

**COMMISSION DECISION (EU) 2020/1814****of 28 June 2019****ON THE STATE AID SA.33846 – (2015/C) (ex 2014/NN) (ex 2011/CP) implemented by Finland for Helsingin Bussiliikenne Oy***(notified under document C(2019) 3152)***(Only the Finnish and Swedish texts are authentic)****(Text with EEA relevance)**

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),

Having regard to the decision by which the Commission initiated the procedure laid down in Article 108(2) of the Treaty of the functioning of the European Union <sup>(1)</sup>,

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(2)</sup> and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) On 31 October 2011, Nobina Sverige AB and Nobina Finland Oy lodged a complaint to the Commission alleging that Finland granted unlawful aid to Helsingin Bussiliikenne Oy ('HelB'). On 15 November 2011, Nobina AB – the parent company of Nobina Sverige AB and Nobina Finland Oy – joined the complaint. Nobina Sverige AB, Nobina Finland Oy and Nobina AB are hereinafter jointly referred to as 'the complainants'. The complainants provided additional information on 12 December 2011, 27 February 2012, 4 April 2012, 21 June 2012 and 4 September 2012.
- (2) The complaint along with the Commission's request for information in English was forwarded to Finland for comments on 22 November 2011. The Finnish translation of the complaint was sent to Finland on 1 February 2012. Finland's comments were provided, together with additional information, by letter dated 28 February 2012.
- (3) The comments of Finland on the complaint were forwarded to the complainants by letter of 31 May 2012. The observations of the complainants were provided on 27 July 2012. Finland provided additional information on 28 September 2012.
- (4) By letter dated 31 October 2012, the Commission forwarded to Finland the observations of the complainants received on 27 July 2012 and requested additional information. Finland provided the information requested on 3 January 2013 and 7 and 12 February 2013. Moreover, Finland provided additional information by email of 16 May 2013.
- (5) A meeting with the Finnish authorities took place on 17 May 2013, after which the Commission requested additional information by email of 24 May 2013. Finland provided the information requested on 31 May 2013 and 3, 7 and 10 June 2013.
- (6) The Commission requested additional information by email of 24 October 2013 and by letter dated 6 November 2013, to which Finland replied on 8 November 2013 and on 31 January 2014, respectively.

<sup>(1)</sup> Commission Decision C (2015) 80 final of 16 January 2015 (OJ C 116, 10.4.2015, p. 22).

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

- (7) The Commission requested additional information by e-mails of 27 February 2014 and 3 April 2014, to which Finland replied by e-mails of 5 March 2014 and 11 April 2014, respectively.
- (8) The services of the Commission met with the complainants and their legal representatives on 29 January 2014 and 14 October 2014.
- (9) By letter dated 16 January 2015, the Commission informed Finland that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the alleged aid ('the Opening Decision').
- (10) The Opening Decision was published in the *Official Journal of the European Union*.<sup>(3)</sup> The Commission invited interested parties to submit their comments on the measures identified in the Opening Decision.
- (11) Finland provided comments on the Opening Decision on 18 March 2015, 18 June 2015 and 6 November 2015.
- (12) The Commission received comments from the complainants on 8 May 2015 and forwarded them on 20 May 2015 to Finland, which was given the opportunity to react. Finland replied to the comments of the complainants by letters dated 12 August 2015 and 10 September 2015.
- (13) The Commission requested additional information from Finland on 27 May 2016, 15 September 2016, 13 October 2016 and 21 December 2016. Finland responded on 23 June 2016, 2 September 2016, 24 October 2016, 26 October 2016, 8 December 2016 and 13 January 2017.
- (14) On 16 February 2017, the Commission met with the complainants and their legal representatives.
- (15) The Commission requested further information from Finland on 31 October 2017 and 21 December 2017. Finland responded on 9 November 2017 and 16 February 2018.
- (16) On 19 March 2018, the Commission met with the Finnish authorities. Finland submitted additional comments on 10 April 2018.

## 2. BACKGROUND

### 2.1. The complainants

- (17) Nobina AB is the largest company to offer public transport bus services in the Nordic region and one of the ten largest public transport companies in Europe, active in the regional and interregional traffic segments. Its market share in the regional traffic segment in the Nordic region was 16 % in 2015/2016 (calculated on the basis of the number of buses). In the same period the company carried approximately 377 million passengers. In 2015/2016, Nobina AB made a profit after tax of approximately SEK 4 million (ca. EUR 0,4 million).
- (18) Nobina AB's main market is Sweden, where it operates as Nobina Sverige AB. In 2015/2016, Nobina AB's sales in Sweden accounted for approximately 71 % of its total sales and its market share in Sweden was 30 % (measured by the number of buses). In the same period, Nobina AB's sales in Finland, where it operates as Nobina Finland Oy, accounted for approximately 11 % of its total sales and its market share in Finland was 19,1 % (measured by the value of services).

### 2.2. The beneficiary

- (19) HelB was created on 1 January 2005 through the acquisition of assets and liabilities of HKL Bussiliikenne – a separate business unit of the City of Helsinki ('the City') – by the City-owned transport company Suomen Turistiauto Oy ('STA'), which then changed its name to HelB. HelB operated bus routes in the area of Helsinki and offered charter transport and bus leasing services. Around the time of the Opening Decision it had a fleet of approximately 380 buses.
- (20) HKL Bussiliikenne was created in 1995 as a spin-off from the City's transport services' department. The key figures concerning the financial situation of HKL Bussiliikenne prior to its acquisition by STA are presented in Table 1 below.

---

<sup>(3)</sup> See footnote 1.

Table 1

**Key figures of HKL Bussiliikenne (in EUR 000)**

	1999	2000	2001	2002	2003	2004
<b>Net turnover</b>	49 490	49 612	51 936	53 759	58 129	62 863
<b>Operating profit</b>	1 724	512	-917	-1 095	-35	447
<b>Result before appropriations and tax</b>	-374	-1 533	-3 036	-3 144	-1 738	-1 086

Source: Financial statements of HKL Bussiliikenne.

- (21) STA was a private limited company owned by the City, providing transport services. The key figures concerning the financial situation of STA prior to it acquiring HKL Bussiliikenne and changing its name to HelB are presented in Table 2 below.

Table 2

**Key figures of STA (in EUR 000)**

	1999	2000	2001	2002	2003	2004
Net turnover	29 460	32 187	34 069	29 921	29 511	25 674
Operating profit	-777	-624	-1 139	-2 334	-2 892	-2 546
Result before appropriations and tax	-1 109	-1 085	-1 638	-2 366	-3 220	-2 833

Source: Financial statements of STA.

- (22) HelB was 100 % owned by the City until December 2015. The key figures concerning the financial situation of HelB in 2005-2014 are presented in Table 3 below.

Table 3

**Key figures of HelB (in EUR 000)**

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Net turnover	85 134	88 169	90 194	91 913	98 164	93 641	91 506	99 407	89 943	80 696
Operating profit	-2 214	-1 590	-2 399	-8 470	-4 319	-3 621	-6 136	-1 941	-1 511	-4 498
Result before appropriations and tax	-2 842	-2 321	-2 231	-7 505	-3 768	-3 308	-6 123	-1 845	111	-7 031

Source: Financial statements of HelB.

- (23) On 14 December 2015 HelB was sold <sup>(4)</sup> to a private bus operator Viikin Linja Oy ('the buyer'), a competitor of the complainants and the largest bus operator in Finland, belonging to the Koiviston Auto Group ('KAG'). In 2016, KAG's estimated market share in Finland was 21,9 % (based on the value of services) and its profit after tax was EUR 3,8 million.

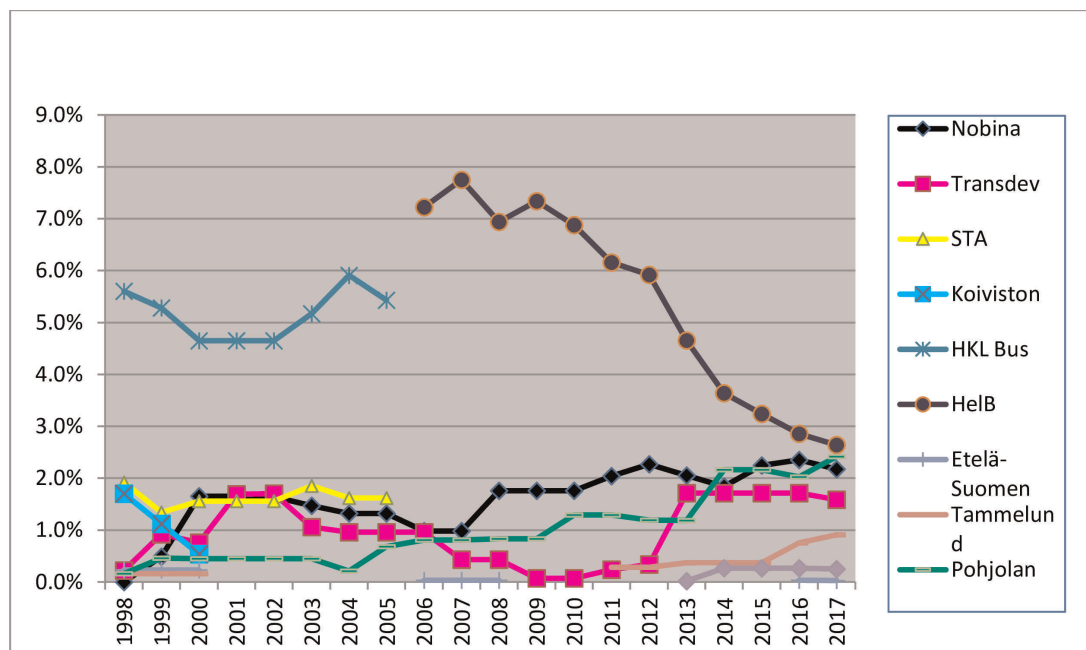
<sup>(4)</sup> For details of the transaction see recitals (45) to (49).

### 2.3. Local transport market in the Helsinki area

- (24) Local bus transport services in Helsinki were tendered for the first time in 1998 <sup>(i)</sup>. The responsibility for the planning of public transport and the purchase of public transport services in the metropolitan area of Helsinki, including the City, lies with the Helsinki Regional Transport Authority.
- (25) There are a number of companies operating in the Helsinki area in addition to HelB, notably Nobina Finland Oy and Veolia Transport Finland Oy. The estimated percentages of market shares of bus operators in the Helsinki local transport market each year are presented in the chart below.

Table 4

#### Helsinki Local Traffic Market Share per Operator in % (line/km) as of 1 January each year



Source: Nobina.

## 3. DESCRIPTION OF THE MEASURES

### 3.1. The 2002 equipment loan

- (26) On 6 May 2002, the City granted to HKL Bussiliikenne a EUR 14,5 million equipment loan to fund the procurement of bus transport equipment. The loan was disbursed as follows: EUR 13 million on 24 May 2002, EUR 1 million on 31 August 2002, and EUR 0,5 million, on 30 September 2002. The maturity of the loan was 12 years with a grace period of two years. The interest rate was set at the 12-month EURIBOR rate plus a margin of 0,05 %. The City could re-set the interest rate every five years from the first disbursement of the loan, i.e. on 24 May 2007 and 24 May 2012. The interest was due on 31 December each year, starting from 2002, and the principal was to be repaid annually in 12 equal instalments, starting from 31 December 2004. The loan was not secured by any collateral.
- (27) On 1 January 2005, HelB assumed the equipment loan on the same terms as it had been granted to HKL Bussiliikenne, except that no instalments had to be repaid in years 2005 and 2006.
- (28) On 1 October 2007, the City decided to extend the repayment of the equipment loan until 31 December 2023 (i.e. by eight years as compared to the original schedule).
- (29) HelB repaid the interest and EUR 3,8 million of the principal of the equipment loan. On 13 January 2016, the City exempted HelB <sup>(e)</sup> from the obligation to repay the outstanding principal of the loan, that is to say EUR 10,7 million. This happened after the business of HelB along with its business name 'Helsingin Bussiliikenne' was sold to Viikin Linja Oy (see recitals (45) to (49)).

<sup>(i)</sup> Regional bus traffic was first open to competition in the Helsinki region (including Espoo and Vantaa) in 1994. The local bus transport market only includes Helsinki and not Espoo and Vantaa.

<sup>(e)</sup> At that time HelB had already changed its name to Helsingin kaupungin Linja – autotoiminta Oy (see recital (47)).

### 3.2. The 2005 capital loan

(30) On 1 January 2005, upon its establishment, HelB took over the following liabilities from HKL Bussiliikenne and STA:

- (a) 'a set-up loan' granted by the City in 1994 in the amount of EUR 16,3 million, of which EUR 12,3 million was outstanding in the balance sheet of HKL Bussiliikenne as at 31 December 2004 (the main terms of the 'set-up loan' were: interest rate 9 %, duration 25 years, no collateral);
- (b) a liability of STA originating from an initial capital investment made by the City in HKL Bussiliikenne, of which EUR 3,6 million remained as at 31 December 2004.

The City decided to refinance those liabilities by converting them into a capital loan in the total amount of EUR 15 893 700,37 (on 31 December 2004, it converted the outstanding 'set-up loan' in the amount of EUR 12 255 223,50 and on 18 April 2006 it converted the liability of STA in the amount of EUR 3 638 476,87).

- (31) The interest rate on the capital loan was 6 %. That loan was repayable only if and to the extent that the share capital and other non-distributable items on the balance sheet were fully covered. In other words, as long as in a given financial year the company generated losses or did not generate such profit that in combination with the amount of capital loans would exceed its accumulated losses, the capital loan was not to be repaid. The unpaid interest was capitalised. The loan was subordinated to all other debts, was not secured by any collateral and had an unlimited duration.
- (32) The capital loan was not repaid (neither principal nor interest). After the opening of the formal investigation procedure, on 11 December 2015, the City converted it into equity of HelB.

### 3.3. The 2011 capital loan

- (33) On 31 January 2011, the City granted HelB a second capital loan in the amount of EUR 5,8 million on the same terms as the 2005 capital loan. In particular, the 2011 capital loan was also repayable only if HelB generated sufficient profits, was subordinated, was not secured by any collateral and had an unlimited duration. The loan was used to ensure HelB's liquidity.
- (34) The 2011 capital loan was not repaid and after the opening of the formal investigation procedure, on 11 December 2015, the City converted it into equity of HelB.

### 3.4. The 2012 capital loan

- (35) On 23 May 2012, the City granted HelB the third capital loan in the amount of EUR 8 million at the same terms as the 2005 and 2011 capital loans.
- (36) The 2012 capital loan was not repaid either and after the opening of the formal investigation procedure, on 11 December 2015, the City converted it into equity of HelB.

### 3.5. Other measures

- (37) The present decision will not examine the conversion into equity of the 2005, 2011 and 2012 capital loans, which took place after the opening of the formal investigation procedure. The present decision shall be without prejudice to the assessment of such subsequent measures.
- (38) The present decision will not address the measures concerning the Ruskeasuo Depot ('the Depot'), the bus depot located in Helsinki's metropolitan area. Those measures were described in recitals (38) to (46) of the Opening Decision. The Commission decided to maintain the procedure open for these measures.

## 4. THE COMMISSION DECISION TO OPEN THE FORMAL INVESTIGATION PROCEDURE

- (39) In the Opening Decision, the Commission expressed doubts whether the interest rate on the 2002 equipment loan was market conform given that it reflected the interest rate that the City itself had obtained for its loan on the market, without taking into account the difficult financial situation of the beneficiary.

- (40) The Commission considered that a rational private investor would have carried out an assessment of the creditworthiness of HKL Bussiliikenne before granting it a loan to be sure of the capacity of the company to repay the debt. In addition, the Commission considered that, even if HKL Bussiliikenne was a business unit of the City at the time, it was nevertheless engaged in providing transport services on the market and should be considered as an economic operator, not a mere extension of the public administration. Therefore, the provision of the 2002 equipment loan could not be regarded as a purely internal arrangement. Moreover, in the Commission's view, the lack of collateral did not seem to be properly reflected in the interest rate charged for the loan.
- (41) As regards the 2005 capital loan, the Commission considered that before setting up a new successor company (i.e. HelB) and providing it with a EUR 15,9 million capital loan, a profit-motivated private investor would have considered whether the liquidation of HKL Bussiliikenne and STA was preferable in economic terms, in view of the financial indicators of HKL Bussiliikenne and STA prior to the transfer of business to HelB. The Commission also had doubts whether a rational private investor would have provided to HelB a capital loan in 2005 at an interest rate of 6 % with no collateral in view of the financial situation of both predecessors of HelB and bearing in mind the situation of the local bus market at the time. In addition to this, the Commission observed that the examples provided by Finland of capital loans granted to other companies were not fully comparable to the 2005 capital loan.
- (42) As regards the 2011 capital loan, the Commission had doubts concerning its market-conformity, given the difficult financial situation of HelB (significant losses, negative equity). The Commission came to a preliminary conclusion that a rational private investor would not have provided the capital loan to HelB at an interest rate of 6 %. In addition, as the capital loan of 2005 had not been repaid, the Commission considered it doubtful that a market investor would have made a repeated investment in the form of a second capital loan.
- (43) The Commission also had doubts whether the 2012 capital loan could be considered to be in line with market conditions, given an even worse financial situation of HelB than when the 2011 capital loan was granted. The Commission considered it doubtful that a market investor would have invested in a loss-making firm for the third consecutive time.
- (44) The Commission therefore decided to initiate the procedure laid down in Article 108(2) TFEU.

#### 5. SALE OF HelB AFTER THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

- (45) As mentioned in recital (23), HelB was sold on 14 December 2015 to the buyer Viikin Linja Oy (KAG) and the sale took effect on 31 December 2015. No public tender was organised. According to Finland, the City contacted several potential buyers, i.e. bus operators active on the market in Finland and abroad, and the only offer came from Viikin Linja Oy.
- (46) The agreed sale price was EUR 24 210 193. The transaction documents also included a provision fully indemnifying the buyer in case of State aid recovery claim and part of the sale price in amount of EUR 1 879 766 was deposited in an escrow account. The escrow arrangement is in force until a final decision has been reached in the present State aid case or until 31 December 2022 at the latest. In addition, an earn-out mechanism was negotiated to be included in the deed of sale, on the basis of which the buyer undertook to pay the seller a bonus into the same escrow account if the previously agreed profit levels are exceeded <sup>(7)</sup>. The earn-out mechanism is in force for the period 2016-2020 and the bonuses for the years 2016 and 2017 were calculated to be EUR 2 524 302,19 for 2016 and EUR 2 558 068,21 for 2017.
- (47) In accordance with the terms of the deed of sale, HelB's business name 'Helsingin Bussiliikenne Oy' was taken over by the buyer Viikin Linja Oy, which then changed its name to 'Helsingin Bussiliikenne Oy' (the new HelB). The old HelB, owned by the City, had its name changed to 'Helsingin kaupungin Linja-autotoiminta Oy' (the old HelB). Although the old HelB's principal line of business entered in the trade register was not changed, the old HelB currently performs no business operations and has no assets except for the amounts which could be potentially received from the escrow account and via the earn-out mechanism, as mentioned above.

<sup>(7)</sup> In accordance with clause 3.4 of the 2015.09.21 deed of sale of HelB, if during the years 2016 to 2020 new HelB's EBITDA for the five comparable 12 months long accounting periods exceeds EUR 4 200 000 (per accounting period), then for those accounting periods, the buyer is obliged to pay an additional sale price. The additional sale price will equal 50 % of the amount by which the EBITDA exceeds the aforementioned EUR 4 200 000.

- (48) The scope of the deal did not cover old HelB's shares but rather its entire business operations and included old HelB's agreements (including the transport service agreement with the Helsinki Regional Transport Authority), orders and offers, staff, fixed assets and inventories, and intangible rights required for the company's business, as well as the responsibilities and obligations related to agreements, orders and offers, staff, property, intangible property and leasing and licencing contracts. All the 918 employees of the old HelB were transferred to the new HelB.
- (49) However, the equipment loan and the capital loans obtained by the old HelB from its owner, the City of Helsinki, were not transferred to the new HelB. Instead, the City exempted the old HelB from the obligation to repay the outstanding principal amount of the equipment loan on 13 January 2016, as mentioned in recital (29), and converted the outstanding amounts of the capital loans <sup>(8)</sup> into equity of the old HelB on 11 December 2015.

## 6. COMMENTS FROM FINLAND ON THE OPENING DECISION

- (50) In the opinion of the Finnish authorities, the measures under assessment do not entail State aid. Finland argues that the City, as the owner of HelB (as well as of HKL Bussiliikenne and STA), provided the funding to HelB on market terms and against a return that would be satisfactory for a private shareholder operating under prevailing market conditions.
- (51) Finland claims that when HelB was created in 2005, the aim was to improve the profitability and competitiveness of HelB as well as its future development in such a way that it could operate as a profitable and high-quality public transport provider. Finland also points out that the measures should be assessed in the context of the time when they were actually granted. To this end, Finland refers to their submission dated 28 February 2012, which included a list of interest rates applied to capital loans granted to other companies in Finland in the period 2004–2006.
- (52) Finland maintains that the fact that HelB's performance has not been as expected is not due to poor competitive strength of HelB, which would have required a boost by an injection of funding, but solely to the distorted situation in the local bus market. According to the publicly available financial accounts, other major bus operators active in the Helsinki metropolitan area were also making losses during the period 2005–2012. In the light of this, the actions taken by the City were very similar to those taken by private business owners or investors actually operating in the market.
- (53) As regards the financial situation of HelB, Finland admits that it has deteriorated over time and that, in the period 2008–2010, it appeared necessary to implement measures to improve its profitability, including changes in the price structure, staff reduction etc. In its previous comments, i.e. before the Opening Decision, Finland did not consider that HelB was a firm in difficulty within the meaning of the 2004 Community Guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(9)</sup> ('the 2004 R&R Guidelines').

### 6.1. Existence of aid

- (54) As regards the 2002 equipment loan granted to HKL Bussiliikenne, Finland reiterates that the interest rate on the loan can be regarded as market conform mainly because it was tied to the market interest rate, i.e. the 12-month EURIBOR.
- (55) Furthermore, Finland considers it probable that HKL Bussiliikenne would have obtained a loan with similar conditions from a private financing institution. According to Finland, the creditworthiness of HKL Bussiliikenne, being an organisational part of the City and not a separate legal person, would have been the same as that of the City (i.e. good). According to Finland, the interest rate set for the equipment loan was based on the interest rate on external loans taken by the City on the financial market at the time.
- (56) Finland also explained that the equipment loan should be considered as a purely internal arrangement within the City, as the City and HKL Bussiliikenne constituted the same legal person. The loan had no collateral as it was such an internal arrangement.

<sup>(8)</sup> Except for the interest on the capital loans as, in accordance with the conditions of the capital loan agreements, no interest was due because old HelB was loss-making.

<sup>(9)</sup> Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

- (57) In addition, Finland seems to argue that, should the equipment loan be considered State aid (contrary to Finland's view), it should be regarded as existing aid until 1 January 2005, when HKL Bussiliikenne, an entity within the City without a separate legal personality, was succeeded by HelB, a city-owned company with its own legal personality. To support its argument, Finland refers to the Commission services' letter in an earlier case where the Commission found that the measures granted in favour of municipality-owned agencies in Finland (exemption from certain taxes, VAT refund and unlimited State guarantee resulting from State-ownership and the associated absence of bankruptcy risk) seemed to constitute existing aid within the meaning of Article 108(1) TFEU because they dated back to the time before Finland's accession to the Union. <sup>(10)</sup>
- (58) Concerning the extension of the equipment loan in 2007, Finland argues that it was justified on the basis that it was a variable rate loan and the [base] interest rates were rising in 2007 and were expected to continue rising. The fall of the interest rates to the current low level could not have been predicted at the time.
- (59) As regards the 2005 capital loan, Finland argues that it was not a new loan but rather a purely technical procedure of changing the 'set-up loan', which had been included in HKL Bussiliikenne's balance sheet for over 10 years, into a capital loan. The purpose of that procedure was to ensure compliance with Finnish company law, according to which a 'set-up loan' of a municipality-owned company could not have been left on the balance sheet of a limited liability company. A capital loan is a normal form of shareholder financing for limited liability companies.
- (60) In relation to the 6 % interest rate on the 2005 capital loan, Finland notes that it was the same as the interest rate on the 'set-up loan' for HKL Bussiliikenne. Taking into account that, in Finland's opinion, this was a purely technical change and not a new financing arrangement, the same interest rate must be viewed as justified. Finland also points out that it had previously provided an extensive review of the capital loans granted by other operators at the time. The interest rates on those loans were between 4,7 % and 7,539 %. All the capital loans mentioned in the review were without collateral and subordinated, as required by law, and as such Finland views them as a comparable reference group.
- (61) In relation to the 2011 capital loan, Finland continues to claim that it should be seen as a loan provided by a long-term group owner and not as a single short-term financing decision by an external investor. Finland admits that at the time the financial situation of HelB was poor and a rapid injection of additional funding was required. Also, HelB implemented measures to improve its profitability in the period 2008-2010, including a reduction of the company's costs, changes in the price structure, change of the applicable collective agreement, staff reduction and closing of one of the depots (the Koskela depot). Finland stresses that the 2011 capital loan was the first measure from the City which was taken due to the difficult financial situation of HelB.
- (62) Finland provided an example of a capital loan granted to another company in the period 2011-2012 where the interest rate on the loan was the 6-month EURIBOR + 4,75 %. As the interest rate of the 2011 capital loan (6 %) was higher, Finland considers it to be market conform.
- (63) In addition, Finland claims that, taking into account that the national law includes specific provisions on capital loans, the fact that the 2005 capital loan had not been repaid at the time of granting the 2011 capital loan cannot in itself be regarded as a significant factor in determining market-conformity.
- (64) Finland considers that the 2012 capital loan is 'mainly the same as the 2011 loan'. Finland argues that it was not State aid but a justified shareholder financing measure performed to ensure the liquidity of the fully-owned subsidiary. In relation to the interest rate on the 2012 capital loan, Finland refers to its comments concerning the 2011 capital loan. Finally, according to Finland, due to the fact that the 2012 capital loan was granted after the complaint was lodged in October 2011, the City Executive Board required the 2012 capital loan to be provided on market terms. On this basis, Finland claims that the 2012 capital loan would not involve aid and would not need to be notified to the Commission for approval.

<sup>(10)</sup> By letter of 14 April 2010 the Commission services communicated to Finland its preliminary view concerning the case SA.30679 (E 2/2010) *Aid to municipality-owned agencies in Finland* finding that the aid in question might no longer be compatible and requesting Finland to amend the underlying legislation so that the municipality-owned agencies engaged in an economic activity should no longer benefit from such aid. Finland amended its legislation; following these amendments, by letter of 1 April 2014, the Commission closed the case.



## 6.2. Compatibility of the aid

- (65) Finland has not provided any grounds for compatibility as it reiterated its position presented during the preliminary assessment phase that the measures at stake do not constitute State aid within the meaning of Article 107(1) TFEU on the grounds that they were carried out on market terms.

## 6.3. Economic continuity

- (66) Finland argues that there is no economic continuity between the old HelB and the new HelB due to the fact that the sale of the old HelB's business was construed as an asset deal.
- (67) Finland also claims that despite the fact that the business of the old HelB was sold not via an open, transparent, non-discriminatory and non-conditional tender process, the sales project was published so widely that the transaction price established on the basis of the offer and the reply to the offer and during negotiations represents the market value of HelB's business operations. In support of this, Finland additionally provides an evaluation made by an independent external expert, Inspira Oy, which considers that the transaction price agreed upon is in line with the values calculated in the evaluation on the basis of most valuation methods.

## 7. COMMENTS FROM INTERESTED PARTIES

- (68) The complainants commented on the Opening Decision by a joint letter dated 8 May 2015. They endorsed the facts as well as the reasoning expressed by the Commission in that Decision.
- (69) The complainants stressed that [the old] HelB clearly qualifies as an undertaking in difficulty within the meaning of the 2004 R&R Guidelines as well as under the 2014 Guidelines on State aid for rescuing and restructuring non-financial firms in difficulty <sup>(11)</sup> ('the 2014 R&R Guidelines'). According to the complainants, the same applies to HKL Bussiliikenne under the 1999 Community Guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(12)</sup> ('the 1999 R&R Guidelines').
- (70) The complainants argue that the grant of State support to a firm in difficulty must in principle be considered to confer economic advantage to the company concerned. The State is unlikely to be conforming to normal market discipline where it supports a company that does not have long-term viability prospects, such as HelB, as no rational private operator would have granted the measures concerned to HelB.
- (71) In particular, as regards the 2002 equipment loan, a rational private investor would have demanded a higher interest rate than the rate corresponding to the one that the public authority itself obtained at the financial markets. In addition, no private creditor would have transferred the loan to a newly-created company, such as HelB in 2005, on the same terms and conditions as originally provided to its established predecessor, in this case HKL Bussiliikenne. The complainants also pointed out that no rational private investor would have accepted the repeated deferrals of the principal payments without upward adjustments of the interest rate.
- (72) As regards the 2005 capital loan, the complainants claim that, given that both HKL Bussiliikenne and STA were loss-making prior to the creation of HelB, a private investor would have rather exited such an investment than provided additional financing. Consequently, the whole 2005 capital loan is to be considered as an economic advantage which HelB would have never obtained under normal market conditions. Also, even if a private investor had agreed to provide the financing, it would never have done so under the terms provided to HelB, i.e. with a 6 % interest rate and without any collateral.
- (73) As regards the 2011 and 2012 capital loans, the complainants point out that at the time of granting those loans HelB's financial situation was extremely bad, of which the City was fully aware. Moreover, according to the complainants, HelB had not paid any interest nor made any instalments on the 2005 capital loan. Under such circumstances, no lender of funds would have been prepared to assume the risk of a loan and, consequently, the total amount of the 2011 and 2012 capital loans constitutes State aid.

<sup>(11)</sup> Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

<sup>(12)</sup> Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

- (74) Finally, the complainants argue that there is clearly an economic continuity between the old HelB and the new HelB, given the scope of the deal, the absence of a tender and the other relevant criteria.

#### 8. COMMENTS FROM FINLAND ON THE COMMENTS FROM COMPLAINANTS

- (75) Finland considers that the complainants' comments largely repeat the allegations already described in the Opening Decision and therefore refers to its reply to that Decision of 17 March 2015. Finland submitted the following additional comments which relate to the above comments of the complainants.
- (76) In response to the complainants' comments that the City did not act as a market investor, Finland observed that the market economy investor principle should be interpreted in such a way as to take into account the owner's interest in protecting the capital invested in the company it owns and in seeking long-term profitability. As the owner, the City should be compared to a market operator who is trying to protect its investment, rather than to a theoretical investor who has no such prior exposure. According to Finland, in its capacity as owner, the City acted in the same way and under the same market conditions as other owners of companies operating on the local bus transport market in the Helsinki area, including Nobina itself.
- (77) Concerning the complainants' comments on the 2011 and 2012 capital loans, Finland refers to a study prepared by an external expert in 2015 (see recital (174)), according to whom the loans were market-conform. However, if the loans were found to constitute aid (contrary to Finland's position), Finland is of the opinion that such aid should be limited to the amount resulting from the difference between the actually applied interest rate and the market interest rate [rather than equal the total amount of the loans, as argued by the complainants].

#### 9. EXISTENCE OF AID

- (78) This decision addresses the existence of State aid within the meaning of Article 107(1) TFEU, whether such aid might be compatible with the internal market, and, finally, the economic continuity between the old HelB, now Helsingin kaupungin Linja-autotoiminta Oy, and the new HelB, now part of KAG.
- (79) Article 107(1) TFEU lays down that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (80) Therefore, a measure constitutes State aid if it meets the following cumulative conditions: (i) it is imputable to the State and stems from State resources; (ii) it is selective; (iii) it confers an economic advantage on an undertaking; and (iv) it distorts or threatens to distort competition and affects trade between Member States.

##### 9.1. Measure 1 – the 2002 equipment loan to HKL Bussiliikenne

- (81) First of all, State aid rules only apply when the beneficiary of a measure is an 'undertaking'. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. <sup>(13)</sup> The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities and not on its status under national law. An entity that is formally part of the public administration may nevertheless have to be regarded as an undertaking within the meaning of Article 107(1) TFEU. The only relevant criterion is whether it carries out an economic activity.

<sup>(13)</sup> Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

- (82) Finland argues that when the equipment loan was granted, HKL Bussiliikenne was neither a company nor a separate legal entity under the Finnish law, but a profit centre <sup>(14)</sup> within the internal business unit of the City (HKL). Thus, the equipment loan should be understood as an internal arrangement within the City. This seems to imply that the measure should not be subject to State aid rules.
- (83) The Commission does not share this view. Even if HKL Bussiliikenne was formally part of the City, it was an economic operator (as Finland itself acknowledges) engaged in providing bus transport services on the competitive market and not a public authority exercising essential functions of the State. As such, HKL Bussiliikenne clearly carried out economic activities and therefore, regardless of its formal legal status, it must be considered to be an undertaking within the meaning of Article 107(1) TFEU. Consequently, State aid rules apply to HKL Bussiliikenne. Needless to say, they also apply to HelB, which was a separate legal entity from the City and performed the same type of economic activities as its predecessor.
- (84) Finland also seems to argue that the equipment loan should be regarded as existing aid, similarly to the measures granted in favour of the municipality-owned agencies (see recital (57)). The Commission observes that those measures were in place before Finland's accession to the Union on 1 January 1995 (e.g. exemption from transfer tax since 1943, exemption from property tax since 1992, exemption from income tax since 1974). In contrast, the equipment loan was granted on 6 May 2002, i.e. more than seven years after the accession. Therefore, it clearly does not constitute existing aid.

#### 9.1.1. State resources and imputability

- (85) The City provided the equipment loan directly to HKL Bussiliikenne, which was then assumed by HelB in 2005, and financed it from its own budget. State resources for the purpose of Article 107(1) TFEU are the resources of a Member State and of its public authorities as well as the resources of public undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence. In light of this definition, the measure clearly involves State resources and is imputable to the State. Finland does not dispute that.

#### 9.1.2. Selectivity

- (86) The City granted the equipment loan exclusively to HKL Bussiliikenne; in 2005 this loan was assumed by HelB. Thus, the equipment loan was granted on totally *ad hoc* basis to a single company and was not available to other companies active in the bus transport sector in the Helsinki area which are in a comparable legal and factual situation, or in other sectors. No comparable companies were eligible for a measure similar to that granted to HKL Bussiliikenne and thus no such companies received a comparable advantage. Therefore, the measure is selective.

#### 9.1.3. Existence of an economic advantage

- (87) Economic transactions carried out by public bodies do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions. <sup>(15)</sup> To determine whether a transaction is carried out in line with normal market conditions, the behaviour of a public body must be compared to that of a hypothetical private economic operator being in a similar situation (the so-called market economy operator, or 'MEO', test). The Union courts have developed specific types of MEO test for different types of economic transactions, in particular the 'market economy investor principle', to identify the presence of an economic advantage in cases of public equity investments <sup>(16)</sup> and the 'private creditor test', in cases of transactions involving debt. <sup>(17)</sup>

<sup>(14)</sup> Finland has not provided more detailed information in this respect. Profit centre is normally part of an organisation whose financial performance is measured separately from other parts. Management accounting system is set up in such a way that revenues and costs can be properly allocated to a profit centre. This does not necessarily mean that a profit centre would prepare its own statutory financial statements.

<sup>(15)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 60 and 61.

<sup>(16)</sup> See, for instance, Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission* ('Tubemeuse'), C-142/87, ECLI:EU:C:1990:125, paragraph 29; Judgment of the Court of Justice of 21 March 1991, *Italy v Commission* ('ALFA Romeo'), C-305/89, ECLI:EU:C:1991:142, paragraphs 18 and 19; Judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 51; Judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, ECLI:EU:T:1999:7, paragraph 104; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57.

<sup>(17)</sup> Judgment of the Court of Justice of 22 November 2007, *Spain v Commission*, C-525/04 P, ECLI:EU:C:2007:698; Judgment of the Court of Justice of 24 January 2013, *Frucona v Commission*, C-73/11 P, ECLI:EU:C:2013:32; Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332.

- (88) As regards the present measure, the Commission must therefore examine whether by granting the equipment loan to HKL Bussiliikenne, which was then assumed by HelB, on the agreed terms the City behaved as a hypothetical private creditor would have done in a similar situation.
- (89) To begin with, any prudent private creditor, before granting a loan, would have first conducted a credit assessment of a prospective debtor to decide whether to grant a loan and on what terms and conditions. <sup>(18)</sup> To prove market-conformity, a Member State must provide evidence showing that its decision to carry out the transaction was taken on the basis of such *ex ante* assessment. <sup>(19)</sup>
- (90) Finland has not provided any evidence showing that the City had conducted a credit assessment (or any other type of *ex ante* assessment) of HKL Bussiliikenne before granting the equipment loan. Moreover, Finland explicitly acknowledged that no such assessment, internal or external, had ever been carried out. This is a sign that Finland did not behave as a hypothetical private creditor.
- (91) Finland claims that the loan was nevertheless market-conform on the grounds that (i) the interest rate was tied to the market interest rate, i.e. the 12-month EURIBOR; and (ii) HKL Bussiliikenne would have likely been able to obtain a loan with a similar margin from a private financing institution because, as an internal business unit, it had the same (good) creditworthiness as the City itself.
- (92) When it comes to the first argument, the Commission observes that a variable interest rate, such as the one applied to the equipment loan, consists of two elements: a base rate and a margin. The base rate in the present case, i.e. the 12-month EURIBOR, is a rate at which banks borrow money from each other on the inter-bank market. The margin is a premium charged for the risk associated with lending money to a particular debtor. It is therefore not the base rate but the margin which is relevant for the assessment whether a loan is market-conform or not. Consequently, the fact that the interest rate on the equipment loan was tied to the 12-month EURIBOR is in itself not sufficient to prove that the loan was market-conform. What must be assessed is whether the margin properly reflected the risk profile of HKL Bussiliikenne at the time when the equipment loan was granted. In view of that, the first argument must be rejected.
- (93) Concerning the second argument brought forward by Finland, the Commission first notes that Finland has not provided any factual evidence to substantiate its claim that HKL Bussiliikenne would have been able to obtain a loan with a similar margin from a private financing institution, such as for example offers from commercial banks or examples of comparable market transactions. Finland merely claims that HKL Bussiliikenne would have been able to obtain such a loan on the grounds that it had the same creditworthiness as the City itself and the City presumably obtained loans with the same margin as the equipment loan.
- (94) The Commission does not share this view. Firstly, the Commission considers that, despite their organisational link, HKL Bussiliikenne and the City did not have the same creditworthiness. From a market creditor's perspective, a loan granted to the City as a public authority would have always entailed a lower risk than a loan granted to HKL Bussiliikenne, a bus operator acting on the competitive market, even if the latter was organisationally part of the City.
- (95) Secondly and more importantly, the high creditworthiness of the City is inextricably linked to the fact that its public debts are ultimately guaranteed by the State. A loan granted to the City cannot be considered as an appropriate market benchmark, because its terms take into account this ultimate State's backing, from which a market debtor does not benefit. Consequently, in order to assess market-conformity of the equipment loan, HKL Bussiliikenne's creditworthiness must be established on a stand-alone basis and the terms of the loan must be compared to a proper market rate or proxy. As mentioned before, Finland has not conducted any such assessment. In the past the

<sup>(18)</sup> Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 82 to 85 and 105.

<sup>(19)</sup> Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 82 to 85. See also Judgment of the Court of Justice of 24 October 2013, *Land Burgenland v Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraph 61.

Commission did not accept as free of aid loans granted by a public shareholder to its subsidiary on the same favourable terms available to the public entity concerned. <sup>(20)</sup> In view of that, the second argument brought forward by Finland must also be rejected.

- (96) Compliance with market conditions can be established directly, where the transaction is carried out '*pari passu*' by public entities and private operators, or on the basis of other assessment methods, where the transaction-specific market data are not available. The loan in question was granted without participation of private operators, therefore its compliance with market conditions cannot be assessed directly.
- (97) Absent specific market information, compliance of a debt transaction with market conditions may be established through benchmarking, that is to say by comparing its terms with the terms of comparable market transactions. Such transactions may include, for example, loans taken or bonds issued by comparable market debtors or credit default swaps traded on their debts.
- (98) Finland has not provided any examples of comparable market transactions that could be used as benchmark for the 2002 equipment loan.
- (99) According to the complainants, Nobina's (a private competitor of HelB) interest rates for its long-term loans around 2002 were approximately 8-11 %. Nobina's credit rating at the time was B+.
- (100) The Commission has not found any other suitable market benchmarks. Nevertheless, the Commission notes that the margin of 0,05 %, charged on the equipment loan, implies virtually no credit risk. Even debtors with an excellent credit rating and good collateral would have most probably not obtained such a low margin on the market, let alone HKL Bussiliikenne, which was in poor financial condition and did not provide any collateral.
- (101) Given that no transaction-specific market data are available and that appropriate market benchmarks cannot be established, the Commission considers it justified to assess compliance of the equipment loan with market conditions on the basis of the reference rates set out in the 1997 Reference Rate Communication <sup>(21)</sup>. The reference rate is supposed to reflect the average level of interest rates charged in Member States on medium and long-term loans backed by normal security. As such it can be used as a proxy market rate.
- (102) The Commission observes that the equipment loan was not backed by any security. In addition, the average interest rate implies an average borrower, in other words a borrower who is in an average financial situation. HKL Bussiliikenne and STA, predecessors of HelB, were clearly not in an average financial situation. Both companies generated increasing losses before the equipment loan was granted and continued to be loss-making thereafter (see recitals (20)-(21)). In September 2004, the City Board itself predicted that there would be no significant improvement in profits of HKL Bussiliikenne and STA in the near future and that the losses would continue. <sup>(22)</sup> When it comes to HelB, it did not have its own financial track record before assuming the equipment loan. However, a prudent market creditor would have surely taken into account the financial situation of its predecessors before taking a decision to transfer the loan. In view of that, the reference rate in the present case clearly underestimates the risk involved in granting the equipment loan.
- (103) According to the 1997 Reference Rate Communication, the reference rate is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided). In such cases the premium may amount to 400 basis points or more if no bank would have agreed to grant the relevant loan.
- (104) As mentioned in recital (26), the equipment loan was not secured by any collateral. This is sufficient to establish that the equipment loan was granted in a situation involving a particular risk within the meaning of the 1997 Reference Rate Communication.

<sup>(20)</sup> See e.g. Commission Decision (EU) 2016/788 of 1 October 2014 on the State aid SA.32833 (2011/C) (ex 2011/NN) implemented by Germany concerning the financing arrangements for Frankfurt Hahn airport put into place in 2009 to 2011 (OJ L 134, 24.5.2016, p. 1), recital 117.

<sup>(21)</sup> Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

<sup>(22)</sup> Proposal of the City Board 13/2004 of 1 September 2004.

- (105) In addition, the Commission observes that, before obtaining the equipment loan in May 2002, HKL Bussiliikenne had shown signs of a firm being in difficulty, such as increasing losses. In the Opening Decision, the Commission preliminarily concluded that HKL Bussiliikenne would have qualified as an undertaking in difficulty under the 1999 R&R Guidelines. However, on the basis of the elements collected during the formal investigation procedure, the Commission found that HKL Bussiliikenne did not experience a diminishing turnover, mounting debt or rising interest charges. Therefore, the Commission takes the view that a sole factor of increasing losses is not enough to conclude that HKL Bussiliikenne was a company in difficulty within the meaning of 1999 R&R Guidelines. At the same time, increasing losses are undoubtedly a sign of a poor financial condition of HKL Bussiliikenne at that time, which entailed higher than average risk for the creditor. This is yet another factor, in addition to the lack of security, indicating that the equipment loan was granted in a situation involving a particular risk. The financial situation of HKL Bussiliikenne did not materially improve after it had received the equipment loan and remained bad at the time when the loan was transferred to HelB.
- (106) Before the equipment loan was transferred to HelB in January 2005, STA had also experienced increasing losses. In a similar vein as in case of HKL Bussiliikenne, the Commission considers that, although increasing losses is a sign of a firm being in difficulty this sole criterion is not enough to conclude that STA was an undertaking in difficulty. However, it undoubtedly shows that STA was in poor financial condition.
- (107) HelB was set up in 2005, therefore it did not have its own financial track record before taking over the equipment loan. Nevertheless, the financial situation of its predecessors, HKL Bussiliikenne and STA, should have been taken into account when assessing the risk involved in transferring the equipment loan to HelB. Moreover, the fact that HelB was a newly-created firm constituted additional risk for the creditor, since its future financial performance was less predictable compared to a company with its own historical record.
- (108) The actual financial performance of HelB after the transfer of the equipment loan confirms what could have been predicted on the basis of the financial performance of its predecessors. HelB reported significant losses in each year of its activities, since its establishment in 2005 until 2014. The only exception was in 2013 when it recorded a small profit of EUR 0,1 million immediately after having received two capital loans. To make matters worse, since 2009 HelB had increasing negative equity: EUR -3,3 million in 2009, EUR -6,6 million in 2010, EUR -12,7 million in 2011, EUR -14,6 million in 2012, EUR -15,9 million in 2013 and EUR -22,9 million in 2014.
- (109) Finally, in 2004 and 2007 the City postponed the repayment of the equipment loan by a total of eight years, from the originally scheduled 31 December 2015 until 31 December 2023. The extension of the repayment period increases the non-repayment risk, for which a rational market creditor would have sought additional premium. The City did not increase the margin on the equipment loan and thus this additional risk was not accounted for in the interest rate.
- (110) On the basis of the analysis made in recitals (104) to (109), the Commission considers that the equipment loan was granted and subsequently transferred in a situation involving a particular risk within the meaning of the 1997 Reference Rate Communication. Therefore, in light of the circumstances of the present case, the Commission considers that the floor rate should be increased by a premium of at least 400 basis points.
- (111) Under the 1997 Reference Rate Communication, the premium of 400 basis points could be further increased in cases where no private bank would have agreed to grant the relevant loan. The Commission has found no evidence and considers it unlikely that any private bank would have agreed to grant the equipment loan at the same terms as the City, given the poor financial condition of the borrower(s). Nevertheless, in the absence of clear rules on how to quantify such additional premium, for the sake of prudence, the Commission has decided not to further increase the premium of 400 basis points.
- (112) The floor reference rate for Finland, set on the basis of a five-year interbank swap rate, amounted to 5,06 % in May 2002 and to 4,08 % in January 2005. Under the 1997 Reference Rate Communication, the Commission reserved the right to use a shorter-term base rate than the five-year interbank swap rate. In the present case, the Commission considers it appropriate to use the 12-month EURIBOR as a base rate. This is because, firstly, it was the actual base rate used in the equipment loan and thus enables a more accurate approximation of the market rate than the reference rate. Secondly and more importantly, the use of EURIBOR gives a variable proxy market rate, which is exactly the type of interest rate used in the equipment loan (by contrast the reference rate would effectively give a fixed-rate proxy).

- (113) The methodology for setting the reference rates was revised under the 2008 Reference Rate Communication. <sup>(23)</sup> The new methodology entered into force on 1 July 2008, i.e. after the equipment loan was granted. However, the interest rate on the equipment loan could have been re-set every five years from the first disbursement of the loan (see recital (26)), i.e. on 24 May 2007 and on 24 May 2012. A rational creditor facing a deteriorating financial situation of the debtor would have used such contractual possibility and increased the interest rate to match the new level of risk. As mentioned in recital (153), at least since 2009 HelB qualified as a firm in difficulty. Based on the 2008 Reference Rate Communication, a market-conform loan margin for a firm in difficulty without collateral amounts to 1 000 basis points.
- (114) On the basis of the above, the market rate for the equipment loan amounts to (i) the 12-month EURIBOR plus 400 basis points between 24 May 2002 and 23 May 2012; and (ii) the 12-month EURIBOR plus 1 000 basis points between 24 May 2012 and 13 January 2016, when the City waived the loan (see below). The actual interest rate was the 12-month EURIBOR plus 5 basis points and thus was 395 basis points and 995 basis points, respectively, below the market level.
- (115) On 13 January 2016, the City exempted HelB <sup>(24)</sup> from the obligation to repay the outstanding principal amount of the equipment loan in the amount of EUR 10,7 million. Thus, in addition to the below market-level interest rate, HelB benefited from not having to repay the principal.
- (116) On the basis of the foregoing assessment, the Commission concludes that the City did not behave as a market creditor as it granted the equipment loan on terms which did not comply with market conditions. Consequently, the 2002 equipment loan conferred an undue economic advantage on HKL Bussiliikenne and HelB.

#### 9.1.4. *Effect on competition and trade between Member States*

- (117) A distortion of competition within the meaning of Article 107(1) TFEU is assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. <sup>(25)</sup> As observed by the Court of Justice in its *Altmark* judgment <sup>(26)</sup>, since 1995 several Member States had started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings were already offering their urban, suburban or regional transport services in Member States other than their State of origin. The Finnish bus market is open to competition. In particular, the local bus transport services in the Helsinki area have been procured through competitive tenders since 1998 (see recitals (24) and (25)). Several bus operators have been active in the market, including operators from other Member States. In addition, any measure granted by the State that is liable to improve the competitive position of the recipient compared to other undertakings with which it competes affects competition and trade. <sup>(27)</sup> The Commission therefore concludes that the equipment loan distorted or threatened to distort competition and affected trade between Member States.

#### 9.1.5. *Conclusion on the existence of State aid within the meaning of Article 107(1) TFEU*

- (118) In the light of the above, the Commission concludes that Measure 1 constitutes State aid within the meaning of Article 107(1) TFEU. The aid is equal to the sum of:
- (1) the difference between (a) the interest due calculated on the basis of the market-conform interest rate of the 12-month EURIBOR plus a margin of 400 basis points (between 24 May 2002 and 23 May 2012) and 1 000 basis points (between 24 May 2012 and 13 January 2016); and (b) the interest paid calculated on the basis of the actual interest rate of the 12-month EURIBOR plus a margin of 5 basis points; and
  - (2) the outstanding principal of the loan not repaid in the amount of EUR 10,7 million.

<sup>(23)</sup> Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

<sup>(24)</sup> More precisely, Helsingin kaupungin Linja-autotoiminta Oy, which is the current name of HelB, changed after the business of HelB was sold to Viikin Linja Oy on 15 December 2015.

<sup>(25)</sup> Judgment of 15 June 2000, *Alzetta Mauro*, T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, ECLI:EU:T:2000:151, paragraphs 141 to 147.

<sup>(26)</sup> Judgment of the Court of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, ECLI:EU:C:2003:415.

<sup>(27)</sup> Judgment of the Court of Justice of 7 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209, paragraph 11. See also judgment in *Alzetta Mauro* (footnote 25), ECLI:EU:T:2000:151, paragraph 80.

The aid thus calculated amounts to EUR 20 190 595 (see Annex). The granting date of the aid is: for component (1) the date when the interest was due, i.e. 31 December of each year between 2002 and 2015 and 13 January 2016 (the last day of the loan); for component (2) the date when the loan was waived, i.e. 13 January 2016.

## 9.2. Measure 2 – the 2005 capital loan to HelB

### 9.2.1. State resources and imputability, selectivity, effect on competition and trade between Member States

- (119) The conclusion concerning State resources and imputability (see recital (85)), selectivity (see recital (86)), effect on competition and trade between Member States (see recital (117)) made with respect to Measure 1 applies accordingly to the present measure.

### 9.2.2. Existence of an economic advantage

- (120) Finland claims that the measure was not a new financing but purely a technical change of the 'set-up loan', which had been included in HKL Bussiliikenne's balance sheet for over 10 years, into a capital loan. In Finland's view the change was needed to ensure compliance with the Finnish law (HKL Bussiliikenne's operations under the Finnish Local Government Act were coming to an end, while HelB's operations under the Finnish Limited Liabilities Companies Act were about to start).
- (121) The Commission observes that the terms of the capital loan were much more favourable for HelB than the terms of the liabilities (the 'set-up loan' and the liability of STA) which were converted into that capital loan (see recital (30)). While those liabilities were due regardless of the financial situation of HelB, the capital loan was to be repaid only if HelB generated sufficient profits. This was doubtful, given that HelB's predecessors (HKL Bussiliikenne and STA) had made significant losses for six consecutive years before the measure was granted (1999-2004). In addition, the capital loan was subordinated to all other debts, while the converted liabilities were not. Furthermore, the 'set-up loan' was granted for 25 years, whereas the duration of the capital loan was unlimited. Finally, the interest rate on the capital loan (6 %) was lower than the original interest rate on the 'set-up loan' (9 %).
- (122) Moreover, certain features of the capital loan, such as repayment conditional on the generation of sufficient profits, subordination, unlimited duration, differ to such an extent from a standard loan and resemble so closely to capital, that it is justified to treat it no longer as a loan but as a quasi-equity instrument. The capital loan was even initially reported as equity in the balance sheet of HelB.
- (123) In the past the Commission concluded that significant changes of the original financing must be considered as a new measure. <sup>(28)</sup> Therefore, in view of the above, the capital loan cannot be regarded as a mere 'technical change', as claimed by Finland, but as a new financing arrangement (as compared to the 'set-up loan'), consisting in the conversion of existing liabilities into a quasi-equity instrument.
- (124) As regards the claim that the conversion of the existing liabilities into the capital loan was needed to ensure compliance with the Finnish law, the Commission observes that, while certain features of capital loans are indeed regulated in the Finnish Limited Liabilities Companies Act (e.g. restricted repayment terms, no collateral), the law itself did not oblige the City to convert liabilities into a capital loan at first place, let alone to do it on the agreed terms. It was up to the City to choose an appropriate instrument. For example, the City could have refinanced liabilities on different terms or could have refinanced them on the market. Only once the City decided to convert them into a capital loan, certain features of such loan had to comply with the Finnish law. The City was still free to

<sup>(28)</sup> Commission Decision of 23 January 2018 in Case SA.43127 *Restructuring of the Polish Regional Railways* (OJ C 158, 4.5.2018, p. 10), recitals 65-67.



define other features, not regulated in the law, for example the interest rate. Therefore, the claim is unfounded. In any case, even if the conversion were needed to ensure compliance with domestic law, the terms of such conversion must still comply with State aid rules. In other words, for the purpose of State aid assessment it is not relevant whether the City had to convert liabilities or not under domestic law, but whether it has done so on market terms.

- (125) Consequently, the Commission must assess whether the 2005 capital loan conferred an undue economic advantage on HelB. To this end the Commission must establish whether by deciding to convert the liabilities into the capital loan on the agreed terms the City behaved in a way comparable to that of a private creditor in a similar situation.
- (126) A rational market creditor facing a choice between transferring the existing liabilities without changing their terms and converting them into a capital loan, would have first compared the financial outcome of both scenarios (for example, the net present value of expected future cash flows) and would have chosen the one ensuring a higher expected return.
- (127) The City had not carried out any such comparative analysis to determine which course of action would have been economically more beneficial. Finland explicitly acknowledged that the City had not conducted any *ex ante* business assessment before it granted the capital loan. Therefore the City could not have formed any substantiated expectations whether HelB would generate sufficient funds to repay the capital loan, much less so whether the loan would ensure higher return than the converted liabilities. This is not the way a rational market creditor would have behaved in a similar situation.
- (128) Finland informed the Commission that an investigation had been carried out, on the basis of which it was assessed that operational and economic benefits could be achieved by the merger of HKL Bussiliikenne with STA. In this context Finland refers to the proposal of 1 September 2004 made by the City Board to proceed with the merger. <sup>(29)</sup>
- (129) The Commission has reviewed that proposal and found that it concerns the merger and not the capital loan. In particular, it analyses whether it is better for the City to merge HKL Bussiliikenne with STA or keep them separate and which merger model would be the best solution. The proposal does not even mention the capital loan, let alone analyse its economic rationale or its terms. Therefore, it cannot be considered as a justification for market-conformity of the capital loan.
- (130) In any case, it is apparent that by granting the capital loan (by way of conversion of liabilities) the City weakened its position as a creditor. This is because the terms of repayment of the capital loan were much less beneficial to the City than the terms of repayment of the underlying liabilities (see recital (121)). On the other hand, the City did not gain anything in return. In particular, as the only owner of HelB, the City would have had the same rights to future capital gains, whether it had granted the capital loan (by way of conversion of liabilities) or transferred the underlying liabilities without changing their terms.
- (131) Like in the case of the equipment loan (Measure 1), Measure 2 was carried out without the participation of private operators; therefore its compliance with market conditions cannot be assessed directly.
- (132) Unlike in the case of Measure 1, Finland has provided examples of capital loans granted between 2004 and 2006, for which the interest rate applied ranged between 4,7 % and 7,539 %, claiming that they form a comparable reference group for the capital loan under assessment.
- (133) In this respect the Commission notes that an appropriate benchmark must be sufficiently comparable to the State intervention, in particular in terms of the kind of operator concerned, the market concerned as well as the type of transaction at stake and the situation of the beneficiary undertaking. <sup>(30)</sup>
- (134) As regards the examples provided by Finland, the Commission observes, firstly, that Finland did not clarify whether the reference creditors were of a similar kind as the City, that is to say whether they were parent companies of a group with prior exposure to their debtors both as creditors and shareholders. Secondly, the reference beneficiaries of capital loans operated on different markets than the HelB (e.g. metal production, real estate, building and construction, financial services) and none of them provided bus transport services. This is important because not only individual debtors but also business sectors have their own market-specific risk, which must be adequately reflected in the cost of financing. Thirdly, the reference transactions consisted in granting capital loans to

<sup>(29)</sup> Proposal of the City Board 13/2004 of 1 September 2004.

<sup>(30)</sup> See Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 251.

established companies. By contrast, the transaction under assessment consists in the granting of a capital loan (by way of conversion of liabilities) for a newly-created company, which entails higher risk for the creditor (see recital (107)). Fourthly, the reference creditors may not have been in a comparable financial situation to HelB. This is crucial because the financial standing of the debtor determines its debtor-specific credit risk and, in turn, the interest rate. Taking all these differences into account, the Commission considers that the examples provided by Finland cannot be regarded as comparable market transactions and thus do not constitute an appropriate benchmark.

- (135) Absent transaction-specific market data and appropriate market benchmarks, the Commission considers it justified to assess market-conformity of the 2005 capital loan on the basis of the 1997 Reference Rate Communication, as in the case of the equipment loan.
- (136) Like the equipment loan, the 2005 capital loan was not secured by any collateral. In addition to that, it was subordinated to all other debts. Therefore the conclusion made with respect to the equipment loan in recital (104), namely that it was granted in situation involving a particular risk within the meaning of the 1997 Reference Rate Communication, applies *a fortiori* to the 2005 capital loan.
- (137) In addition, given that in 2005 HelB did not have its own financial track record, a market creditor assessing the risk involved in granting the 2005 capital loan (by way of conversion of liabilities) to HelB would have taken into account the financial situation of its predecessors, HKL Bussiliikenne and STA. In this respect the assessment made in recitals (105)-(106) in relation to the equipment loan applies accordingly to the 2005 capital loan. Moreover, the fact that HelB was a newly-created firm constituted an additional risk for a creditor, since its future financial performance was less predictable compared to a company with its own historical record.
- (138) On the basis of the above, the Commission considers that the 2005 capital loan was granted in a situation involving a particular risk within the meaning of the 1997 Reference Rate Communication. Therefore, in light of the circumstances of the present case, the Commission considers that the floor reference rate should be increased by a premium of at least 400 basis points.
- (139) The Commission has found no evidence and considers it unlikely that any private bank would have agreed to grant the capital loan on the same terms as the City. According to Finland it is no longer possible to establish with reliability the willingness of the banks or financing institutions to grant financing to HelB in 2005. Under the 1997 Reference Rate Communication in cases where no private bank would have agreed to grant the relevant loan the premium of 400 basis points could be further increased. Nevertheless, like in the case of the 2002 equipment loan, in the absence of clear rules on how to quantify such additional premium, for the sake of prudence, the Commission has decided not to further increase the premium of 400 basis points.
- (140) Moreover, not only the premium but also the floor reference rate itself underestimates the risk involved in granting the capital loan (by way of conversion of liabilities). This is because the reference rates are supposed to reflect average rates on standard loans, whereas the measure at hand is not a standard loan but a quasi-equity instrument (see recital (122)), for which, all other factors equal, a market creditor would require a higher interest rate.
- (141) Taking into account the particular risk involved in granting the capital loan (by way of conversion of liabilities), the proxy market rate should amount to at least 8,08 % in January 2005 (when the 'set-up loan' was converted) and at least 7,70 % in April 2006 (when the liability of STA was converted), this being equal to the floor reference rates of 4,08 % and 3,70 %, respectively, increased by the premium of at least 400 basis points. In view of that, the interest rate on the capital loan (6 %) was lower than the proxy market rate established on the basis of the 1997 Reference Rate Communication.
- (142) On the basis of the foregoing assessment, the Commission concludes that the City did not behave as a market creditor as it granted the capital loan (by way of conversion of liabilities) on terms which did not comply with market conditions. Consequently, the 2005 capital loan conferred an undue economic advantage on HelB.

### 9.2.3. Conclusion on the existence of State aid

(143) In the light of the above, the Commission concludes that Measure 2 constitutes State aid within the meaning of Article 107(1) TFEU. The aid amounts to a difference between:

- (1) the interest due calculated on the basis of the market-conform interest rate, that is to say (a) 8,08 % on the 'set-up loan' between 1 January 2005 and 11 December 2015; and (b) 7,70 % on the liability of STA between 18 April 2006 and 11 December 2015 <sup>(31)</sup>; and
- (2) the interest actually paid, that is to say 0.

The aid thus calculated amounts to EUR 20 241 255 (see Annex). The granting date of the aid is the date when the interest would have been due had the loan been granted on market terms, i.e. 31 December of each year between 2005 and 2014 and 11 December 2015 (the day when the 2005 capital loan was converted into equity of HelB). <sup>(32)</sup>

## 9.3. Measure 3 – 2011 capital loan to HelB

### 9.3.1. State resources and imputability, selectivity, effect on competition and trade between Member States

(144) The conclusion concerning State resources and imputability (see recital (85)), selectivity (see recital (86)), effect on competition and trade between Member States (see recital (117)) made with respect to Measure 1 applies accordingly to the present measure.

### 9.3.2. Existence of an economic advantage

(145) As a preliminary remark, the 2011 capital loan was granted on the same terms as the 2005 capital loan, in particular 6 % interest rate, no collateral, repayment conditional on the availability of sufficient profits, subordination to all other debts and unlimited duration. Therefore, like the 2005 capital loan, the 2011 capital loan should be treated as a quasi-equity instrument. Finland itself calls Measure 3 'a capital injection' and acknowledges that it was an equity instrument. Unlike the 2005 capital loan, however, the 2011 capital loan was not a result of the conversion of existing liabilities but a fresh equity investment.

(146) A rational market investor considering making an equity investment would have first conducted an investment appraisal analysis to assess whether the expected rate of return from such an investment is higher than the investor's required rate of return taking into account all relevant risks. A required rate of return in the present case can be defined as a minimum rate of return that a market investor would have sought to generate in order to undertake the investment. Typical methods used in investment appraisal include, for example net present value (NPV) or internal rate of return (IRR). A rational market operator would have undertaken an investment if its IRR was greater than the required rate of return or if its NPV was greater than 0.

(147) The City had not performed any investment appraisal, nor any other type of *ex ante* analysis estimating the financial outcome of the investment before it took a decision to grant HelB the 2011 capital loan. According to Finland, the City monitored and was familiar with the financial situation of HelB before granting the loan. The mere knowledge of the financial situation, however, is not sufficient to justify an investment, even more so when that situation is poor, as in the case of HelB. As it happened, the City simply provided equity without having an informed view whether its investment was likely to yield a required return. This is surely not the way a rational investor would have behaved in a similar situation.

<sup>(31)</sup> The interest due is calculated on the basis of outstanding principal with capitalised interest, as according to the terms of the loan the unpaid interest was to be capitalised (see recital (31)).

<sup>(32)</sup> According to the loan agreement the interest was payable if in a given financial year the company generated sufficient profit. The financial year of HelB coincided with calendar year. Therefore, the Commission considers that if the loan had been granted on market terms (i.e. at market-conform interest rate payable regardless of the financial performance of HelB), the interest would have been due on 31 December of each year throughout the duration of the loan and on 11 December 2015, i.e. the day when the loan was converted into equity of HelB.

- (148) Like in the case of the previous two measures, the 2011 capital loan was granted without participation of private operators, therefore its compliance with market conditions cannot be assessed directly.
- (149) Finland has provided one example of capital loan granted on 4 December 2012 for the amount of EUR 65 million and at the interest rate of the 6-month EURIBOR plus a margin of 4,75 % (i.e. in total 5,092 % at the granting date), claiming that since the interest rate on the 2011 capital loan was higher, this can be regarded as a proof of market-conformity.
- (150) As in the case of the 2005 capital loan, Finland did not clarify whether the reference creditor was of a similar kind as the City, that is to say whether it was a parent company of a group with prior exposure to its debtor both as a creditor and a shareholder. In addition, the reference issuer of the capital loan operated on different market (forestland and plot sales) than the City/HelB. Moreover, the reference transaction was carried out more than 1,5 year after the capital loan under assessment. Finally, the reference creditor may not have been in a comparable financial situation to HelB. Therefore, the Commission considers that the example provided by Finland cannot be regarded as a comparable market transaction and thus does not constitute an appropriate benchmark.
- (151) The Commission has not found any appropriate market benchmarks, either. Given that the transaction-specific market data are not available and that appropriate market benchmarks could not have been identified, the Commission must resort to other assessment methods.
- (152) In case of an equity investment, such as the present measure, the Commission considers that NPV is an appropriate assessment method. NPV equals to the expected future cash flows from the loan discounted at a required rate of return. The expected future cash flows consist of the initial capital outlay (i.e. the loan itself) and subsequent payments to be received on the loan (i.e. repayment of principal and interest) until it is fully amortised. The Commission must therefore assess what amount of payments a prudent and rational market investor could have reasonably expected to receive on the capital loan granted to a company being in the financial situation of HelB in January 2011.
- (153) The Commission examined first the financial situation of HelB in 2010, i.e. the last financial year before the City granted the capital loan. For this year, HelB reported a loss of EUR -3,3 million and a negative equity of EUR -6,6 million. In earlier cases, <sup>(33)</sup> the Commission concluded that, where a company has negative equity, there is an *a priori* assumption that it qualifies as a firm in difficulty under point 10 of the 2004 R&R Guidelines. The General Court has also concluded that a company with negative equity is a company in difficulty. <sup>(34)</sup> Thus on the basis of the 2004 R&R Guidelines before receiving the 2011 capital loan HelB qualified as an undertaking in difficulty (it qualified as such since 2009 onwards <sup>(35)</sup>) which means an undertaking that without intervention by the State would almost certainly be condemned to going out of business in the short or medium term.
- (154) To assess financial perspectives of a company a rational private investor would have looked not only at its current financial situation but also at its past financial record. This is because the current financial situation may be distorted, for example due to the impact of one-off, non-recurring events. Taking into account longer record enables investor to better predict possible future trend. Such an investor would seek to answer the question whether despite poor financial condition of HelB in 2010, there were still reasonable grounds, to expect that the company would improve its performance and generate sufficient profits in the future to repay the capital loan.
- (155) Looking at historical financial statements of HelB, an investor would have noted that the company had never reported any profits from the beginning of its operations in 2005. The loss made in 2010 was therefore not an exception resulting from possible impact of one-off events or temporary deterioration of market environment, but part of the long-term trend marked by six consecutive years of heavy loss-making. As of 31 December 2010, the

<sup>(33)</sup> Commission Decision 2008/716/EC of 2 April 2008 on State aid C 38/07 (ex NN 45/07) implemented by France for *Arbel Fauvet Rail SA* (OJ L 238, 5.9.2008, p. 27) replaced by Commission Decision (EU) 2015/1321 of 23 June 2010 on State aid C 38/2007 (ex NN 45/2007) implemented by France for *Arbel Fauvet Rail SA* (OJ L 203, 31.7.2015, p. 31).

<sup>(34)</sup> Judgement of the General Court of 3 March 2010, Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen and Others v Commission*, ECLI:EU:T:2010:62, paragraph 106.

<sup>(35)</sup> As it turned out later, HelB recorded increasing negative equity: EUR -3,3 million in 2009, EUR -6,6 million in 2010, EUR -12,7 million in 2011, EUR -14,6 million in 2012, EUR -15,9 million in 2013 and EUR -22,9 million in 2014.

accumulated losses of HelB stood at EUR -16,5 million (down from EUR -0,1 million in 2005). There cannot be any doubt that a rational investor would have seen it as a serious warning that the company was structurally loss-making and not likely to generate profits. Such expectation would have been even more justified upon examination of the financial records of HelB's predecessors, HKL Bussiliikenne and STA. As it happened, these companies had not made any profits either, at least since 1999. This means that the year 2010 was not the sixth but in fact the 12th consecutive year in which HelB or its predecessors generated losses.

- (156) Suppose a rational investor, aware of such bad financial situation and track record of HelB, would have nevertheless found it worth considering whether a new capital loan could turn the company profitable. Finland seems to suggest that this might have been rationally expected, especially taking into account that HelB implemented the profitability-improving measures in the period 2008-2010 (see recital (61)).
- (157) In this respect the Commission observes that before taking the investment decision in question, such an investor would have already known the actual financial outcome of these profitability-improving measures. At the end of 2010, the last year of their implementation, HelB reported a loss of EUR -3,3 million. By way of comparison, in the period 2005-2007, i.e. during three years preceding the implementation of these measures, HelB reported an average annual loss of EUR -2,5. That means that after implementation of the profitability-improving measures HelB not only did not turn profitable, but generated even higher loss than before. It is worth noting, with a benefit of hindsight, that one year later, despite having received the 2011 capital loan, the loss of HelB further increased, to EUR -6,1 million.
- (158) A rational investor would have also examined whether its potential investment target company was repaying other debts. It would have been reassuring to find that HelB met its obligations. A rational investor would not have gained comfort, however, by learning that HelB had not repaid anything of the 2005 capital loan. The outstanding balance of this loan at the end of 2010 (with accrued interest) stood at EUR 21,6 million. The Commission recalls that according to Finland at the time when the 2005 capital loan was granted HelB had satisfactory creditworthiness and improving profitability prospects. If a company in allegedly good financial situation had not repaid anything of the 2005 capital loan, a rational investor would not have expected to receive more from an undertaking in a much worse financial condition, such as HelB in 2011.
- (159) The Commission does not share Finland's opinion that the non-repayment of the 2005 capital loan cannot be regarded as a significant factor in determining market-conformity of the 2011 capital loan. Finland claims it on the grounds that the Finnish law includes specific provisions on capital loans. The reasons why the alleged need to ensure compliance with the Finnish law cannot be considered as a factor in determining market-conformity, as set out in recital (124) with respect to the 2005 capital loan, apply *mutatis mutandis* to the 2011 capital loan. In addition, any rational investor considering granting a capital loan would have taken it as a significant decision-making criterion whether its potential debtor had been repaying similar loans in the past or not.
- (160) As regards the question what cash flows a rational investor would have expected to generate from the 2011 capital loan, it is worth recalling that the loan was repayable only if and to the extent that HelB generated sufficient profits. The Commission will therefore look at what profits a rational investor would have expected HelB to generate from 2011 onwards.
- (161) On the basis of analysis made in recitals (153)-(157), the Commission considers that a rational investor with a normal risk profile would not have expected HelB to generate any profits and consequently to receive any payments on the 2011 capital loan. The actual financial results of HelB also confirm this analysis, as HelB continued to generate losses and never repaid anything of the 2011 capital loan. Ultimately, the City converted the loan to equity, which – given that HelB ceased operations – effectively meant its write-off.
- (162) Even if HelB had generated some profits, it could not have used them all to repay the 2011 capital loan. HelB would have had first to cover the balance of its accumulated losses and capital loans (EUR -0,6 million as of 31 December 2010) and then, if any surplus were still remaining, use almost 80 % of it to repay the 2005 capital loan. This is because the capital loans were repayable on a pro rata basis and the 2005 capital loan (including accrued interest) accounted for roughly 80 % of the total balance of both capital loans (i.e. the 2005 and 2011 loans). In other words, in order to repay the 2011 capital loan of EUR 5,8 million, HelB would have had to make profit of at least

EUR 28 million, as it would also have had to cover the capital deficit of EUR -0,6 million and repay the 2005 capital loan (EUR 21,6 million with accrued interest at the end of 2010). In addition, HelB would have had to repay any interest accrued on the 2011 capital loan. By way of comparison, during the six financial years of its operations until 2010, HelB made a total net loss of EUR -16,3 million.

- (163) As stated in recital (161), the expected future repayments from the 2011 capital loan, from the perspective of a rational investor, would have been nil. Thus the NPV of this investment, being equal to the sum of the initial capital outlay (i.e. the loan itself) and subsequent payments, amounts to EUR -5,8 million. Even assuming that HelB would have made some profits, it would certainly not have been enough to repay the whole loan (see recital (162)). In such case the NPV of the investment would have still been negative. Given that the decisional rule in the NPV analysis is (i) invest if NPV is greater than zero; and (ii) do not invest if NPV is negative, the Commission concludes that a rational investor would not have granted the capital loan to HelB in January 2011.
- (164) Finland argues that the 2011 capital loan should not be assessed by comparison to a loan provided by a hypothetical new investor but rather as a capital injection made by a long-term group owner into the fully-owned subsidiary to safeguard its capital.
- (165) Indeed, prior economic exposure of the City to HelB as a shareholder (and creditor) should be taken into consideration when examining whether the capital loan in question is in line with market conditions. <sup>(36)</sup> Such prior exposure may be considered in the framework of counterfactual scenarios, for instance, by comparing the expected return on the investment concerned with the expected return in the counterfactual scenario. Such counterfactual scenarios may include, for example, sale of the company, asset disposal, liquidation, restructuring or raising private capital. In the event that any of these alternative scenarios provides higher expected gains or lower expected losses than the chosen one, a market owner would have gone for that option.
- (166) The City did not compare the return on the 2011 capital loan with the return in any alternative scenario. Moreover, Finland does not argue that the loan would have provided the City with the highest return. Thus, the City took the investment decision in question without verifying whether it will be more beneficial than other available options. Whatever the case, this is not the way a rational investor with prior exposure would have behaved.
- (167) Absent any comparison from the City, the Commission has conducted its own assessment. First of all, the Commission observes that a shareholder owning 100 % of the shares of a company may have indeed different interests than an investor without prior exposure; however, even such a shareholder would not have financed its subsidiary indefinitely, but would have sooner or later required a return on its investment.
- (168) By the time the City granted the 2011 capital loan, HelB and its predecessors had not returned any profit for at least 12 consecutive years and there were no realistic prospects of profitability going forward (see recital (155)). Moreover, although the City had previously invested at least EUR 30,8 million in the form of the 'set-up loan' and the equipment loan, it saw its capital depleted each year. By 2010 the City's accumulated capital losses on investment in HelB and its predecessors reached EUR -21,7 million. <sup>(37)</sup> It is doubtful that any rational shareholder would have continued to finance its subsidiary in such circumstances.
- (169) In quantitative terms, the return on the 2011 capital loan that a rational market investor would have reasonably expected was EUR -5,8 million (see recital (163)). However, this is not the only element that a shareholder (especially a shareholder owning 100 % of the shares of a company) would have taken into account. He would have also considered the expected future capital gains/losses. In this respect the Commission notes that if HelB kept depleting its capital at an average rate recorded between 2005 and 2010, the City would have lost further at least EUR -2,7 million of its capital each year after the investment. The City actually lost much more, on average EUR -4,1 million of capital per year in the period 2011-2014.

<sup>(36)</sup> See Judgment of the Court of Justice of 3 April 2014, *ING Groep NV*, C-224/12 P, ECLI:EU:C:2014:213, paragraphs 29 to 37.

<sup>(37)</sup> Net assets of HKL Bussiliikenne decreased from EUR 9 million in 1999 to EUR 3,6 million in 2004 and net assets of HelB decreased from EUR 9,7 million in 2005 to EUR -6,6 million in 2010.

- (170) The Commission will now consider an alternative scenario of sale of HelB. In such case the City would have incurred the costs of the sale process, which are normally negligible. It would have also lost the 2005 capital loan. This loan, however, was unlikely to be repaid anyway and was actually never repaid (see recital (158)). The City would have also lost the equipment loan, the outstanding balance of which at the end of 2010 was EUR 13,1 million and of which HelB was repaying EUR 0,6 million per year. It was not reasonable to expect that the equipment loan would be fully repaid (HelB had actually repaid only EUR 2,4 million before the City wrote the loan off). Nevertheless, even in the unlikely event that HelB kept repaying this loan, any related proceeds would have been more than counterbalanced by the probable capital losses (see the previous recital). In sum the incremental costs of the sale scenario as compared to the actual one can be safely assumed to be 0.
- (171) On the other hand, in this scenario the City would have received proceeds from a sale. The Commission does not have precise appraisal of the value of HelB in January 2011. However, for the purpose of the assessment, it is not necessary to establish the precise sale value. It is sufficient to demonstrate that the expected proceeds from a sale would be higher than the return in the baseline scenario, that is to say EUR -5,8 million (see recital (163)).
- (172) In September 2015, Inspira Oy, an expert hired by the City, assessed the value of HelB at between EUR 11,6 million and EUR 25,6 million (depending on the valuation method used). In December 2015, the City sold HelB for EUR 24,2 million. The Commission notes that net assets of HelB, which reflect the value of the company, were by EUR 16,3 million lower in December 2014 than in December 2010. Also the financial perspectives of HelB deteriorated, as the company reported a loss of EUR -7 million in 2014 (down from the previous year) and a loss of EUR -3,3 million in 2010 (up from the year before). Given that, it can be assumed that the value of HelB at the time when the 2011 capital loan was granted was higher than when the company was sold. Whatever the case, it is beyond any reasonable doubt that the City could have expected to generate at least some proceeds from the sale of HelB in January 2011. This is sufficient to conclude that the expected return was higher in the scenario of sale than in the actual scenario of granting the loan. Consequently, the 2011 capital loan was not market-conform even taking into account prior economic exposure of the City.
- (173) Without prejudice to the conclusion reached in the previous recital, even if the 2011 capital loan had been the best option for the City to pursue (*quod non*), it would have still not been market-conform on the grounds that it was not granted on market terms. This is because under the 2008 Reference Rate Communication,<sup>(38)</sup> which entered into force on 1 July 2008 and therefore it is applicable to the 2011 capital loan, the proxy market interest rate for a standard loan granted in January 2011 to a company in financial difficulties (rating CCC and below), such as HelB, with no collateral was 11,49 % (base rate of 1,49 % plus a margin of 1 000 basis points). Thus it was much higher than the actually applied interest rate of 6 %. In fact the proxy rate should be even higher to account for the additional risk connected with the quasi-equity character of the capital loan.
- (174) Finland submitted a study prepared by an expert who evaluated market conformity of subordinated loans granted to HelB. The study covers the 2011 and 2012 capital loans. The expert found that the 6 % interest rate charged on these loans can be considered to be market-based. The Commission observes, however, that the study is dated 8 June 2015, i.e. it was prepared long after the City had taken a decision to grant the loans in question. In line with consolidated jurisprudence of the Court, compliance with market conditions must be examined on an *ex ante* basis, having regard to the information available at the time the intervention was decided upon.<sup>(39)</sup> The study was prepared *ex post*, therefore it cannot be accepted as legitimate evidence of market-conformity.
- (175) Nevertheless, the Commission has examined the study and considers that it cannot be accepted as evidence of market conformity for the following reasons. Firstly, it estimates HelB's rating over a three-year period 2010-2012 and thus does not accurately capture the financial standing of the company at the exact time when the loans were granted. Secondly, it compares the loans under assessment with a sample of subordinated market loans. The reference group is, however, skewed towards the higher-rating debtors and therefore underestimates the median market interest rate.<sup>(40)</sup> In any case, the interest rate on the capital loans for HelB is still lower than this

<sup>(38)</sup> See footnote 23.

<sup>(39)</sup> Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 83, 84 and 85 and 105; Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraphs 71 and 72; Judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 76; Judgment of the General Court of 25 June 2015, *Servizi assicurativi del commercio estero SpA (SACE) and Sace BT SpA v Commission*, T-305/13, ECLI:EU:T:2015:435, paragraph 183, confirmed by the judgment of the Court of Justice of 23 November 2017, C-472/15 P, ECLI:EU:C:2017:885, paragraphs 108 and 109.

<sup>(40)</sup> In particular, the sample includes eight BB-/Ba3 (i.e. higher) rated loans and only two CCC+/Caa1 (i.e. lower) rated loans, which decreases the median interest rate of the reference group.

underestimated median interest rate (6,9 %), with no justification. Finally, the interest rate on the capital loans is lower than the median coupon rates for the bonds issued in 2011 and 2012, whereas bonds typically have a higher seniority than subordinated loans and therefore are less risky. In conclusion, apart from the fact the study was made *ex post*, which is per se sufficient to reject it as legitimate evidence, it does not appropriately estimate the market-conform rate for the capital loans.

- (176) On the basis of the foregoing assessment, the Commission concludes that the 2011 capital loan conferred an undue economic advantage on HelB.
- (177) The Commission concluded in recital (163) that a rational investor would not have granted the capital loan to HelB in January 2011. In other words HelB would not have obtained such a loan on the market on any terms. This is because, no matter the interest rate charged, the NPV of an investment consisting in granting such a loan would have always been negative. HelB could not have been reasonably expected to generate sufficient profits to repay such a loan, given its difficult financial condition. The General Court ruled that in circumstances where the borrower is in a delicate financial situation characterised notably by decreasing turnover, negative equity, and inability to reimburse loans from its own funds, the economic advantage embedded on a loan may equal the total amount of the funds borrowed <sup>(41)</sup>. In view of that the economic advantage of the 2011 capital loan is equal to the total amount of the loan.

#### 9.3.3. *Conclusion on the existence of State aid*

- (178) In the light of the above, the Commission considers that Measure 3 constitutes State aid within the meaning of Article 107(1) TFEU. The aid amounts to the full amount of the loan, that is to say EUR 5,8 million. The granting date of the aid is the date of granting the loan, that is to say 31 January 2011.

#### 9.4. **Measure 4 – 2012 capital loan to HelB**

##### 9.4.1. *State resources and imputability, selectivity, effect on competition and trade between Member States*

- (179) The conclusion concerning State resources and imputability (see recital (85)), selectivity (see recital (86)), effect on competition and trade between Member States (see recital (117)) made with respect to Measure 1 applies accordingly to the present measure.

##### 9.4.2. *Existence of an economic advantage*

- (180) To begin with, Finland claims that since the 2012 capital loan was granted after the complaint was lodged in October 2011, the City Executive Board required this loan to be provided on market terms. On this basis Finland claims that the loan does not involve aid. This claim has not been substantiated by any evidence or reasoned justification. It is also not confirmed by the Commission's assessment (see below). Therefore it must be rejected.
- (181) The 2012 capital loan was granted on the same terms as the 2011 capital loan. In particular, it bore interest rate of 6 %, was not secured by any collateral, its repayment was conditional on the availability of sufficient profits, it was subordinated to all other debts and had unlimited duration. Finland confirmed that the general terms of the 2012 capital loan were the same as those of the 2011 capital loan.
- (182) Before granting the 2012 capital loan to HelB, the City had not performed any investment appraisal or any other equivalent assessment of the expected financial outcome of the investment.
- (183) The 2012 capital loan was granted without participation of private operators and, therefore its compliance with market conditions cannot be assessed directly. Finland has not provided any comparable market transactions (see recitals (149)-(150)) and the Commission has not found any appropriate market benchmarks. Therefore, like in the case of the 2011 capital loan, the Commission must resort to the other assessment method, namely the NPV analysis.

<sup>(41)</sup> Case T-423/14, *Larko Geniki Metalleftiki kai Metallourgiki AE v Commission*, ECLI:EU:T:2018:57, paragraph 193 and case-law cited.



- (184) The financial situation of HelB at the time of granting the 2012 capital loan was even worse than when the company received the 2011 capital loan. At the end of 2011, HelB reported a loss of EUR -6,1 million (down from EUR -3,3 million in 2010) and a negative equity of EUR -12,7 million (down from EUR -6,6 million in 2010). The company qualified as an undertaking in difficulty within the meaning of the 2004 R&R Guidelines. Similarly, the financial perspectives of HelB in May 2012, were even worse than in January 2011, when the previous capital loan was granted. This is because its accumulated losses further increased due to the loss recorded in 2011, which thus became the 13th consecutive year in which HelB or its predecessors generated losses.
- (185) Since the financial situation and financial perspectives of HelB have further deteriorated, the conclusion made in recital (161) with respect to the 2011 capital loan applies *a fortiori* to the 2012 capital loan. That is to say a rational investor with a normal risk profile would not have expected HelB to generate any profits and consequently to receive any payments on the 2012 capital loan. This was confirmed by subsequent events as HelB never repaid anything of the 2012 capital loan and the City ultimately converted it into equity, which – given that HelB ceased operations – effectively meant its write-off.
- (186) Moreover, in May 2012 the City had still not received any payments on the 2005 capital loan and, in addition, it had not received any payments on the 2011 capital loan. The outstanding balance of these loans at the end of 2011 (with accrued interest) amounted to EUR 28,4 million (i.e. EUR 6,8 million more than at the end of 2010). Consequently, in order to repay the 2012 capital loan, HelB would have had to make profits of at least EUR 37,3 million, first to cover the capital deficit <sup>(42)</sup> (EUR -0,9 million at the end of 2011), then to repay the 2005 and 2011 capital loans (EUR 28,4 million with accrued interest at the end of 2011) on a pro rata basis together with the EUR 8 million 2012 capital loan. Thus future profits necessary to repay the 2012 capital loan were by EUR 9,3 million higher than in the case of the 2011 capital loan (see (162)).
- (187) Given that the expected future repayments from the 2012 capital loan equalled nil, the NPV of this investment, being equal to the sum of the initial capital outlay (i.e. the loan itself) and subsequent payments, amounts to EUR -8 million. Even if HelB had made some profits, it would certainly not have been enough to repay the whole loan (see recital (186)). In such case the NPV of the investment would have still been negative. On this basis, taking into account the decisional rule in the NPV analysis (see recital (163)), the Commission concludes that a rational investor would not have granted the capital loan to HelB in May 2012.
- (188) Concerning Finalnd's argument that the 2012 capital loan was a justified shareholder financing measure performed to ensure the liquidity of the fully-owned subsidiary, the assessment made in recitals (165)-(172) with respect to the 2011 capital loan applies, *mutatis mutandis*, to the 2012 capital loan, as further explained below.
- (189) By the time the City granted the 2012 capital loan, HelB and its predecessors had not made any profit for at least 13 consecutive years and there were no realistic prospects of profitability going forward (see recital (184)). Moreover, although the City had previously invested at least EUR 36,6 million in the form of the 'set-up loan', the equipment loan and the 2011 capital loan, it saw its capital continuously depleted. By 2011 the City's accumulated capital losses on investment in HelB and its predecessors reached EUR -27,8 million. <sup>(43)</sup> It is doubtful that any reasonable shareholder would have continued to finance its subsidiary in such circumstances.
- (190) In quantitative terms, the return on the 2012 capital loan that a rational market investor would have reasonably expected was EUR -8 million (see recital (187)). However, this is not the only element that a shareholder (especially a shareholder owning 100 % of the shares of a company) would have taken into account. He would have also considered the expected future capital gains/losses. In this respect the Commission notes that if HelB kept depleting its capital at an average rate recorded between 2005 and 2011, the City would have lost further at least EUR -3,2 million of its capital each year after the investment. The City actually lost even more, on average EUR -3,4 million of capital per year in the period 2012-2014.
- (191) Like in the case of the 2011 capital loan, the Commission will now consider an alternative scenario of sale of HelB. In such case the City would have incurred the costs of the sale process, which are normally negligible. It would have also lost the 2005 and 2011 capital loans. These loans, however, were unlikely to be repaid anyway and were actually never repaid (see recitals (158) and (161)). The City would have also lost the equipment loan, the outstanding balance of which at the end of 2011 was EUR 12,5 million and of which HelB was repaying EUR 0,6 million per year. It was not reasonable to expect that the equipment loan would be fully repaid (HelB had

<sup>(42)</sup> The sum of accumulated losses and capital loans.

<sup>(43)</sup> Net assets of HKL Bussiliikenne decreased from EUR 9 million in 1999 to EUR 3,6 million in 2004 and net assets of HelB decreased from EUR 9,7 million in 2005 to EUR -12,7 million in 2011.

actually repaid only EUR 1,8 million before the City wrote the loan off). Nevertheless, even in the unlikely event that HelB kept repaying this loan, any related proceeds would have been more than counterbalanced by the probable capital losses (see the previous recital). In sum the incremental costs of the sale scenario as compared to the actual one can be safely assumed to be 0.

- (192) On the other hand, in this scenario the City would have received proceeds from sale. The Commission does not have precise appraisal of the value of HelB in May 2012. However, for the purpose of the assessment, it is not necessary to establish the precise sale value. It is sufficient to demonstrate that the expected proceeds from sale would be higher than the return in the baseline scenario, that is to say EUR -8 million (see recital (187)).
- (193) As mentioned in recital (172), in September 2015, the value of HelB was assessed at between EUR 11,6 million and EUR 25,6 million and, in December 2015, the City sold HelB for EUR 24,2 million. The Commission notes that net assets of HelB, which reflect the value of the company, were by EUR 10,2 million lower in December 2014 than in December 2011. Also the financial perspectives of HelB deteriorated, as the company reported a loss of EUR -7 million in 2014 (down by EUR 7,1 million from the previous year) and a loss of EUR -6,1 million in 2010 (down by EUR 3,3 million from the year before). Given that, it can be assumed that the value of HelB at the time when the 2012 capital loan was granted was higher than when the company was sold. Whatever the case, it is beyond any reasonable doubt that the City could have expected to generate at least some proceeds from the sale of HelB in May 2012. This is sufficient to conclude that the expected return was higher in the scenario of sale than in the actual scenario of granting the loan. Consequently, the 2012 capital loan was not market-conform even taking into account prior economic exposure of the City.
- (194) Without prejudice to the conclusion reached in the previous recital, even if the 2012 capital loan had been the best option for the City to pursue (*quod non*), it would have still not been market-conform on the grounds that it was not granted on market terms. This is because under the 2008 Reference Rate Communication, <sup>(44)</sup> which entered into force on 1 July 2008 and therefore it is applicable to the 2012 capital loan, the proxy market interest rate for a standard loan granted in May 2012 to a company in financial difficulties (rating CCC and below), such as HelB, with no collateral was 11,67 % (base rate of 1,67 % plus a margin of 1 000 basis points). Thus it was much higher than the actually applied interest rate of 6 %. In fact the proxy rate should be even higher to account for the additional risk connected with the quasi-equity character of the capital loan.
- (195) As assessed in recitals (174)-(175), the study submitted by Finland concerning the 2011 and 2012 capital loans cannot be accepted as legitimate evidence of their market-conformity.
- (196) On the basis of the foregoing, the Commission concludes that the 2012 capital loan conferred an undue economic advantage on HelB. The aid amounts to the full amount of the loan, for the same reasons as explained in recital (177).

#### 9.4.3. Conclusion on the existence of State aid

- (197) In the light of the above, the Commission considers that Measure 4 constitutes State aid within the meaning of Article 107(1) TFEU. The aid amounts to the full amount of the loan, that is to say EUR 8 million. The granting date of the aid is the date of granting the loan, that is to say 23 May 2012.

#### 9.5. Overall conclusion on the existence of aid

- (198) In the light of the assessment made in recitals (78)-(197) the Commission concludes that Measures 1, 2, 3, 4 (equipment loan and capital loans) constitute State aid within the meaning of Article 107(1) TFEU, which amounts to a total of EUR 54 231 850.

### 10. COMPATIBILITY OF THE AID

- (199) To the extent that Measures 1, 2, 3 and 4 constitute State aid within the meaning of Article 107(1) TFEU, the Commission must assess whether that aid can be declared compatible with the internal market.

<sup>(44)</sup> See footnote 23.

- (200) According to case-law, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met. <sup>(45)</sup> However, Finland considers that the measures concerned do not constitute State aid and have therefore not provided any grounds for compatibility.
- (201) The Commission has nevertheless assessed compatibility of the aid.
- (202) Since HelB and its predecessors operate in the field of public passenger transport, the Commission first examined whether Regulation (EEC) No 1191/69 and Regulation (EC) No 1370/2007 <sup>(46)</sup> could have been applicable to the present case. Regulation (EEC) No 1191/69 laid down the rules applicable to public service obligations in the field of land transport prior to the entry into force of Regulation (EC) No 1370/2007 on public passenger transport services by rail and road. Regulation (EC) No 1370/2007 lays down the conditions under which compensation payments stipulated in contracts and concessions for public passenger transport services shall be deemed compatible with the internal market and exempt from prior State aid notification. The Commission observes that the 2002 equipment loan and the 2005, 2011 and 2012 capital loans constitute debt financing measures which were granted to HelB and in no way constitute compensation for discharge of public service obligations. Therefore, the measures under assessment fall outside the scope of application of such Regulations.
- (203) The Commission has then assessed whether Article 93 TFEU is a suitable basis for compatibility. Article 93 TFEU contains rules for the compatibility of State aid in the area of coordination of transport and public service obligations in the field of transport and constitutes a *lex specialis* with respect to Articles 106(2) and 107(3) TFEU. The Court of Justice has ruled that this Article ‘*acknowledges that aid to transport is compatible with the internal market only in well-defined cases which do not jeopardise the general interests of the [Union]*’. <sup>(47)</sup>
- (204) The Commission observes that for aid to be compatible it must meet the needs of coordination of transport. For a given measure to be considered to meet the needs of transport coordination, it has to be necessary and proportionate to the intended objective. In its constant decisional practice, the Commission considered that aid for the coordination of transport is compatible with the internal market on the basis of Article 93 if the following cumulative conditions are met: (i) the aid contributes to an objective of common interest; (ii) the aid is necessary and has an incentive effect; (iii) the aid is proportionate; (iv) the aid or the aided activity is open to all users on a non-discriminatory basis. Thus, first of all aid must be necessary to achieve an objective of common interest, and it must have an incentive effect, i.e. the aid must change the behaviour of the beneficiary in such a way that it engages in additional activity, which it would not carry out without the aid or that it would carry out in a restricted or different manner, so that the objective of common interest would not be achieved. The Commission considers that the 2002 equipment loan and the 2005, 2011 and 2012 capital loans did not have any incentive effect, since those measures did not change the behaviour of HelB (neither that of its predecessor) in such a way that it engaged in additional activity that it would have not carried out without the aid. Given that the conditions outlined above are cumulative, this is sufficient to conclude that the measures under assessment cannot be declared compatible under Article 93 TFEU.
- (205) The Commission has also assessed whether the exceptions laid down in Article 107(2) and (3) TFEU could be used to assess the compatibility of the aid. The Commission considers that the exceptions laid down in Article 107(2) TFEU (aid granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences, aid granted to the economy of certain areas affected by the division of Germany) are clearly not applicable. The same conclusion applies to the exceptions provided for in Article 107(3), points (d) and (e), TFEU (aid to promote culture and heritage conservation and aid specified by decision of the Council). Likewise, the exception relating to the development of certain areas or of certain sectors laid down in Article 107(3)(a) TFEU is not applicable.

<sup>(45)</sup> Judgment of the Court of Justice of 28 April 1993, *Italy v Commission*, C-364/90, ECLI:EU:C:1993:157, paragraph 20.

<sup>(46)</sup> Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1); Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

<sup>(47)</sup> See judgment of the Court of Justice of 12 October 1978, in *Commission v Belgium*, 156/77, ECLI:EU:C:1978:180, paragraph 10.

- (206) The Commission has also assessed whether any of the measures at stake could be compatible on the basis of Article 107(3)(b) TFEU under the crisis rules enshrined in the Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis. <sup>(48)</sup> First of all, the Commission observes that the aid under assessment does not appear to have been granted in order to support access to finance in the context of financial and economic crisis. Finland does not argue that HelB could not attract financing due to the effects of financial and economic crisis. In any event, the Temporary Framework was applicable between 17 December 2008 and 31 December 2011. It applied to the *de minimis* aid and to aid in the form of guarantees and subsidised interest rate, aid for the production of green products and to risk capital measures. As regards the loans, only the 2011 capital loan was granted within the period of applicability of the Temporary Framework. However, from 1 January 2011 subsidised loans to firms in difficulty were excluded from the scope of application of the Temporary Framework. At the time when HelB received the 2011 capital loan, it qualified as an undertaking in difficulty (see recital (153)). In view of the above, the Commission considers that the Temporary Framework is not applicable to the aid under assessment.
- (207) Article 107(3)(c) TFEU provides that State aid can be authorised where it is granted to promote the development of certain economic sectors and where this aid does not adversely affect trading conditions to an extent contrary to the common interest. In application thereof, the Commission has set out the criteria it will follow in assessing rescue and restructuring aid in the 1999 R&R Guidelines <sup>(49)</sup> and 2004 R&R Guidelines <sup>(50)</sup> (applicable to the measures under assessment). The assessment of the compatibility with the internal market must therefore involve the examination whether the conditions laid down in these Guidelines are met. Given the financial situation of HKL Bussiliikenne, STA and HelB and the nature of the measures concerned (meant to ensure economic viability of the beneficiary), the Commission considers it appropriate to assess the present aid on the basis of the applicable R&R Guidelines.
- (208) According to both 1999 R&R Guidelines and the 2004 R&R Guidelines only firms in difficulty are eligible for rescue and restructuring aid. As established in recital (105), with reference to the 2002 equipment loan, HKL Bussiliikenne was not an undertaking in difficulty under the 1999 R&R Guidelines at the moment the aid was granted. Similarly, HelB was not an undertaking in difficulty under the 2004 R&R Guidelines at the moment that the 2005 capital loan was granted as it was just established and did not have any financial record prior to 2005. In addition, under point 12 of the 2004 R&R Guidelines, a newly created firm is not eligible for rescue or restructuring aid even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets. A firm will in principle be considered as newly created for the first three years following the start of operations in the relevant field of activity. Only after that period will it become eligible for rescue or restructuring aid, provided that: (a) it qualifies as a firm in difficulty within the meaning of the R&R Guidelines; and (b) it does not form part of a larger business group, except under specific conditions laid down in the R&R Guidelines. Therefore, HelB was not eligible for rescue and restructuring aid for the period 2005-2007, i.e. the first three years of HelB's operations. As regards the 2011 and 2012 capital loans, HelB qualified as a firm in difficulty under point 10 of the 2004 R&R Guidelines at least since 2009 (see recital (153)) and was eligible for rescue or restructuring aid in that period.
- (209) However, the Commission notes that the conditions for rescue aid laid down in Section 3.1 of the 1999 and 2004 R&R Guidelines are not met for any of the measures under assessment. With the exception of the 2002 equipment loan, the measures concerned did not consist of liquidity support in the form of loan guarantees or loans. Notably, the capital loans were not standard bank loans but quasi-equity instruments. In addition, all measures under assessment did not come to an end within a period of not more than six months after the disbursement of the first

<sup>(48)</sup> Communication from the Commission – Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 16, 22.1.2009, p. 1), as amended on 25 February 2009 (OJ C 83, 7.4.2009, p. 1), 28 October 2009 (OJ C 261, 31.10.2009, p. 2) and 8 December 2009 (OJ C 303, 15.12.2009, p. 6). The Temporary Framework, originally applicable until the end of 2010, was subsequently prolonged and finally expired on 31 December 2011 (OJ C 6, 11.1.2011, p. 5).

<sup>(49)</sup> See footnote 12.

<sup>(50)</sup> See footnote 9.

instalment to the firm and they were not provided on the grounds of serious social difficulties. Finally, they were not accompanied by a commitment by Finland to communicate to the Commission a restructuring plan or a liquidation plan, as required in point 25(c) of the 2004 R&R Guidelines and point 23(d) of the 1999 R&R Guidelines.

- (210) The Commission observes that Finland did not notify to the Commission any of the measures concerned as restructuring aid, as defined in Section 3.2 of the 1999 and 2004 R&R Guidelines. According to both the 1999 and 2004 R&R Guidelines, the grant of restructuring aid is conditional on the implementation of a restructuring plan which must be endorsed by the Commission in all cases of individual aid. Finland did not submit any restructuring plan. It also failed to demonstrate that any of the necessary compatibility conditions for such aid have been fulfilled (restoration of long-term viability, compensatory measures, own contribution, etc.). Therefore the Commission concludes that the aid does not comply with the compatibility conditions of the 1999 and 2004 R&R Guidelines.

#### *Conclusion on the compatibility of the aid*

- (211) Consequently, the Commission concludes that the State aid established in recital (198) is not compatible with the internal market.

### 11. ECONOMIC CONTINUITY

- (212) According to the Treaty and established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market.<sup>(51)</sup> The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation.
- (213) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of incompatible aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market and the situation prior to the payment of the aid has been restored.<sup>(52)</sup>
- (214) In addition, according to the case law,<sup>(53)</sup> the recovery obligation may be extended to a new company, to which the company in question has transferred or sold part of its assets, where that transfer or sale structure will trigger the conclusion that there is economic continuity between the two companies.
- (215) As stated in recitals (45) to (49), after the opening of the formal procedure, the business of HelB was sold to a private bus operator Viikin Linja Oy (part of KAG), which then changed its name to 'Helsingin Bussiliikenne', thus becoming the new HelB.
- (216) Therefore, in order to determine from which company to recover incompatible aid granted to HelB, the Commission has to assess whether there is economic continuity between the old HelB (now Helsingin kaupungin Linja-autotoiminta Oy) and the new HelB (part of KAG). If economic continuity between the two companies is established, the aid insofar it has not been recovered from the old HelB has to be recovered from the new HelB (part of KAG).

<sup>(51)</sup> See Judgment of the Court of Justice of 12 July 1973, *Commission v Germany*, 70/72, ECLI:EU:C:1973:87, paragraph 13.

<sup>(52)</sup> See Judgment of the Court of Justice of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

<sup>(53)</sup> Judgment of the General Court of 28 March 2012, *Ryanair v Commission*; T-123/09, ECLI:EU:T:2012:164, paragraph 155.

- (217) According to the Multimedia case-law <sup>(54)</sup> and the Commission practice <sup>(55)</sup>, the assessment of economic continuity between the aid beneficiary and the undertaking to which its assets were transferred is established based on a set of indicators. The following factors may be taken into consideration: (i) the subject matter of the transfer (assets and liabilities, maintenance of workforce, bundle of assets); (ii) the transfer price; (iii) the identity of the shareholders or owners of the acquiring undertaking and the original undertaking; (iv) the moment of the sale (after initiation of the investigation, the opening of the formal investigation procedure or the final decision); (v) the economic logic of the operation. <sup>(56)</sup>
- (218) In view of the sale of the old HelB's business to the new HelB the Commission will thus analyse, on the basis of the above listed criteria, whether there is an economic continuity between the old HelB (now Helsingin kaupungin Linja-autotoiminta Oy) and the new HelB (part of KAG), which acquired the business of the old HelB.

### 11.1. The scope of the transaction

- (219) The Commission recalls that in order to avoid economic continuity, the assets and other elements of the business transferred need to represent only a part of the previous company or its activities. The larger the part of the original business that is transferred to a new entity, the higher the likelihood that the economic activity related to these assets continues benefitting from the incompatible aid. <sup>(57)</sup>
- (220) Although Finland claims that the transaction was an 'asset deal', the terms of the transaction indicate in reality that the business of HelB has been sold as a going concern. As indicated in recitals (47)-(48), the scope of the transaction included all the assets needed for business operations (including the instalment debt on HelB's newly procured bus fleet), all 918 employees <sup>(58)</sup>, the brand name 'Helsingin Bussiliikenne Oy' and all contracts and associated liabilities (including the contracts for transport services and for the sublease of the Depot facilities, but excluding the 2002 equipment loan and 2005, 2011 and 2012 capital loans).
- (221) Moreover, Article 2.2 of the sales agreement between HelB and Viikin Linja Oy dated 14 December 2015 expressly mentions that the business of HelB is transferred according to this agreement as a going concern, whereas Article 2.3 of that sales agreement states that the sale includes all assets and all contracts and liabilities needed for the continuation of the business of HelB.
- (222) Therefore, as regards the scope of the transaction, the new HelB has effectively taken over all economic activities of the old HelB, together with all related assets, rights and obligations. Therefore, the new HelB simply continues with the economic activities of the old HelB with essentially the same scope compared to the situation before the transaction.
- (223) Furthermore, the Commission notes that the sale of HelB's business did not involve HelB's outstanding liabilities arising out of the 2002 equipment loan and 2005, 2011 and 2012 capital loans, which amounted to ca. EUR 54 million (with accrued interest) <sup>(59)</sup>.

<sup>(54)</sup> Judgment of the Court of Justice of 8 May 2003, *Italy and SIM 2 Multimedia v Commission*, Joined Cases C-328/99 and C-399/00, ECLI:EU:C:2003:252

<sup>(55)</sup> Commission Decision of 17 September 2008 in cases N 321/2008, N 322/2008 and N 323/2008 implemented by Greece – *Vente de certains actifs d'Olympic Airlines/Olympic Airways Services* (OJ C 18, 23.1.2010, p. 9); Commission Decision of 12 November 2008 in Case N 510/2008 implemented by Italy – *Sale of assets of Alitalia* (OJ C 46, 25.2.2009, p. 6); Commission Decision of 4 April 2012 in SA.34547 implemented by France – *Reprise de actifs du groupe SERNAM dans le cadre de son redressement judiciaire* (OJ C 305, 10.10.2012, p. 10).

<sup>(56)</sup> This set of indicators was first confirmed by the General Court in its judgment of 28 March 2012, *Ryanair v Commission* (Judgment of the General Court of 28 March 2012, *Ryanair v Commission*, T-123/09, ECLI:EU:T:2012:164, point (155), which upheld the Alitalia decision.

<sup>(57)</sup> Commission Decision (EU) 2015/1826 of 15 October 2014 on the State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ (OJ L 269, 15.10.2015, p. 71), paragraph 149.

<sup>(58)</sup> The employees were not made redundant and then rehired by the new HelB, instead their employment contracts were simply transferred to the new HelB in accordance with clause 2.6 of the sale deed.

<sup>(59)</sup> The City exempted the old HelB from the obligation to repay the 2002 equipment loan on 13 January 2016 and the capital loans were converted into capital of the old HelB on 11 December 2015, i.e. a few days before the sale of its business.

- (224) Moreover, Finland expressly admitted that the old HelB had no assets except for the amounts in the escrow account and the amounts potentially receivable under the earn-out mechanism of the sales deed (see recital (46)), and that in case the recovery amount were greater than the escrow sum and amounts receivable under the earn-out mechanism, that would in practice lead to insolvency proceedings of the old HelB.
- (225) The Commission considers that such plan to leave the old HelB as an 'empty shell' with liabilities amounting to ca. EUR 54 million, exceeding the sale price more than twice, and with no assets to cover these liabilities clearly shows the attempt to circumvent the recovery obligation by Finland and indicates economic continuity between the old HelB and the new HelB.

#### 11.2. The transfer price

- (226) As stated in recital (45) HelB's business was sold without a tender, which generally indicates that the sale price does not represent the market price.
- (227) According to the Finnish authorities, several domestic and foreign public transport operators were contacted <sup>(60)</sup> as regards the sale of HelB's business, and the only bid came from private bus operator Viikin Linja Oy, which offered EUR 24 210 193 (see recital (46)).
- (228) However, a simple distribution of a legally non-binding investment memorandum to potential buyers pre-selected by the seller itself cannot be equalled to a competitive tender procedure initiated by public announcement. When the addressees of such an invitation to submit an offer are chosen unofficially, there remains a high probability that certain potential buyers willing to pay a higher price would not be contacted. Furthermore, carrying out the sale via a competitive tender procedure ensures objectivity and transparency of the process, which may easily be compromised in a subjective 'survey' style procedure, as organised by the City of Helsinki.
- (229) The Finnish authorities further argue that the price received for the sale of HelB's business was a market price based on an *ex ante* evaluation <sup>(61)</sup> ordered by the City from an independent company, Inspira Oy. Inspira Oy used three different valuation methods, namely (i) the discounted cash flows method showing the market value of HelB to be in a range of EUR 11,6-17,6 million; (ii) the comparable transactions multiples method, which gives an estimate of EUR 22,1 million (based on the EBITDA of HelB in 2014) <sup>(62)</sup> or EUR 23,2 million (based on the EBITDA of HelB in 2015) <sup>(63)</sup>; and (iii) the fair value of assets method, which estimates the market value of HelB's business to be EUR 25,6 million.
- (230) Finland also claims that even disregarding the amount blocked on an escrow account and the earn-out mechanism (see recital (46)), the sale price was closer to the higher end of the valuation range.
- (231) The Commission has reviewed the valuation and found that it contains flaws which distort the estimated market value of the business of HelB. The Commission notes that Inspira Oy itself describes the valuation as a 'rough estimate to determine the level of the selling price'.
- (232) With regard to the first method used (the discounted cash flows), the valuator considered two scenarios. The first scenario, based on management forecasts, assumes a stable growth of 2 % for a residual period and arrives at an enterprise value of EUR 17,6 million. The second scenario, based on the current contracts only, assumes that after 2022 the company will not generate any cash flows and thus arrives at an enterprise value of EUR 11,6 million.
- (233) The Commission considers that the assumption underlying the second scenario, namely that the company will not generate any cash flows after 2022, might have been overly pessimistic. Given that the buyer would not have taken over the equipment and the capital loans (ca. EUR 54 million including accrued interest), one should not reasonably rule out that some positive cash flows might be generated in the longer term. This is without prejudice to the assessment of the capital loans in the present decision, which was made on the assumption that the loans remain in the balance sheet of HelB. Consequently, in that case cash flows would be available to an investor only after the loans were repaid.

<sup>(60)</sup> Finland claims that the investment memorandum on HelB's business was distributed to 9 companies, including the complainants.

<sup>(61)</sup> Project Viima, explanatory memorandum on the selling price 21.9.2015, submitted as Annex IX25 of the 23.6.2016 reply by Finland.

<sup>(62)</sup> EUR 19,6 million if the multiples of listed companies are used.

<sup>(63)</sup> EUR 20,6 million if the multiples of listed companies are used.

- (234) Furthermore, the Commission notes that in both scenarios the weighted average cost of capital (WACC) of HelB used as a discount rate was 7,3 %. As is evident from the valuation, that rate was established by adding an illiquidity premium of 5 % to the cost of equity component of the WACC. While the illiquidity premium is indeed used in company valuations, Finland has not substantiated why the level of 5 % should be considered justified. On the contrary, Finland acknowledged that it was completely discretionary. <sup>(64)</sup> This may have additionally distorted the estimated market value.
- (235) With regard to the second method used (the comparable transactions multiples method), the valuation uses the EBITDA of the old HelB for the years 2014 and 2015 in the calculations and disregards the fact that HelB was being sold.
- (236) The Commission considers that for the purpose of company valuation, it is the expected EBITDA of HelB and not the historical EBITDA that should have been taken into account. If the expected EBITDA used under the first valuation method had been taken into account, all other factors constant, the company's market value would have increased from EUR 22,1-23,2 million to ca. EUR 36 million.
- (237) With regard to the third method (fair value of assets), the Commission observes that the book value of buses (accounting for ca. 95 % of HelB's total fixed assets) <sup>(65)</sup> on 31 August 2015 was EUR 42,6 million. Out of this EUR 42,6 million, ca. EUR 32,7 million related to the buses procured before 2015 and ca. EUR 9,9 million related to the new EURO 6 class buses procured in 2015. The valuation also took into account additional EUR 3,4 million related to the buses to be procured in the autumn of 2015.
- (238) The fair value of the older buses was calculated on the basis of discount factor of 50 % on their net book value (i.e. after depreciation). The 50 % rate is arbitrary and explained by poor secondary market for bus fleet in Finland and the age of buses concerned (on average 7,3 years). The fair value of the new buses (including buses to be procured in the autumn of 2015) was calculated on the basis of the discount factor of 30 % applied to their net book value.
- (239) The Commission considers that a 30 % discount applied to the book value of the new buses, which were less than one year old, could be too high, which is even more evident with respect to the buses still to be procured. The Commission also considers that a 50 % discount on the older buses appears to be too high as well, given that their book value already takes into account depreciation. By way of comparison, if a 10 % discount factor had been applied to the new buses and a 30 % discount factor to the older buses, the estimated value of the company would have increased from EUR 25,6 million to ca. EUR 35 million.
- (240) In addition, the sale transaction documents provided for a full indemnification of the new HelB by the old HelB from any State aid recovery claims (see recital (46)). From an economic perspective such indemnification reduces business risk for the buyer as it effectively constitutes insurance against contingent liability. As such, it gives the buyer additional benefit and thus should be accounted for in the sale price. Yet, the valuation by Inspira Oy does not take the indemnification into account in determining the sale price.
- (241) For the reasons stated in recitals (231) to (240), the Commission considers that the valuation submitted by Finland does not accurately reflect the market value of HelB. This, combined with the absence of the open, transparent, non-discriminatory and non-conditional tender, leads the Commission to conclude that the price paid by the buyer for HelB's business does not accurately reflect the market price.

### 11.3. The identity of the owners

- (242) The Commission notes that the city of Helsinki sold the business of HelB to the private bus operator Viikin Linja Oy, which is not in any way connected to the City.

<sup>(64)</sup> Submission by Finland of 13 January 2017.

<sup>(65)</sup> Submission by Finland of 13 January 2017.



- (243) Therefore, in the absence of any evidence to the contrary, the Commission concludes that there are no links between the original and new owners of HelB business transferred to Viikin Linja Oy.

#### 11.4. Timing of the transaction

- (244) The Commission observes that the transaction must not be carried out so as to avoid recovery of the State aid, which would result in a circumvention of a future negative decision from the Commission. <sup>(66)</sup>
- (245) The sale of HelB's business was initiated in April 2015, i.e. almost immediately after the Commission had opened the formal investigation procedure and informed Finland about the Opening Decision.
- (246) Therefore, the State of Finland as well as the City of Helsinki were well aware of a possibility that the measures in question could constitute illegal and incompatible aid which would need to be recovered.
- (247) In addition, the Commission investigation in this State aid case is even mentioned as one of the motives for the sale, <sup>(67)</sup> with cash paid into an escrow account as collateral in case the Commission issues a negative decision with recovery extending to the new HelB.
- (248) Therefore, the Commission considers that the timing of the sale of HelB's business and the above mentioned circumstances clearly show that the sale of the business of HelB was construed so as to avoid the consequences of a potential negative decision by the Commission.

#### 11.5. Economic logic of the transaction

- (249) When the Commission assesses the criterion of the economic logic of the transaction it verifies whether the acquirer of the assets uses them in the same way as the seller or whether, on the contrary, it integrates the assets in its own commercial strategy and thus realises synergies justifying its interest in acquiring these assets. <sup>(68)</sup>
- (250) In the case at hand, the acquisition by the buyer involved all the assets needed for the continuation of business of the old HelB as a going concern together with all the employees of the old HelB and related rights and obligations (except for the 2002 equipment loan, and 2005, 2011 and 2012 capital loans). Furthermore, it is explicitly stated in the sale agreement that the sale was carried out as a going concern.
- (251) As mentioned in recitals (23) and (25), Viikin Linja Oy was a competitor of Nobina AB and acted in the same market as the old HelB. After the buyer, Viikin Linja Oy, purchased the business of the old HelB, it changed its name into HelB and became the new HelB, which is part of KAG. This indicates that the business of the old HelB was set to continue with no major differences under the new HelB, with the same buses on the same routes and even of the same colour. <sup>(69)</sup>
- (252) Consequently, the Commission considers that the new HelB simply continues the business of the old HelB and uses old HelB's assets in the same way as the old HelB.

#### 11.6. Conclusion on economic continuity between the old HelB and the new HelB.

- (253) The Commission therefore concludes that the only change brought by the sale of HelB's business concerns the legal entity to which the new HelB belongs. The business of the old HelB was sold after the Commission opened the formal investigation procedure, and it was sold as a going concern, with all employees, assets and contracts being transferred to the new HelB. Further, the new HelB continues with the business of the old HelB and uses old HelB's assets the same way as the old HelB.

<sup>(66)</sup> Commission Decision (EU) 2015/1587 of 7 May 2015 on the State aid SA.35546 (2013/C) (ex 2012/NN) implemented by Portugal for Estaleiros Navais de Viana do Castelo S.A. (OJ L 250, 25.9.2015, p. 208), paragraph 165 and Commission Decision 2011/97/EC of 14 September 2005 – State aid measure, C 11/04 (ex NN 4/03) – Olympic Airways – Restructuring and privatisation (OJ L 45, 18.2.2011, p. 1), paragraphs 178-183.

<sup>(67)</sup> Project Viima, explanatory memorandum on the selling price 21.9.2015.

<sup>(68)</sup> Commission Decision (EU) 2015/1826 of 15 October 2014 on the State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ (OJ L 269, 15.10.2015, p. 71), paragraph 163.

<sup>(69)</sup> <http://svenska.yle.fi/artikel/2015/10/21/helsingforsfullmaktige-godkande-forsaljning-av-bussbolag>, last visited on 12.10.2017

- (254) Moreover, the Commission concludes that the sale of HelB was organised to circumvent the recovery obligation by leaving the 2002 equipment loan, and 2005, 2011 and 2012 capital loans in an ‘empty shell’ of the old HelB with no assets to cover those loans.
- (255) Finally, the price paid for the HelB’s business does not accurately reflect a market price due to the sale not having been organised via the tender procedure and flaws in the valuation presented by Finland. Even if the sale price of the business of HelB corresponded to the market price (*quod non*), that alone would not be sufficient to rule out economic continuity since the market price is just one of the factors to be taken into account (see recital (217)), whereas other indicators clearly point to the presence of economic continuity between the old and the new HelB.
- (256) In the light of the above, the Commission is of the view that there is economic continuity between the old HelB, which currently goes under the name of Helsingin kaupungin Linja-autotoiminta Oy (see recital (47)) and the new HelB.
- (257) As a consequence of the above, the Commission is of the view that the advantage granted by Finland to old HelB constitutes unlawful and incompatible State aid, and that the recovery of this incompatible State aid granted to old HelB is to be extended to the new owner of the business – the new HelB. Indeed, with its continuous operational presence in the market, the new HelB continues to benefit from the State aid that old HelB’s economic activities received and thus continues to distort the market.

## 12. RECOVERY

- (258) According to the Treaty on the Functioning of the European Union and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market. <sup>(70)</sup> The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation. <sup>(71)</sup>
- (259) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored. <sup>(72)</sup>
- (260) In line with the case-law, Article 16(1) of Council Regulation (EU) 2015/1589 <sup>(73)</sup> states that ‘where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.’
- (261) Thus, given that the measures in question were implemented in breach of Article 108(3) TFEU, and are to be considered as unlawful and incompatible aid, they shall be recovered in order to re-establish the situation that existed on the internal market prior to their granting. Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiary until effective recovery. The amount to be recovered shall bear interest until effective recovery.

### 12.1. Measure 1 – 2002 equipment loan

- (262) The aid to be recovered is equal to the sum of:
- (1) the difference between (a) the interest due calculated on the basis of the market-conform interest rate of the 12-month EURIBOR plus a margin of 400 basis points (between 24 May 2002 and 23 May 2012) and 1 000 basis points (between 24 May 2012 and 13 January 2016); and (b) the interest paid calculated on the basis of the actual interest rate of the 12-month EURIBOR plus a margin of 5 basis points; and
  - (2) the outstanding principal of the loan not repaid in the amount of EUR 10,7 million.

<sup>(70)</sup> Judgment of 12 July 1973, *Commission v Germany*, C-70/72, ECLI:EU:C:1973:87, paragraph 13.

<sup>(71)</sup> Judgment of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraph 66.

<sup>(72)</sup> Judgment of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

<sup>(73)</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

- (263) The aid thus calculated amounts to EUR 20 190 595 (see Annex). The granting date of the aid is: for component (1) the date when the interest was due, i.e. 31 December of each year between 2002 and 2015 and 13 January 2016 (the last day of the loan); for component (2) the date when the loan was waived, i.e. 13 January 2016.

#### 12.2. Measure 2 – 2005 capital loan

- (264) The aid to be recovered amounts to a difference between:

- (1) the interest due calculated on the basis of the market-conform interest rate, that is to say (a) 8,08 % on the 'set-up loan' between 1 January 2005 and 11 December 2015; and (b) 7,70 % on the liability of STA between 18 April 2006 and 11 December 2015; and
- (2) the interest actually paid, that is to say 0.

- (265) The aid thus calculated amounts to EUR 20 241 255 (see Annex). The granting date of the aid is the date when the interest would have been due had the loan been granted on market terms, i.e. 31 December of each year between 2005 and 2014 and 11 December 2015 (the day when the 2005 capital loan was converted into equity of HelB)

#### 12.3. Measure 3 – 2011 capital loan

- (266) The aid to be recovered amounts to the full amount of the loan, which is EUR 5,8 million. The granting date of the aid is the date of granting the loan, that is 31 January 2011.

#### 12.4. Measure 4 – 2012 capital loan

- (267) The aid to be recovered amounts to the full amount of the loan, which is EUR 8 million. The granting date of the aid is the date of granting the loan, that is 23 May 2012.

#### 12.5. Economic continuity

- (268) In view of the economic continuity between old HelB (now Helsingin kaupungin Linja-autotoiminta Oy) and new HelB (full name – Helsingin Bussiliikenne Oy, previously – Viikin Linja Oy), the obligation to repay the whole amount of aid, listed in Sections 12.1 to 12.4 above, shall be extended to the new HelB (full name – Helsingin Bussiliikenne Oy).

#### 12.6. Full indemnity clause

- (269) The Commission observes that the provisions in the old HelB sales agreement and escrow account agreement which fully indemnify the new HelB from any State aid recovery claims (recital (46)) fall outside of the scope of the Opening Decision, and, thus, were not assessed by the Commission in the present decision. However, the Commission recalls that it is settled case-law that such clauses may be qualified as separate State aid measures *per se*, and the exercise of similar indemnity clauses may be qualified as a circumvention of the recovery of unlawful and incompatible State aid.
- (270) Therefore, the Commission wishes to emphasise, that in case these full indemnity provisions are honoured in part or in full at any point in time after this Decision, the Commission may have to investigate not only whether the exercise of these indemnity provisions constitute circumvention of the recovery of unlawful and incompatible State aid as found by the present Decision, but also whether such clauses constitute separate State aid measures *per se*.

### 13. CONCLUSION

- (271) The Commission finds that Finland has unlawfully implemented the aid under Measures 1, 2, 3 and 4, in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (272) The Commission concludes that the aid under Measures 1, 2, 3 and 4 is incompatible with the internal market and must be recovered from the new HelB (full name – Helsingin Bussiliikenne Oy), together with recovery interest,

HAS ADOPTED THIS DECISION:

*Article 1*

The State aid amounting to EUR 54 231 850 unlawfully granted by Finland under aid Measures 1, 2, 3 and 4, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Helsingin Bussiliikenne Oy is incompatible with the internal market.

*Article 2*

1. Finland shall recover the aid referred to in Article 1 from the beneficiary.
2. In view of the economic continuity between old HelB (now Helsingin kaupungin Linja-autotoiminta Oy) and new HelB (full name – Helsingin Bussiliikenne Oy, previously – Viikin Linja Oy), the obligation to repay the aid shall be extended to the new HelB (full name – Helsingin Bussiliikenne Oy).
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and with Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

*Article 3*

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Finland shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

*Article 4*

1. Within two months following notification of this Decision, Finland shall submit the following information to the Commission:
  - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
  - (b) a detailed description of the measures already taken and planned to comply with this Decision;
  - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Finland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

*Article 5*

This Decision is addressed to the Republic of Finland.

The Commission may publish the amounts of aid and recovery interest recovered in application of this decision, without prejudice to Article 30 of Regulation (EU) 2015/1589.

Done at Brussels, 28 June 2019.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

---

## ANNEX

## Calculation of aid amount in Measures 1 and 2

Measure 1 (the 2002 equipment loan)			
	Principal outstanding	Interest rate difference	Aid amount
24.5.2002	13 000 000	3,95%	136 933
31.8.2002	14 000 000	3,95%	44 547
30.9.2002	14 500 000	3,95%	143 188
31.12.2003	14 500 000	3,95%	572 750
31.12.2004	14 500 000	3,95%	572 750
31.12.2005	14 500 000	3,95%	572 750
31.12.2006	14 500 000	3,95%	572 750
31.12.2007	14 500 000	3,95%	572 750
31.12.2008	14 300 000	3,95%	564 850
31.12.2009	13 700 000	3,95%	541 150
31.12.2010	13 100 000	3,95%	517 450
31.12.2011	12 500 000	3,95%	493 750
23.5.2012	11 900 000	3,95%	185 409
24.5.2012	11 900 000	9.95%	710 430
31.12.2013	11 300 000	9.95%	1 124 350
31.12.2014	10 700 000	9.95%	1 064 650
31.12.2015	10 700 000	9.95%	1 064 650
13.1.2006	10 700 000	9.95%	35 488
Aid in interest			9 490 595
Aid in waived principal			10 700 000
<b>Total aid</b>			<b>20 190 595</b>

Measure 2 (the 2005 capital loan)			
	Principal outstanding (with capitalised interest)	Interest rate difference	Aid amount
(i) the 'set-up' loan			
31.12.2005	12 255 223,50	8.08%	990 222
31.12.2006	13 245 445,56	8,08%	1 070 232
31.12.2007	14 315 677,56	8,08%	1 156 707
31.12.2008	15 472 384,31	8,08%	1 250 169
31.12.2009	16 722 552,96	8,08%	1 351 182
31.12.2010	18 073 735,24	8,08%	1 460 358
31.12.2011	19 534 093,05	8,08%	1 578 355

<b>Measure 2 (the 2005 capital loan)</b>			
	Principal outstanding (with capitalised interest)	Interest rate difference	Aid amount
31.12.2012	21 112 447,76	8,08%	1 705 886
31.12.2013	22 818 333,54	8,08%	1 843 721
31.12.2014	24 662 054,89	8,08%	1 992 694
11.12.2015	26 654 748,93	8,08%	2 034 054
Sub-total the 'set-up' loan			16 433 579
<b>(ii) the STA liability</b>			
18.4.2006	3 638 476,87	7,70%	196 114
2007	3 834 590,77	7,70%	295 263
2008	4 129 854,26	7,70%	317 999
2009	4 447 853,04	7,70%	342 485
2010	4 790 337,73	7,70%	368 856
2011	5 159 193,73	7,70%	397 258
2012	5 556 451,65	7,70%	427 847
2013	5 984 298,42	7,70%	460 791
2014	6 445 089,40	7,70%	496 272
11.12.2015	6 941 361,29	7,70%	504 791
Sub-total the STA liability			3 807 676
<b>Total aid</b>			<b>20 241 255</b>