

COMMISSION DECISION

of 21 March 2012

on State aid SA.29864 (C 6/10) (ex NN 1/10) implemented by the Czech Republic for České aerolinie, a. s. (ČSA — Czech Airlines a.s. — possible State aid implications of a loan provided by Osinek a.s.)

(notified under document C(2012) 1664)

(Only the Czech version is authentic)

(Text with EEA relevance)

(2012/637/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 regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ⁽¹⁾, in respect of the aid SA.29864 (C 6/10, ex NN 1/10, CP 371/2009) ⁽²⁾,

Having called on interested parties to submit their comments pursuant to the provisions cited above and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) In May 2009, on the basis of publicly available information, the Commission learned that a state-owned company in liquidation called Osinek a.s. ('Osinek') had agreed to grant a loan of CZK 2,5 billion (approximately EUR 100 million) to ČSA — Czech airlines, a. s. ('ČSA'). The Commission requested information from the Czech Republic by letters dated 14 May 2009 and 24 September 2009. The Czech Republic provided the Commission with further information by letters dated 10 September 2009 and 25 November 2009.
- (2) By letter dated 24 February 2010 the Commission informed the Czech Republic of its decision to initiate the procedure laid down in Article 108(2) TFEU in respect of the measure ('the opening decision'). The Czech Republic provided comments on that decision by letter dated 26 April 2010. The Commission asked

further questions by letter dated 6 July 2010, to which the Czech Republic replied on 15 September 2010.

- (3) The opening decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the measure.
- (4) The Commission received comments from four interested parties: Travel Service and Icelandair Group on 10 March 2011, Czech Connect Airlines a.s. on 11 March 2011, JOB AIR Technic a.s. on 10 March 2011, and ČSA on 14 March 2011. The Commission forwarded these comments to the Czech Republic, which was given the opportunity to reply; the Commission received the reply by letter dated 12 May 2011.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The Osinek loan

- (5) The measure under investigation is a loan granted on 30 April 2009 by Osinek to the Czech national flag carrier, ČSA. The loan was disbursed in three tranches as follows:
 - (a) the first tranche, for CZK 800 million, was drawn on 11 May 2009;
 - (b) the second tranche, for CZK 900 million, was drawn on 30 July 2009; and
 - (c) the third tranche, for CZK 800 million, was drawn on 24 September 2009.
- (6) The expected date of repayment was 30 November 2010, with the possibility of prolongation. The interest rate on the loan was the three-month Prague Inter Bank Offered Rate ('PRIBOR') plus 300 basis points as a risk premium, i.e. 5,51 % at the date on which the loan agreement was signed. Interest was due on a quarterly basis on the last business day of a calendar quarter (interest period). Interest was calculated daily from the day preceding the repayment of the Osinek loan.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108 respectively of the Treaty on the Functioning of the European Union ('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 Article 87 and 88, respectively, of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

⁽²⁾ Commission Decision C(2010) 987 final of 24 February 2010 (OJ C 43, 11.2.2011, p. 6).

- (7) According to the Czech authorities, the risk margin of 300 basis points correctly reflects an appropriate risk margin for the financial situation of the company, which had a Standard & Poor's B rating (vulnerable financial situation), and the level of collateralisation of the loan, which amounted to 110 % of the loan amount.
- (8) The collateral used to secure the loan-comprised buildings located at Prague Ruzyně airport, land, inventories and spare parts. The market value of most of the collateral was established by an independent expert. Four addendums to the Osinek loan agreement were concluded, extending and modifying the collateral assets⁽¹⁾. The Czech authorities claim that all these changes respected the condition stipulated in the Osinek loan agreement that the actual loan amount must not exceed 90 % of the value of the collateral at any point in time or the agreed maximum loan amount.
- (9) The Osinek loan was not repaid as initially envisaged, but was instead decollateralised and the debt capitalised on 30 June 2010 (debt-for-equity swap).

Table 1

Overview of the assets securing the Osinek loan

Collateral	Value in CZK (million)	Value determined by	Period of use
Operational building — Hangar F (including land under the building)	[925 - 990] (*)	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 1 June 2009	from 11 May 2009 (1st tranche)
Administrative building 'APC' (including land under the building)	[735 - 770]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 5 July 2009	from 30 July 2009 (2nd tranche) until 9 December 2009 (cancelled by 3rd Addendum)
Spare parts (rotating spare parts and/or replacement engines)	[150 - 165]	Valuation based on net book value at 30 September 2009	from 24 September 2009 (3rd tranche)
Spare parts (rotating, type A310 (all) and Boeing)	[520 - 575]	Valuation based on net book value at 30 September 2009	from 24 September 2009 (3rd tranche) until 25 January 2010 (4th Addendum)
Land around the 'APC' administrative building	[60 - 65]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 5 July 2009	from 23 July 2009 (1st Addendum) until 25 January 2010
Land around and adjacent to Hangar F	[105 - 115]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 5 July 2009	from 23 July 2009 (1st Addendum)
Spare parts, type: A319/320	[265 - 290]	Based on net book value	from 23 July 2009 (1st Addendum)
Spare parts, type: A310, ATR and Boeing	[440 - 485]	Based on net book value	from 22 September 2009 (2nd Addendum)
Flight simulator	[155 - 170]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 10 September 2009	from 22 September 2009 (2nd Addendum)
1 Boeing 737-55s, registration mark: OK CGK	[140 - 155]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 7 December 2009	from 9 December 2009 (3rd Addendum)
2 Boeing 737-55s, registration marks: OK CGH, OK CGJ	[300 - 330]	YBN Consult — Znalecký ústav s.r.o., Expert opinion of 7 December 2010	from 9 December 2009 (3rd Addendum) until 25 January 2010 (4th Addendum)
IT	[80 - 85]	PROSCON — s.r.o., Expert opinion of 30 November 2009	from 9 December 2009 (3rd Addendum)
'ČSA CZECH AIRLINES' trademark	[140 - 155]	Vladimir Cmejla, Expert opinion of 30 November 2009	from 9 December 2009 (3rd Addendum)
ČSA's share in ČSA Support, s.r.o.	[790 - 865]	PROSCON — s.r.o., Expert opinion of 20 January 2010	from 25 January 2010 (4th Addendum)

(*) Business secret.

⁽¹⁾ The first addendum was concluded on 23 July 2009, the second on 22 September 2009, the third on 9 December 2009 and the fourth on 25 January 2010.

2.2. Scope of this Decision

- (10) The opening decision dated 24 February 2010 refers to the Osinek loan of CZK 2,5 billion on the basis of the loan agreement concluded on 30 April 2009 and assumes that the decollateralisation of the loan on the basis of Czech Government Resolution No 1343 of 26 October 2009 had already been carried out. However, the decollateralisation of the loan and its capitalisation (the debt-for-equity swap) was notified to the Commission on 12 May 2010 (SA.30908 ČSA — Czech Airlines — Restructuring plan) and implemented in June 2010. Therefore, this decision deals only with the Osinek loan of CZK 2,5 billion itself on the basis of the loan agreement concluded on 30 April 2009. The assessment of the decollateralisation and subsequent debt-for-equity swap of the Osinek loan will be the subject of the final decision in Case SA.30908.

2.3. Osinek

- (11) Osinek was a financial vehicle corporation founded in order to supervise the closure of coal mines in the Czech Republic and their revitalisation. At the time when the loan was granted, it was 100 %-owned by the Czech authorities under the supervision of the Ministry of Finance. On 5 November 2008 Osinek went into liquidation. Before its liquidation, Osinek still had funds at its disposal, and was reportedly looking for different investment possibilities. The Osinek loan agreement was concluded and signed on 30 April 2009 on behalf of Osinek by its liquidator. In order to identify potential risks associated with the loan, Osinek commissioned an economic analysis of ČSA from an independent expert, European Business Consulting spol. s.r.o. ('EBC'), as well as a legal analysis from the law firm, JUDr. Jiří Rybář & JUDr. Pavel Štrbík.
- (12) On 29 September 2009 Osinek and the Ministry of Industry and Trade of the Czech Republic signed an agreement under which Osinek's accounts receivable from ČSA arising from the Osinek loan agreement were assigned to the Ministry as a result of the Osinek liquidation procedure. ČSA received notice of this assignment on the same day. On 8 March 2010 the Osinek liquidation procedure was completed.
- (13) On 3 May 2010 the Czech Government adopted Resolution No 333 on a restructuring plan for ČSA under which the Czech Government instructed the Ministry of Industry and Trade to implement the release of pledges over some of the collateral before

the increase of ČSA's registered capital. The loan capitalisation (debt-for-equity swap) was legally based on that Resolution and implemented on 30 June 2010.

2.4. The beneficiary, ČSA

- (14) ČSA has been the national air carrier of the Czech Republic since 1923. It is headquartered in Prague and operates from Prague Ruzyně airport. ČSA is the largest airline based at Prague Ruzyně airport, accounting for 37 % of the passengers whose trip originates or finishes in Prague. ČSA is a member of the Sky Team alliance. Before restructuring, the fleet of ČSA comprised 51 aircraft. ČSA offers scheduled air transport services (to 104 destinations in 44 countries). ČSA also provides charter flights, cargo services, ground handling services (it handles approximately 60 % of all passengers at Prague Ruzyně airport), aircraft maintenance services, crew training services, catering services, and it operates duty-free shops at Prague Ruzyně airport and duty-free sales on board.

2.4.1. Ownership structure

- (15) ČSA is a state-owned company with 95,69 % of its shares owned by the Czech Republic through the Ministry of Finance. The minority shareholders are Česká pojišťovna, a.s. (2,26 %), the City of Prague (1,53 %) and the City of Bratislava (0,51 %).
- (16) Upon completion of the restructuring process, the State aims to find a strategic partner for ČSA. As preparation for the planned privatization, the Czech Government decided to create a new corporate structure under the umbrella of Český Aeroholding, a.s. ('ČAH').
- (17) On 25 October 2011, the Czech competition authority approved the creation of ČAH that will include ČSA, Prague Ruzyně airport and ČSA's current subsidiaries, i.e. Czech Airlines Handling, Holidays Czech Airlines, Technics and ČSA Services s.r.o. ČAH's management and structure would comprise elements of a financial holding structure, its purpose being to restructure the companies grouped within the holding to facilitate their access to commercial financing and to prepare them for the upcoming privatisation.

2.4.2. Financial situation of the company

- (18) ČSA has experienced difficulties which worsened significantly in 2009 at the peak of the current economic crisis. Although the company did not qualify at any point in time for insolvency proceedings under Czech national law, it experienced a clearly negative trend in the development of its key financial indicators.

Table 2

ČSA's equity and registered capital, 2006-2008 (CZK thousand)

	2006	2007	2008	2009
Equity	938 646	1 238 093	101 686	- 2 352 045
Registered capital	2 735 510	2 735 510	2 735 510	2 735 510

Source: Annual Reports of ČSA

Table 3

Changes in ČSA's finances (CZK thousand)

(thousands) CZK	31.12.2006	31.12.2007	31.3.2008	30.6.2008	31.12.2008	31.3.2009	30.6.2009	30.9.2009	31.12.2009
Profit/Loss	- 396 951	206 600	[- 880 000 - - 800 000]	[- 180 000 - - 165 000]	470 057	[- 1 320 000 - - 1 190 000]	[- 1 840 000 - - 1 660 000]	[- 2 625 000 - - 2 365 000]	- 3 756 125
Turn- over ⁽¹⁾	23 375 950	23 399 853	[4 625 000 - 5 080 000]	[10 175 000 - 11 250 000]	22 581 692	[4 385 000 - 4 820 000]	[9 265 000 - 10 235 000]	[14 300 000 - 15 830 000]	19 789 620
Net cash flow from operations	- 533 192	- 275 234	[- 1 110 000 - - 1 000 000]	[- 640 000 - - 580 000]	- 1 762 376	[- 1 230 000 - - 1 115 000]	[- 1 320 000 - - 1 195 000]	—	- 3 066 694
Debt	6 476 911	4 391 070	[4 410 000 - 4 890 000]	[3 665 000 - 4 065 000]	6 494 752	[5 685 000 - 6 285 000]	[5 550 000 - 6 065 000]	[6 290 000 - 6 960 000]	6 581 325
Net asset value	11 679 439	10 161 647	[8 945 000 - 9 855 000]	[9 535 000 - 10 065 000]	10 418 871	[8 340 000 - 9 255 000]	[8 990 000 - 9 920 000]	[8 470 000 - 9 390 000]	7 948 571

Source: Financial statements provided by ČSA

⁽¹⁾ The turnover data within a financial year are cumulative.

(19) The company made profits in 2007 and 2008. However, its business result deteriorated significantly in 2009. Its turnover had diminished slightly over the previous four years, but cash flow was declining considerably. The level of debt was more or less stable. The company was offsetting its losses by the sale of assets, especially in the 2009 financial year.

(20) The situation of the company worsened in the course of 2009, in particular after the summer, which is traditionally a profitable period for ČSA.

2.5. The opening decision

(21) On 24 February 2010 the Commission opened the formal investigation procedure. In its decision the

Commission expressed doubts as to whether ČSA was already in difficulty within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty ('the R&R Guidelines')⁽¹⁾ at the time of receiving the loan.

(22) In addition, the Commission expressed doubts as to whether the conditions of the loan provided by Osinek to ČSA, taking into account its financial situation, conferred an economic advantage upon it which the recipient undertaking would not have obtained under normal market conditions. Furthermore, the Commission questioned whether, if the loan did involve state aid, this aid could be found compatible under the applicable state aid rules, especially the Commission communication *Temporary Community Framework for state aid measures to support access to finance in the current financial and economic*

⁽¹⁾ OJ C 244, 1.10.2004, p. 2.

crisis ('the Temporary Framework')⁽¹⁾. If the Osinek loan was found to involve state aid, the measure would have detrimental effects on competition, i.e. to companies operating routes from Prague Ruzyně airport or competing with ČSA and its subsidiaries in other markets.

3. COMMENTS FROM THE CZECH REPUBLIC

- (23) In reply to the opening decision, the Czech Republic submitted comments in which it argued that the Osinek loan met the 'market economy investor principle' test because it did not provide ČSA with undue economic benefits.
- (24) In particular, the Czech Republic is of the opinion that on the date of signing the Osinek loan agreement, ČSA was not a firm in difficulty and only became a firm in difficulty as late as August 2009. The Czech Republic argues that despite its growing problems ČSA has always been able to secure its viability. However, the situation changed in late 2008 and early 2009 and continued to deteriorate throughout the year due to the global economic recession, which had a severe impact on the world transport markets⁽²⁾. This, combined with destabilised oil markets and currency fluctuations, contributed to the deterioration of ČSA's financial condition.
- (25) In the course of 2009 ČSA relied on forecasts based on previous years' results and expected significantly better results in the summer season. None the less, the first half of 2009 results reported to management in mid-August showed a substantial decline in ČSA's average revenue for June. In August 2009 it became clear to management that the company was no longer able to operate without immediate cost-cutting measures and financial assistance from external sources.
- (26) In relation to the possible state aid element in the Osinek loan, the Czech Republic maintains that the interest rate meets the requirements of the communication from the Commission on the revision of the method for setting the reference and discount rates ('the Reference Rate Communication')⁽³⁾. In particular, the Czech Republic submits that it was appropriate to use the three-month PRIBOR rate as the base rate to determine the interest of the loan in question given the volatility of the financial markets at the time of signing the Osinek loan agreement.
- (27) ČSA is not assessed according to rating systems, so the Czech Republic is unable to provide evidence for its assumption that ČSA qualified for a B rating at the

time when the Osinek loan agreement was signed. However, the Czech Republic refers to a report of 27 April 2009 written by EBC according to which ČSA was solvent and creditworthy.

- (28) The Czech Republic reiterates that for the purposes of securing the loan ČSA was required to provide collateral amounting to at least 110 % of the loan for its entire duration. Thus, the amount of the loan actually granted to ČSA was not at any time to exceed 90 % of the value of all the collateral. The Czech Republic confirmed that this requirement was met in all cases and submitted appraisal reports of assets that were used as collateral for the loan.
- (29) In addition, the Czech Republic argues that the liquidator of Osinek, in view of the fact that Osinek had a considerable amount of available financial resources, sought investment opportunities to generate a return. Before entering into the Osinek loan agreement, the liquidator commissioned the independent consulting company, EBC and the law firm JUDr. Jiří Rybář & JUDr. Pavel Štrbík to draw up an economic and legal analysis of the loan offer. The analysis by EBC confirmed that ČSA could be considered solvent and that the risk that lending to ČSA might cause loss or harm to Osinek was minimal. Based on this analysis, the liquidator decided that lending to ČSA would be an advantageous means of depositing Osinek's available financial resources.
- (30) Additionally, the Czech Republic argues that, even if the Commission found that the terms of the Osinek loan were more favourable than those offered in the market, then the loan would be compatible with the conditions laid down in the Temporary Framework.

4. COMMENTS FROM INTERESTED PARTIES

- (31) During the formal investigation procedure the Commission received comments from three interested third parties and from the beneficiary of the measure under investigation, ČSA (paragraph 4).
- (32) ČSA's comments reflect in essence the Czech Republic's comments on the opening decision set out above. ČSA reiterates that the Osinek loan was granted on market terms, since Osinek acted as a rational operator in a market economy motivated by commercial rather than economic or social policy objectives. Moreover, ČSA comments on the quantification of the possible aid element, should the Commission conclude that the Osinek loan was granted at an advantageous interest rate, i.e., assuming that ČSA's rating were worse than 'B' and/or the collateral were not be classified as 'high'.

⁽¹⁾ OJ C 83, 7.4.2009, p. 1.

⁽²⁾ In 2009 the Czech market experienced a 6 % drop in passenger traffic at Prague Ruzyně airport.

⁽³⁾ OJ C 14, 19.1.2008, p. 6.

(33) All of the interested third parties are competitors of ČSA and are represented by the same law firm; therefore, their reasoning is identical to some extent. The interested third parties argue that the Osinek loan provided ČSA with state aid which enabled the company to compete unfairly by charging prices which the other competitors who have not received any state subsidies cannot offer without losing the capacity to cover their costs and generate a reasonable profit ⁽¹⁾.

(34) The interested third parties argue that ČSA was in severe difficulties already before 1 July 2008. Furthermore, they argue that the Osinek loan was provided at a substantially lower interest rate than what a bank would require under similar circumstances, considering the financial situation of ČSA, the length of repayment, the quality of the collateral and the low probability of actual repayment. In such circumstances, the Osinek loan would constitute illegal state aid incompatible with EU rules. One competitor who provided comments claims that ČSA fulfilled the condition that more than half of its registered capital had disappeared in 2007, 2008 and 2009. Moreover, in the years 2008 and 2009, more than one quarter of the registered capital of ČSA had disappeared over the preceding 12 months. The same competitor explains that it may be assumed from the decrease of registered capital of ČSA in 2008 that already on 1 July 2008 the company met both conditions for a firm in difficulty within the meaning of point 10(a) of the R&R Guidelines.

(35) The interested third parties further claim that due to the negative operating cash flow, the plurality of creditors and the existence of financial obligations due and payable within 30 days, it may be assumed that the company suffered from impending insolvency from the end of the year 2007 and should, therefore, qualify as a firm in difficulty since 2007 (pursuant to point 10(c) of the R&R Guidelines).

5. COMMENTS FROM THE CZECH REPUBLIC ON THE OBSERVATIONS OF INTERESTED PARTIES

(36) The Czech Republic disagreed with the comments of the interested third parties and agreed with the comments of ČSA. The Czech Republic maintained its argument that

⁽¹⁾ Additional comments made by the interested third parties concerning: (i) the capitalisation of the Osinek loan via the debt-for-equity swap; (ii) the alleged payment of remuneration of the Chairman of the Board of Directors and of the President of ČSA by the state-owned Prague Ruzyně airport, and (iii) transfers of property of ČSA to the state-owned Prague Ruzyně airport with the subsequent lease-back to ČSA, do not relate to this case and will be analysed in the final decision in Case SA.30908 ČSA — Czech Airlines — Restructuring plan.

the Osinek loan was granted on market terms and in accordance with the Reference Rate Communication. Furthermore, the Czech authorities argue that ČSA was able to operate without state aid until the second half of 2009. The condition of ČSA's assets was not seriously impaired even in the first half of 2009, and its value actually increased from CZK [8 340-9 255] million in the first quarter of 2009 to CZK [8 990-9 920] million in the second quarter of 2009.

(37) The Czech Republic notes that, although ČSA publishes the results of its operations compiled in accordance with both Czech Accounting Standards ('CAS') and International Financial Reporting Standards ('IFRS'), the interested third parties based their comments solely on results compiled in accordance with CAS, the methodology of which does not provide a true picture of the company's operations. Accounts compiled in accordance with IFRS provide better information about the company's financial condition and are therefore more appropriate. ČSA is using CAS because of its obligation under Czech tax laws. However, ČSA's activities are not limited to the Czech Republic but are global, which is why ČSA has been using IFRS as well. The Czech Republic points out that IFRS are applied by banks in their lending decisions because they are considered to be more precise than CAS.

(38) Finally, the Czech Republic provided evidence showing that at the time when the Osinek loan was granted ČSA did not fulfil the conditions for insolvency under the Czech Insolvency Act ⁽²⁾.

6. PRESENCE OF STATE AID

(39) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through state resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(40) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the notified measures constitute state aid within the meaning of Article 107(1) TFEU all of the following conditions must be fulfilled. The financial support would have to:

— be granted by the State or through state resources;

— confer an economic advantage on the recipient;

— favour certain undertakings or the production of certain goods;

⁽²⁾ Act No 182/2006

- distort or threaten to distort competition; and
- affect trade between Member States.

6.1. State resources and imputability

- (41) The concept of state aid applies to any advantage granted directly or indirectly, financed out of state resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.
- (42) Therefore, it has to be established, first, whether the Osinek loan must be regarded as state resources. As mentioned above, Osinek was, at the time when the loan was granted, 100 %-owned by the Ministry of Finance of the Czech Republic and, for this reason, irrespective of its corporate or any other legal status, it is a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings⁽¹⁾. Thus, the Commission considers that the Osinek loan is financed from state resources.
- (43) However, the Court of Justice has also ruled that, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under state control is not sufficient for measures taken by that undertaking, such as the loan agreement in question, to be considered imputable to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in some way or other, in the adoption of this measure. On that point, the Court indicated that the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken⁽²⁾.
- (44) Such indicators can be the integration of the undertaking into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the scope of the measure, its content or the conditions which it contains.

- (45) The Commission notes that the majority of Osinek Supervisory Board members are representatives of public authorities (such as the Ministry of Finance).
- (46) Osinek went into liquidation on 5 November 2008 by virtue of the decision of its sole shareholder of the same date. Although, under Czech law, the liquidator has to act on his/her own and without instructions from the company's bodies during the liquidation process, the Commission further notes that the liquidator was appointed by the Ministry of Finance of the Czech Republic acting as the sole shareholder of Osinek.
- (47) In addition, the Czech authorities have provided the Commission with expert opinions from JUDr. Jiří Rybář and JUDr. Pavel Štrbík which recommended that before taking the decision to grant a loan to ČSA the liquidator of Osinek should consult Osinek's shareholder, i.e. the Czech Republic.
- (48) As regards the supervision of the activities of Osinek by the State, the Commission further observes that the Czech Government subsequently also took the decision to decollateralise the Osinek loan and swap the debt for ČSA's equity by Resolution No 333.
- (49) Therefore, the Commission concludes that the decision to grant the Osinek loan is imputable to the Czech State. The Osinek loan must, therefore, be regarded as being financed from state resources.

6.2. Economic advantage

- (50) The Commission notes that, according to well-established principles of EU law, if additional capital is made available by the State to an undertaking on conditions better than normal market conditions, this could fall within the scope of Article 107(1) TFEU, as it would result in favouring the particular undertaking within the meaning of that Article. In order to determine whether an undertaking has been granted an economic advantage by the State which it would not have obtained under normal market conditions, the Commission applies the 'market economy investor principle' ('the MEIP')⁽³⁾.
- (51) According to that principle, no state aid would be involved where, in similar circumstances, a private investor of a comparable size to that of the bodies operating in the public sector could, while operating in normal market conditions of a market economy, have been prompted to make the capital contribution in question. The Commission must therefore assess whether a private investor would have entered into the transaction in question on the same terms. The projected behaviour of the hypothetical private investor is that of a prudent investor whose goal of profit maximisation is tempered by caution about the level of risk acceptable for a given rate of return. According to this principle,

⁽¹⁾ OJ L 318, 17.11.2006, p. 17.

⁽²⁾ Case C-482/99 *France v Commission* ('Stardust Marine') [2002] ECR I-4397, paragraphs 52 and 57.

⁽³⁾ Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank GZ v Commission* [2003] ECR II-435, paragraph 251.

capital put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be regarded as state aid ⁽¹⁾.

(52) According to established case law, the MEIP is applicable to loans. When applied to the grant of a loan, this principle raises the question of whether a private investor would have granted the loan to the beneficiary on the terms on which it was actually granted ⁽²⁾. In this respect, the Commission assesses whether the loan is made on normal commercial terms and whether such loans would have been available from a commercial bank. With regard to the terms of such loans, the Commission takes into account in particular both the interest rate charged and the security sought to cover the loan. The Commission assesses whether the security given is sufficient to repay the loan in full in the event of default and the financial position of the company at the time when the loan is made ⁽³⁾.

(53) The Commission notes that ČSA is a legal person engaged in economic activities and is therefore regarded as an undertaking within the meaning of Article 107 TFEU. In order to determine whether the Osinek loan was granted on favourable conditions or on market conditions, the Commission verified the compliance of the interest rate for the loan in question with the Commission reference rate as laid down in the Reference Rate Communication, which is applied as a proxy for the market rate.

(54) As regards the relevant date to be taken into account when comparing the interest rate of the loan in question with the reference rate, the Commission already expressed its opinion in the opening decision that this should be the date of the legally binding act according to which the loan was granted, i.e. 30 April 2009 (date of conclusion of the loan agreement between Osinek and ČSA).

(55) The Czech Republic claims that, at that time, ČSA still had access to external financing by private banks and became a firm in difficulties only in August 2009. In early 2009 ČSA's creditworthiness corresponded to rating category B.

(56) In order to verify the claims of the Czech Republic, the Commission consulted several private banks having

business relations with ČSA on their internal rating for ČSA in the first six months of 2009, the changes of the internal rating for ČSA between July 2008 and July 2009, the conditions of loans which were granted to ČSA in the first six months of 2009, and other comments concerning ČSA's creditworthiness in the first six months of 2009. Three private banks provided information on the condition that the information would be held in confidence, would be used only for the Commission's internal assessment and would not be disclosed to any third party, including ČSA and the Czech authorities.

(57) Although all of these banks acknowledged the worsening of ČSA's financial situation in early 2009, working capital loans and credit facilities were provided to ČSA during the first half of 2009. The internal rating for ČSA of the three private banks corresponds roughly to a B rating.

(58) The Commission notes that the banks' answers are consistent and sound. Although the internal ranking of the company deteriorated, the downgrading does not seem significant enough to justify a higher risk margin.

(59) In addition, the Commission observes that, as already indicated in the opening decision and based on the information provided by the Czech Republic, UniCreditBank provided a working capital, medium-term loan (4 years) of CZK 200 million to ČSA in September 2008, secured by a flight simulator. On 25 June 2009, due to the deviation from the financial indicators agreed in the loan agreement, UniCreditBank increased the risk margin for the ČSA loan from 160 basis points (agreed in September 2008) to 325 basis points above the one-month PRIBOR (i.e. an interest rate of 5,10 % p.a. on 25 June 2009). The Commission notes that this interest rate, which reflected the recent worsening of ČSA's financial situation, is below the interest rate of the Osinek loan (5,51 % p.a.) and corresponds approximately to a reference rate for a company with a B rating (with high collateralisation).

(60) In view of the above, it can be concluded that, in principle, ČSA had access to external financing at the time the Osinek loan was granted and that ČSA's creditworthiness in the first half of 2009 corresponded to a B rating.

(61) The collateral used to secure the loan comprised buildings located at Prague Ruzyně Airport, land, inventories and spare parts. The market value of the collateral was established by independent experts from the Czech Republic, who are registered either in the Register of Expert Institutes or the Central Register of Authorised

⁽¹⁾ Commission Communication to the Member States *Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/CEE to public undertakings in the manufacturing sector*, OJ C 307, 13.11.1993, p. 3, point 11. The Communication deals with the manufacturing sector, but is applicable to other economic sectors. Cf. Case T-16/96 *Cityflyer* [1998] ECR II-757, paragraph 51.

⁽²⁾ See Case T-16/96 *Cityflyer Express Ltd v Commission* [1998] ECR II-757, paragraphs 45 and 46.

⁽³⁾ See Communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aid in the aviation sector, OJ C 350, 10.12.1994, p. 5.

Experts maintained by the Czech Ministry of Justice and have experience in the field of the evaluation of assets ⁽¹⁾.

- (62) The Commission notes that the date of the appraisal report for the collateral Hangar F (see Table 1) is 1 June 2009, whereas the first tranche of the Osinek loan was paid on 11 May 2009. The Czech authorities have submitted a declaration by YBN Consult, dated 6 May 2009, which confirms the value of the collateral used. Such a declaration is in line with paragraph 5.9.11 of the Osinek loan agreement provided that the complete appraisal report is submitted within one month from the date of payment of the first tranche. The Commission notes that this condition was fulfilled.
- (63) Furthermore, the Commission has critically evaluated the submitted appraisal reports. The evaluations give no cause for concern since no manifest errors have been detected, accepted methodologies are applied and the evaluations are based on credible assumptions. Therefore, the Commission considers that the results of the present appraisal reports are an appropriate approximation for the realistic market prices of the assets used as collateral

for the Osinek loan. For one type of collateral (the spare parts), the value was based on their net book value. The Commission considers that this valuation method is appropriate for this type of asset given that spare parts can easily be traded and their value should therefore correspond to their original acquisition cost less accumulated depreciation.

- (64) The loan agreement stipulated that the actual loan amount must not exceed 90 % of the value of the collateral, i.e. the value of the collateral must be at least equal to 110 % of the loan amount. Based on the submitted information, at the time when the first tranche was granted in May 2009, the value of the original collateral as agreed in the loan agreement of 30 April 2009 was at least [110-117] %; at the time when the second tranche was granted in July 2009 at least [120-132] %; and at the time when the third tranche was granted in September 2009 at least [128-141] %. In addition, by several addendums to the Osinek loan agreement (see recital 8) additional collateral assets were added and some assets were released.

Table 4

Overview of collateralisation at different time periods of the Osinek loan

Date of change	Amount drawn (CZK million)	Value of collateral (CZK million)	% level of collateral
11 May 2009	800	[880-935]	[110-117] %
23 July 2009	800	[1 350 - 1 485]	[169-186] %
30 July 2009	1 700	[2 040 - 2 240]	[120-132] %
22 September 2009	1 700	[2 485 - 2 760]	[146-162] %
24 September 2009	2 500	[3 190 - 3 535]	[128-141] %
9 December 2009	2 500	[3 275 - 3 615]	[131-145] %
25 January 2010	2 500	[3 310 - 3 640]	[132-146] %

- (65) The Reference Rate Communication assumes that 'high' collateralisation implies a loss given default below or equal to 30 %, which corresponds to a value of the collateral of at least 70 % of the loan amount. The Commission notes that the collateralisation provided for the loan is significantly higher, which creates an important safety margin as regards any possible deviation in the estimates of the value of the collateral.
- (66) The appropriate interest rate following the Reference Rate Communication at that time would be 5,16 % p.a. (base rate 2,96 % + 220 basis points = 5,16 % p.a.). The

margin of 220 basis points reflects a B rating as confirmed by the private banks and the high collateralisation described above.

- (67) That rate is lower than the applied interest rate for the Osinek loan (three-month PRIBOR ⁽²⁾ + 300 basis points), which on 30 April 2009 came to 5,51 % p.a.
- (68) An analysis of the applied rate (three-month PRIBOR plus 300 basis points) and the reference rate plus a margin of 220 basis points shows that these rates are comparable in terms of the methodology of the base as well as of the overall level of the applied rates, including the relevant risk margin.

⁽¹⁾ YBN Consult — Znalecký ústav, s.r.o. is an expert institute qualified to provide expert advice in economics and the building industry. PROSCON — s.r.o. is an expert institute qualified to provide expert advice with respect to economics. Mr Vladimír Čmejla is an expert in economics, patents and inventions.

⁽²⁾ For the daily PRIBOR rates see http://www.cnb.cz/en/financial_markets/money_market/pribor/daily.jsp.

(69) PRIBOR is the reference value of the interest rates on the market of interbank deposits which is calculated (fixed) from the quotations of the reference banks for the sale of deposits (i.e. offers) by the calculation agent for the Czech National Bank and for the Czech Forex Club (Financial Markets Association of the Czech Republic — A.C.I.)⁽¹⁾.

(70) The rate for the Osinek loan is based on PRIBOR calculated for the maturity of 3 months. The reference rate is based on one-year money market rates. However, the Commission reserves the right to use shorter or longer maturities adapted to certain cases.

(71) An analysis of the development of the two rates during the lifetime of the Osinek loan (April 2009 to June 2010) shows that the two rates are indeed comparable. The average rates⁽²⁾ for the period from April 2009 to June 2010 are nearly the same (4,77 % for the PRIBOR + 300 basis points; 4,79 % for the reference rate including a risk margin of 220 basis points). The small difference between two basis points is due to the different method of adjustment. PRIBOR is adjusted on a daily basis; the reference rate is adjusted only every few months.

(72) Against this background, the applied interest rate can be accepted as an appropriate proxy for a market rate. On the basis of the Reference Rate Communication, the measure is in line with the market and does not, therefore, involve an economic advantage to ČSA.

(73) Finally, the Commission notes that the payments of interest by ČSA to the creditor were executed in full compliance with the terms of the Osinek loan agreement⁽³⁾.

6.3. Selectivity

(74) Article 107(1) TFEU requires that a measure, in order to be defined as state aid, must favour 'certain undertakings or the production of certain goods'. In the case at issue, the Commission notes that the Osinek loan was granted to ČSA only. Thus, it is selective within the meaning of Article 107(1) TFEU.

⁽¹⁾ For the methodology of the PRIBOR see http://www.cnb.cz/docs/ARADY/MET_LIST/prib_en.pdf.

⁽²⁾ The average rates are derived from the arithmetic mean of the monthly three-month PRIBOR averages plus 300 basis points according to the Czech National Bank and the relevant reference rates plus 220 basis points between April 2009 and June 2010 (for the relevant data see the tables at http://www.cnb.cz/en/financial_markets/money_market/pribor/averages_form.jsp and http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html).

⁽³⁾ Interest was duly paid for five consecutive calendar quarters and on one occasion a contractual penalty was charged for two day's delay in payment.

6.4. Distortion of competition and effect on trade

(75) With regard to the cumulative criteria of state aid, in the current case the effect on intra-EU trade and distortion of competition of the contested measure are indisputable and were not even contested by the Czech authorities. ČSA is in competition with other European Union airlines, in particular since the entry into force of the third stage of liberalisation of air transport ('third package') on 1 January 1993. The measures in question enabled ČSA to continue operating so that it did not have to face, as other competitors did, the consequences normally deriving from its poor financial results.

6.5. Conclusion

(76) On the basis of the above, the Commission considers that the measure does not involve any state aid to ČSA as the Osinek loan was provided under conditions that a market economy investor would require. In particular, the interest rate at which the Osinek loan was granted in conformity with the reference rate determined on the basis of the Reference Rate Communication in view of the fact that ČSA had a B rating at the time when the loan was granted, which was confirmed by private banks and the loan was secured the whole time by collateralisation significantly higher than the 70 % of the loan amount stipulated in the Reference Rate Communication.

7. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

(77) The Commission nevertheless also analysed whether, if the loan were considered to involve state aid, the measure would be compatible with the internal market under Article 107(3)(b) TFEU, on the basis of the Temporary Framework.

(78) The Osinek loan was granted in 2009. The measure aims therefore at facilitating the access of a firm to external finance at a period of time when the normal functioning of credit markets is severely disturbed because of the financial crisis and when the financial crisis ('credit crunch') is affecting the wider economy and leading to severe disturbances of the economy of Member States.

(79) On 17 December 2008 the Commission addressed this crisis by adopting the Temporary Framework. In it the Commission acknowledged the 'seriousness of the current financial crisis and its impact on the overall economy of the Member States'. The Commission further concluded 'that certain categories of state aid are justified, for a limited period, to remedy these difficulties and that they may be declared compatible with the common market on the basis of Article 107(3)(b) TFEU.'

7.1. Compliance with Section 4.4.2 of the Temporary Framework

(80) The measure must be assessed against the requirements of Section 4.4.2 of the Temporary Framework ('Aid in the form of subsidised interest rate').

Compliance of the interest rate applied

(81) According to the Temporary Framework, the interest rate applied must be at least equal to the central bank overnight rate plus a premium equal to the difference between the average one-year interbank rate and the average of the central bank overnight rate over the period 1 January 2007 to 30 June 2008, plus the credit risk premium corresponding to the risk profile of the recipient, as stipulated by the Reference Rate Communication.

(82) The overnight rate for the Czech Republic on 30 April 2009 was 1,45 %⁽¹⁾. The difference between the average one-year interbank rate and the average of the central bank overnight rate over the period from 1 January 2007 to 30 June 2008 was 68 basis points.

(83) The credit risk premium corresponding to the risk profile of the recipient was 220 basis points. This premium is based on a B rating (see recital 57) and a high level of collateralisation given the collateral offered (see recitals 64 and 65).

(84) Under the Temporary Framework the minimum rate would therefore be 4,33 % (1,45 % + 0,68 % + 2,20 %). The actual rate for the Osinek loan was 5,51 %. As a result, the Osinek loan was granted at a rate higher than the minimum allowed under the Temporary Framework.

(85) Furthermore, Section 4.4 of the Temporary Framework requires two additional conditions to be fulfilled for a loan to be considered to be compatible aid:

Contract concluded before 31 December 2010

(86) First, the contract must have been concluded by 31 December 2010 at the latest. The reduced interest rates may be applied to interest payments before 31 December 2012.

(87) The Osinek loan agreement was concluded on 30 April 2009. The loan was supposed to be paid back in one single payment on 30 November 2010. The loan contract therefore fulfils the first condition.

Not a firm in difficulty on 1 July 2008

(88) Second, the beneficiary must not have been in difficulty on 1 July 2008.

(89) Point 9 of the R&R Guidelines states that there is no EU definition of what constitutes a firm in difficulty and adds that the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

(90) Subsequently, point 10(b) of the R&R Guidelines clarifies that a firm is regarded as being in difficulty, in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months.

(91) In 2008 ČSA's registered capital totalled CZK 2 735 million. Based on the CAS standard, the company's equity fell to CZK 101 million in the same year.

Table 5

Equity and registered capital in 2007 and 2008 (CZK thousand)

2007	6/07	7/07	8/07	9/07	10/07	11/07	12/07
Equity	[1 035 000 - 1 140 000]	[1 415 000 - 1 555 000]	[1 450 000 - 1 595 000]	[1 410 000 - 1 565 000]	[1 950 000 - 2 145 000]	[1 260 000 - 1 390 000]	1 238 093
Registered capital	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510

⁽¹⁾ CZEONIA (Czech Over Night Index Average) is defined as the weighted average of the interest rates of all unsecured O/N deposits placed by reference banks on the interbank market. It is calculated and published by the Czech National Bank (http://www.cnb.cz/en/financial_markets/money_market/czeonia/daily.jsp).

2008	1/08	2/08	3/08	4/08	5/08	6/08
Equity	[585 000 - 645 000]	[385 000 - 420 000]	[110 000 - 120 000]	[690 000 - 755 000]	[860 000 - 950 000]	[965 000 - 1 065 000]
Registered capital	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510

	7/08	8/08	9/08	10/08	11/08	12/08
Equity	[945 000 - 1 030 000]	[1 220 000 - 1 340 000]	[1 270 000 - 1 410 000]	[1 295 000 - 1 430 000]	[610 000 - 670 000]	101 686
Registered capital	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510	2 735 510

Source: Financial statements provided by ČSA

- (92) Although more than half of the registered capital of the company had already disappeared on 1 July 2008, the second condition of point 10(a) of the R&R Guidelines — that more than one quarter of the registered capital must have been lost over the preceding 12 months — is not fulfilled. The equity lost between June 2007 and July 2008 (CZK [31 570 000-34 875 000]) corresponds to only [0,8-1,5] % of the registered capital.
- (93) Furthermore, point 10(c) of the R&R Guidelines considers a company to be in difficulty where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings. The Czech authorities confirmed that ČSA was not eligible for insolvency proceedings under paragraph 3 of the Czech Insolvency Act.
- (94) According to point 11 of the R&R Guidelines, even when none of the circumstances set out in point 10 of those Guidelines are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.
- (95) The changes in ČSA's financial results during the relevant period did not show a clear negative trend (see Table 3). The company made a loss at the end of 2006, but recuperated and showed a positive result for 2007. A loss of CZK [800-880] million was subsequently recorded at the end of the first quarter of 2008. However, the situation improved by the end of the second quarter, i.e. by 30 June 2008. A similar trend can be observed in the cash-flow situation. ČSA's turnover diminished slowly on a yearly basis over the observed period. However, it cannot be concluded that the turnover diminished significantly before 30 June 2008.
- (96) The debt of the company was reduced between March 2008 and June 2008, and then increased in the following six months. Finally, the value of the assets fluctuated over the observed period without any clear trend.
- (97) In conclusion, the trend in the financial criteria as set out in point 11 of the R&R Guidelines does not clearly point to all the usual signs of a firm being in difficulty before 30 June 2008. Furthermore, ČSA still had access to finance at that time, as demonstrated by the fact that it was able to obtain a loan from a private bank in September 2008 (see recital 59).
- (98) The Commission observes that aid compatible under Section 4.4 of the Temporary Framework may be granted to firms that were not in difficulty on 1 July 2008 but entered into difficulty thereafter as a result of the global financial and economic crisis. Therefore, the fact that ČSA became a firm in difficulty at a later date is without prejudice to the compatibility under the Temporary Framework.
- (99) Consequently, the Commission considers that ČSA was not a firm in difficulty on 1 July 2008 and that it was therefore eligible for the application of the Temporary Framework.

7.2. Conclusion

- (100) In view of the above, the Osinek loan fulfils all the conditions outlined in Section 4.4 of the Temporary Framework. Therefore, even if the Osinek loan were deemed to involve state aid, the measure would still be compatible with the internal market under Article 107(3)(b) TFEU.

8. CONCLUSION

- (101) The Commission concludes that the Osinek loan does not involve any state aid. Moreover, even if the Osinek loan were deemed to involve state aid, the measure would still be compatible with the internal market under Article 107(3)(b) TFEU.

(102) This Decision does not cover the decollateralisation and the capitalisation of the Osinek loan of 30 June 2010. The assessment of this measure will be the subject of the final decision in Case SA.30908,

HAS ADOPTED THIS DECISION:

Article 1

The measure which the Czech Republic has implemented for České aerolinie, a. s. in the form of a loan totalling CZK 2,5 billion provided by Osinek a.s. on the basis of the loan agreement of 30 April 2009 does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning

of the European Union and, even if it did, it is compatible with the internal market under Article 107(3)(b) of that Treaty.

Article 2

This Decision is addressed to the Czech Republic.

Done at Brussels, 21 March 2012.

For the Commission
Joaquín ALMUNIA
Vice-President