KölnBonn, without being subject to instructions, [...].
9. The Divestiture Trustee shall
  - (i) propose to the Commission within 4 weeks of appointment a detailed plan of work describing how it plans to fulfil the conditions and obligations in the Decision regarding the business to be divested; it shall in particular present a concept for the divestiture and an assessment as to which divestiture strategy is the most promising;

- (ii) shall sell the divestment business to a buyer [...], in so far as the Commission has not raised any objections regarding the buyer or the final binding sale and purchase agreement within 4 weeks of these being made known. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale. The Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale;
  - (iii) take on the other duties which are conferred on the Divestiture Trustee in the Decision;
  - (iv) propose such measures as it considers necessary to ensure compliance by the Federal Republic of Germany with all commitments towards the Commission, in particular the preservation of the full economic viability, market-ability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
  - (v) submit to the Commission comprehensive monthly reports in English or in German on the development of the divestment procedure. These reports shall be submitted no later than 15 days after the end of each month. At the same time Sparkasse KölnBonn or the Federal Republic of Germany shall receive non-confidential versions of the report.
10. To prepare and carry out the divestiture, the Divestiture Trustee shall in particular provide the following services:
- (i) examining different options for the divestiture; a detailed proposal taking account of the framework conditions for the structuring and concluding of the sale procedure;
  - (ii) compiling the necessary marketing documents on the participation of Sparkasse KölnBonn concerned (in particular the sales memorandum, teasers, and other presentations which are necessary or beneficial for a sale process). These are to be given to interested parties by way of initial information on the pending sale;
  - (iii) in close agreement with the Sparkasse: preparing the content and logistical coordination of the due diligence process;
  - (iv) identifying potential purchasers and contacting the decision-making bodies of these interested parties. For legally binding reasons with regard to the interests of secrecy and in line with the requirement for a non-discriminatory sale, a potential purchaser will, at the request of the Sparkasse, be denied access to the due diligence information (the burden of proof lying with the Sparkasse), whereby this right must be exercised within 3 working days following receipt of the list of potential purchasers;
  - (v) collecting and examining sales offers made by interested parties; support with the evaluation of these offers;
  - (vi) conducting sales negotiations with selected interested parties and preparing the conclusion of the contract.
11. The Divestiture Trustee will be given all the necessary powers of attorney with which the Sparkasse or the subsidiaries it controls will authorise the Divestiture Trustee to complete and carry out the divestiture. The powers of attorney include the power to issue sub-delegated powers in order to carry out and complete the divestiture correctly.
12. The powers of attorney in question shall be maintained until the divestiture is fully completed. The powers of attorney and all sub-delegated powers shall come to an end at the end of the Divestiture Trustee's mandate.
13. The Divestiture Trustee is authorised to commission further advisers to support it in the sale process. As soon as consultancy costs exceed the overall sum of EUR [...], the agreement of Sparkasse KölnBonn is required. If Sparkasse KölnBonn refuses to give its agreement, the Commission instead may, after consulting Sparkasse KölnBonn, approve the commissioning of advisers. Only the Divestiture Trustee can give the advisers instructions or directions.
14. The Divestiture Trustee has to involve the European Commission in each exchange with the Sparkasse, the Träger (responsible public institution) or Germany or to inform these immediately about the exchange.
15. The Träger and Sparkasse KölnBonn shall undertake to support the Divestiture Trustee, to cooperate with it and to provide it with all the information it requires or requests in order to carry out and duly fulfil this mandate. To this end, the Divestiture Trustee shall have access, within legally permissible limits and during normal working hours, to all documents, books and the management or other staff of Sparkasse KölnBonn.
16. Where considered necessary by the Sparkasse and the Träger for the proper execution of the divestiture, they shall allow the Divestiture Trustee access on request to any information or documents available only to them. This applies in particular to each version of the restructuring plan agreed with the European Commission.
17. The Sparkasse shall undertake to exempt the Divestiture Trustee from all claims for damages from third parties, which arise during or in connection with the execution of the mandate. This shall exclude damages based on a breach of obligation on the part of the Divestiture Trustee. Should the Divestiture Trustee be informed of claims which might lead to payment obligations on the part of the Träger or Sparkasse KölnBonn, the Divestiture Trustee shall immediately notify this.



18. The Divestiture Trustee shall be obliged to provide services always with the due care of a prudent businessman. Should there nevertheless be a breach of duty, the Divestiture Trustee shall only be liable towards the Sparkasse, the Träger or Germany to provide compensation for damages if the Divestiture Trustee or its bodies, employees or assistants have intentionally or through gross negligence brought about the reason for the liability in so far as the key contractual obligations are not affected. The Divestiture Trustee shall also be liable for breaching such obligations through simple negligence but only in the amount of typical and foreseeable damages. Liability for loss of anticipated profits shall be excluded.
  19. The Commission may give the Divestiture Trustee instructions or directions in order to guarantee that the conditions and obligations in relation to the Divestment Business are fulfilled.
  20. The cities of Cologne and Bonn and Sparkasse KölnBonn shall undertake not to give the Divestiture Trustee instructions for the duration of the mandate.
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