

**DRAFT LETTER TO BE ADDRESSED TO THE MINISTER OF FOREIGN
AFFAIRS OF THE MEMBER STATE**

(decisions to initiate the formal investigation procedure)

EUROPEAN COMMISSION



Brussels, 25.01.2012

C (2012) 173 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>	<p>PUBLIC VERSION WORKING LANGUAGE This document is made available for information purposes only.</p>
--	--

Subject: State aid SA.26500 No 2012/C (ex 2011/NN CP 227/2008)– Germany

Aéroport d'Altenburg Nobitz - aides en faveur de Ryanair (plainte BDF - Association Fédérale de compagnies aériennes allemandes)

Sir,

The Commission wishes to inform the Federal Republic of Germany that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108 (2) of the Treaty on the Functioning of the European Union (hereinafter: “TFEU”).

1. Procedure

- (1) On 27.08.2008 the Commission received a complaint by BDF – Bundesverband der Deutschen Fluggesellschaften e.V. (Federal association of German airlines) alleging illegal state aid to Altenburg-Nobitz GmbH and Ryanair plc. The complaint was registered under state aid number CP 227/2008.
- (2) The complaint alleges that illegal state aid was granted to the owner and operator of Altenburg-Nobitz airport, the Flugplatz Altenburg-Nobitz GmbH, for infrastructure and operation of the airport. In addition, it alleges illegal state aid to Ryanair granted by Flugplatz Altenburg-Nobitz GmbH in the form of reduced airport charges and marketing fees.
- (3) The Commission requested additional information from the German authorities on 9 August 2010. German authorities provided the information requested on 30 September 2010.

- (4) On 8 April 2011 the Commission requested additional information from Air Berlin and Ryanair. Air Berlin provided the information requested on 10 May 2011. Ryanair provided the information requested on 20 June 2011. A translated confidential version of these comments and annexes was sent to the German authorities on 11 August 2011. The German authorities declared by e-mail of 28 September 2011 that they are not planning to comment at the current stage.

2. Detailed description of the measure

1.1. Geographic situation of AOC

- (5) The formerly named Altenburg-Nobitz airport, now Leipzig-Altenburg airport (hereinafter AOC), is located in the southern part of the Land Thüringen, Germany. AOC is located at around 85 km from Leipzig-Halle airport (travelling time by car around 1h 10 min.), around 113 km from Dresden airport (travelling time by car around 1 h 16 min.) and around 140 km from Erfurt airport (travelling time by car around 1 h 37 min.). The distance to Hof-Plauen airport is 122 km (travelling time by car around 1 h 37 min.)

1.2. Development of the airport

- (6) In 1992, the owner and operator of AOC, "Flugplatz Altenburg-Nobitz GmbH"¹ was incorporated. According to the articles of incorporation the objective of the company is to improve the economic-related infrastructure in order to strengthen economic power of Eastern Thuringia and Western Saxony. The company is responsible for the construction and operation of the airfield AOC. AOC is a former Russian military airfield abandoned in 1991.
- (7) In 1995 the operation as a civil airfield was approved and construction works were carried out thereafter. 19 702 passengers were reached in 1995². In 1996 a first charter flight was offered during the summer months³. Since then, flights from AOC to several European destinations were offered.
- (8) On 3 March 2003 the operator of AOC, Flughafen Altenburg-Nobitz GmbH, concluded an agreement with Ryanair Ltd. (hereinafter Ryanair) for air services and a duration of 10 years. The daily scheduled service to London-Stansted was to start on 1 May 2003.
- (9) The agreement between Ryanair and AOC stipulates that AOC must provide a runway with a defined length and distances by 31.12.2003 and an extended runway by 31.05.2004. AOC therefore had to extend the runway by 180

¹ Also named "Flughafen Altenburg-Nobitz GmbH". Names will be used interchangeably since the information provided sometimes refers to "Flughafen" or "Flugplatz".

² Bericht über die bei der Flugplatz Altenburg-Nobitz GmbH durchgeführte Prüfung des Jahresabschlusses zum 31. Dezember 1995, Anlage IV.

³ Bericht über die bei der Flugplatz Altenburg-Nobitz GmbH durchgeführte Prüfung des Jahresabschlusses zum 31. Dezember 1996, Lagebericht.

metres⁴. AOC had to establish further measures according to the Ryanair contract which will be described further below.

- (10) During certain periods Ryanair seems to have been the only airline serving AOC. In the peak years Ryanair offered up to four destinations from AOC. The route to Girona was cancelled in October 2010 due to a commercial dispute with Girona airport and the foreseen introduction of EUR 8 German air transport tax. The route to Edinburgh was cancelled in October 2009 and the route to Alicante was cancelled in October 2010 as both routes were not a commercial success. The route to London Stansted was affected by an increase of the UK Air Passenger Duty from 5 pounds to 12 pounds, the quadrupling of oil prices and the introduction of the EUR 8 German air transport tax, which made the route unviable.
- (11) Ryanair ceased its services at AOC on 31 March 2011. Since then there were no other airlines operating scheduled flights from AOC. According to the AOC website there are currently no scheduled flights.

1.3. Passenger numbers at AOC

- (12) The German authorities provided passenger numbers at AOC by year:

Year	Passengers
2001	26.602
2002	25.802
2003	70.146
2004	92.931
2005	117.809
2006	105.477
2007	139.216
2008	138.342
2009	140.765

- (13) According to German authorities there were no Ryanair flights from 17.12.2004 until 11.01.2005. In 2006 all flight operations were interrupted for two weeks due to construction works.

1.4. Granting authority

- (14) The financing of AOC stems from the Land Thuringia and the shareholders of "Flugplatz Altenburg-Nobitz GmbH". The company has currently the following shareholders: Landkreis Altenburger Land (60 %), Gemeinde Nobitz (5 %), THÜSAC Personennahverkehrsgesellschaft mbH (3 %), Stadt Meerane (2 %), Own shares (eigene Anteile) (30%)⁵. All the shareholders are public, the company itself holds 30% of its shares.

⁴ Flugplatz Altenburg-Nobitz GmbH, Jahresabschluss zum 31. Dezember 2002, Lagebericht 2002, S.3; c.f. "obligation of AOC", agreement between Ryanair Ltd. and Flughafen Altenburg-Nobitz GmbH of 3 March 2003.

⁵ http://altenburgerland.de/sixcms/detail.php?id=16666&_nav_id1=4865&_nav_id2=15018&_lang=de

- (15) The company is organised in a *Privatrechtsform*, as a limited liability company.

1.5. Beneficiaries and measures

- (16) Beneficiary is the AOC airport owner and operator "Flugplatz Altenburg-Nobitz GmbH".
- (17) Beneficiary could be also Ryanair, having operated air transport services from AOC.

1.5.1. Alleged infrastructure aid for AOC

- (18) According to the information provided by the German authorities the overall investment costs for the period 2000-2009 reached EUR 4.513 million. The infrastructure financing came directly from the Land Thüringen. German authorities claim that the Land did not grant any loans or guarantees nor did it grant operating aid, except in 2009 when the Land paid EUR 270 000 for costs of air traffic control. Some infrastructure measures concern allegedly aviation safety.
- (19) The following table provides an overview of the payments regarding infrastructure and investments made between 2000-2009, among which are the extension of the runway in 2003/2004 with EUR 500 000 and the construction of a new terminal in 2009 with EUR 702 500:

HH-Jahr	Verwendungszweck	Zuwendungsbetrag in €	Gesamt [EUR]
2000	Wetter - Anschaffung Zentralrechner, Zusatzausrüstung etc. Technische Abnahme Peilanlage RT 1000C Wasserversorgung (Anschluss, Umbau)	13.914,40 3.589,88 10.204,82	<u>27.709,10</u>
HH-Jahr	Verwendungszweck	Zuwendungsbetrag in €	Gesamt [EUR]
2001	Sanierung der Start- und Landebahn und Teile des Rollfeldes Anschaffung eines Air Starter	72.652,33 34.494,72	<u>107.147,05</u>
HH-Jahr	Verwendungszweck	Zuwendungsbetrag in €	Gesamt [EUR]
2002	Einfriedung Flugplatzgelände (Restleistung) Planungskosten - P.Ig. Verlegung Bahnende 22 u. Schwelle 22	26.144,06 46.182,86	<u>72.326,92</u>

HH-Jahr	Verwendungszweck	Zuwendungsbetrag in €	Gesamt [EUR]	
2003/2004	Verlegung des Bahnendes 22, Sanierungsmaßnahmen an der Start- und Landebahn (1. Auszahlung 2003, 2. Auszahlung 2004)	314.550,38	<u>314.550,38</u>	2003/2004 <u>500.000,00</u> €
2004	Verlegung des Bahnendes 22, Sanierungsmaßnahmen an der Start- und Landebahn (2. Auszahlung 2004)	185.449,62	<u>185.449,62</u>	
HH-Jahr	Verwendungszweck	Zuwendungsbetrag in €	Gesamt [EUR]	
2006	Flugplatzleuchtfeuer, Anschaffung einer Software, Anschaffung von 5 Funkalarmempfängern, Einbau Rettungstor, Anbau Terminal, Kauf von 27 Biometrietranspondern, Kabelerweiterung Wetterstation	28.787,42		2006/2007 <u>839.404,95€</u>
2006/2007	Anschaffung eines Feuerlöschfahrzeuges 1. Teilbetrag 2006	193.525,84	<u>222.313,26</u>	
2007	Anschaffung eines Feuerlöschfahrzeuges 2. Teilbetrag 2007 Anschaffung eines Kehrblasgerätes	387.051,69 230.040,00	<u>617.091,69</u>	
HH-Jahr	Verwendungszweck	Zuwendungsbetrag in €	Gesamt [EUR]	
2008	Uni-Mäher Sicherheitsüberwachungsnetz Erwerb von Grundstücken Sanierung Start- und Landebahn - Sicherheitsausbau	5.514,00 11.430,33 77.809,00 1.827.460,00	<u>1.922.213,33</u>	
HH-Jahr	Verwendungszweck	Zuwendungsbetrag in €	Gesamt [EUR]	
2009	Markierungsarbeiten auf dem Vorfeld Terminalumbau/Terminalneubau Start- und Landebahnreparatur vor Schwelle 04	5.497,66 702.500,00 336.853,00	<u>1.044.850,66</u>	

Total: EUR **4.513.652,01**

- (20) The amount of payments for 2010 is not stated but the terminal was only opened in 2010⁶. The Commission invites the German authorities to provide an overview of the investments made in the years 2010 and 2011.
- (21) As stated above in paragraph (9), the extension of the runway and the provision of service areas for rental car companies was an obligation of AOC under the agreement between the airport and Ryanair. The fact is also mentioned in the annual financial reports of Flugplatz Altenburg-Nobitz GmbH for the years 2002 and 2003, which state that it became necessary to extend the runway in order to have Ryanair operating from the airport. The financial report for 2004 states that the starting and landing distances at the runway have been extended and allow the operation of a B 737-800 aircraft. According to the agreement between AOC and Ryanair, Ryanair used B 737-300 or other B 737 variant aircraft at AOC. The aircraft used by other operators are not known.
- (22) In the agreement of 3 March 2003 concluded between Flughafen Altenburg-Nobitz GmbH and Ryanair the following is stipulated under heading three called "Obligation of AOC": "for the term of this Agreement, AOC shall:

a. provide a runway as follows by 31.12.2003:

RWY	TORA	TODA	ASDA	LDA
04	1795m	1795m	2095m	1975m
22	1975m	1975m	2185m	1885m

By 31.05.2004 AOC will provide a runway as follows

(50m)

RWY	TORA	TODA	ASDA	LDA
04	1935m	2235m	2235m	1975m
22	1975m	2235m	2235m	1935m

b. provide airport terminal, public relations and marketing functions for the Services as more particularly set out in Annex A attached hereto;

c. provide the handling and related services functions for the Services as more particularly set out in Annex B attached hereto;

⁶ www.nachrichten.lvz-online.de: "Aus für Linienflüge ab Altenburg – Ryanair zieht sich komplett zurück".

d. ensure the operation of a bus service at common local fares between Altenburg-Nobitz Airport and Leipzig-Bahnhof and between Altenburg-Nobitz Airport and Dresden-Bahnhof to connect with the scheduled arrival and departure time of the Services; AOC assumes no responsibility for the punctuality of such bus services or for any circumstances beyond AOC's direct control;

e. operate a reservations facility as set out in the Appendix to Annex B attached."

1.5.2. Alleged operating aid to AOC

- (23) In the period 2000-2009 the Flugplatz Altenburg-Nobitz GmbH accrued annual losses from the operation of AOC. According to German authorities the shareholders have annually provided the following capital contributions to Flugplatz Altenburg-Nobitz GmbH, a total of EUR 7.04 million, to cover the losses:

2000	150 000-250 000 [...] ⁷ - EUR
2001	150 000-250 000 [...] [*] - EUR
2002	150 000-250 000 [...] [*] - EUR
2003	250 000-350 000 [...] [*] - - EUR
2004	450 000-550 000 [...] [*] - - EUR
2005	650 000-750 000 [...] [*] - - EUR
2006	850 000-1 000 000 [...] [*] - - EUR
2007	1 000 000 -1 300 000 [...] [*] - - EUR
2008	1 000 000 -1 200 000 [...] [*] - - EUR
2009	1 000 000 -1 200 000 [...] [*] - - EUR

- (24) The financial report of Flugplatz Altenburg-Nobitz GmbH for the year 2002, which was provided by the complainant, states that the existence of the company would be in danger without capital contributions of the shareholders and that further shareholder contributions are needed. In several other financial reports (years 2003 and 2004) it is also stated that throughout the years it was clear that the company could only survive through the capital contributions⁸. The annual outlook in the financial report for the year 2003 already foresees that capital contributions of the shareholders will be needed in the next financial period. In 2006, an imminent insolvency could only be avoided through shareholders contributions, according to the financial statement of 2006.

- (25) The Commission requested Germany to provide the annual financial statements including profit and loss statements (*Gewinn- und Verlustrechnung*) of airport Altenburg-Nobitz GmbH for the years 2000 until 2010. German authorities answered that annual statements for Flughafen

⁷ [...] ^{*} business secret

⁸ Flugplatz Altenburg-Nobitz GmbH, Jahresabschlusses zum 31. Dezember 2002, Lagebericht 2002, S.4.

Altenburg-Nobitz GmbH cannot be provided since it is a company without participation of the federal state or the Land Thuringia and therefore the federal state cannot intervene in the business of the company. Germany also claims that since it is a small capital company it has therefore no obligation to publish its financial statements according to § 326 HGB.

1.5.3. Reduced service charges for airlines

- (26) The complainants have provided two fee regulations that were in place at AOC. According to these two regulations the fees were the following:

	Landing charges for aircraft with more than 6001kg	Passenger charges	Handling charges
Fee regulation of 1.1.2002	EUR 7.78	EUR 2.67	-
Fee regulation of 1.9.2006	EUR 7.45	EUR 3.00 + VAT	-

The two fee regulations do not state anything concerning security charges.

- (27) Both fee regulations make reference to a so called "Bonusliste". The Commission invites the German authorities to submit this list. For each of the airlines that received a bonus the amount of the bonus, the services rendered and the reason for the bonus should be stated.
- (28) The agreement of 3 March 2003 concluded between Flughafen Altenburg-Nobitz GmbH (named AOC in the agreement) and Ryanair for air services states that "Ryanair shall collect and pay to AOC an amount equal to the passenger security taxes and state fees (currently bearing IATA Code 'DE') at a rate in force at the time of operation of the flight. The original charge is [...]*". The German authorities are invited to clarify the contradiction between the number expressed in words and in numerics. The agreement makes reference to AOC's fee regulation (Gebührenordnung) only as regards flights that arrive to AOC on an unplanned basis.
- (29) Annex A, "Services to be provided by AOC" of the agreement of 3 March 2003: In addition to the obligation of AOC under the agreement of 3 March 2003 to provide the described runway (see above, par. (22)) Annex A of the agreement sets out several other services to be provided by AOC: Priority parking of Ryanair aircraft, all general airport infrastructure, provision of free branding space, provision of a car rental desk, other "reasonable requirements of Ryanair on an 'ad hoc' basis to ensure that Ryanair can maintain a 25 minute turnaround", press conference on launch day, normally at least four press conferences of Ryanair per year at the Airport, partly prepared by AOC. Moreover, AOC has to host, in co-operation with Ryanair, two Journalist Trips per year from the UK ("max. 30 bed nights per year, accommodation, meals and taxis") while AOC has the right to determine the hotels and where meals are taken, AOC has also to host travel agency evenings (at least one per year), AOC has to provide sales support and assistance to assist Ryanair during any

periodic sales missions in the catchment area of the Airport and AOC provides free office space and telecommunications facilities on a complimentary basis during media campaigns.

- (30) The Commission invites the German authorities to provide information on the cost of the each of the measures enumerated and included in the contract.
- (31) Annex B "Handling and related services to be provided by ground handling agents" of the agreement of 3 March 2003: The fees paid by Ryanair include several services as set out in annex B of the agreement such as⁹: baggage loading and unloading (no cargo); free use of GPU of FEP for up to 1 hour per turnaround if required; toilet and water service upon request free of charge; free-delivery and application of de-icing when required by Ryanair with fluid charged at EUR [1-5]* per litre, passenger check-in, boarding and disembarkation and check of travel documents.
- (32) The Commission invites the German authorities to provide information on the cost of the each of the measures enumerated and included in the contract.
- (33) Appendix to Annex B, "Reservations Facility" of the agreement of 3 March 2003: The handling agent has to establish and operate a passenger service desk, has to keep reservation staff adequately trained, pays for computer hardware, telephone, fax and SITA and all equipment maintenance and replacement costs incurred by the handling agent in the running of the passenger desk. At the same time, Ryanair pays a commission to the handling agent at the rate of [0-10%]* of all Ryanair fares (excluding taxes, fees and charges payable by Ryanair on such fares) sold by debit/credit card by the handling agent.
- (34) The Commission invites the German authorities to provide information on the cost of the each of the measures enumerated and included in the Appendix and the income generated by AOC under the commission.
- (35) The German authorities state that under the agreement concluded between Flughafen Altenburg-Nobitz GmbH and Ryanair on air transport services Ryanair paid the fees for the operation of each service according to AOC fee regulation, that is a fixed landing fee of EUR [...] per aircraft and a passenger fee of EUR [...] per passengers¹⁰. The Commission invites the German authorities to further explain, whether these are the fees paid since the start of Ryanair services, how the airport arrived at the calculation of the fixed landing fee and whether the passenger fee includes VAT, and whether the passenger fee comprises security taxes and state fees, and whether these later comprise VAT. It also invites Germany to present the relevant invoices of the airport to Ryanair.
- (36) The fees paid by other airlines operating from AOC in the period 2000-2010 are unknown. The Commission invites the German authorities to state and

⁹ This is only an enumeration of certain measures. The full list of services is contained in Annex B.

¹⁰ According to No. 2b/4 of the fee regulation.

explain the fees applied to other airlines, to provide underlying documents and explain any possible differences with the fees paid by Ryanair.

1.5.4. Marketing agreements with Ryanair

Marketing agreement of 7 April 2003

- (37) Under a first marketing agreement concluded between Flughafen Altenburg-Nobitz GmbH (named AOC in the agreement) and Ryanair on 7 April 2003, valid as of 15 April 2003, Flughafen Altenburg-Nobitz GmbH is obliged to pay a so called "success fee" of EUR [...] per departing passenger. This agreement is also concluded for a period of 10 years as is the main agreement for air transport services of 3 March 2003.
- (38) The German authorities state that Ryanair pays a passenger fee of EUR [1-5] per passenger while Flughafen Altenburg-Nobitz GmbH pays a "success fee" of EUR [...] per passenger to Ryanair. After off-setting the "success fee" with the landing fee (as foreseen in the agreement) Flughafen Altenburg-Nobitz GmbH pays per passenger EUR [...] to Ryanair.
- (39) The "success fee" is described as "net charge per departing passenger including all charges excepting security" which is further described as the net charge paid by Ryanair per passenger in respect of landing, local air traffic control, lightning, parking (without overnight parking), ramp and passenger handling, infrastructure and passenger service charge for Services". The "success fee" ranges in the lowest category depending on the number of rotations from EUR [...] (year 1-5) to EUR [...] (year 6-10) and in the highest from EUR [...] (year 1-5) to EUR [...] (year 6-10):

Number of rotations of the services	Net charge per departing passenger including all charges (excepting security) Year 1-5	Net charge per departing passenger including all charges (excepting security) Year 6-10
1 to 4	EUR [...]*	EUR [...]*
5 to 7	EUR [...]*	EUR [...]*
8 or more	EUR [...]*	EUR [...]*

- (40) The agreement sets out that AOC commissions Ryanair to "design English language advertisements suitable for the Internet medium and undertake sales promotion and public relations". Ryanair also arranges for web links to AOC's homepage and "any other relevant method of promoting the services" such as linking appropriate tourist websites to Ryanair's air operator's websites including appropriate logos. The agreement gives Ryanair the final say as regards all decisions of promotion except in relation to AOC's website.

Marketing services agreement of 28 August 2008

- (41) By letter of 9 August 2010 the Commission requested the German authorities to provide contracts, amendments and annexes thereto existing between Ryanair and Altenburg Nobitz GmbH or any other contract partner concerning air services of Ryanair at AOC. In answering this request Germany provided only the agreement of 3 March 2003 and the marketing agreement of 7 April 2003 between Ryanair and Altenburg-Nobitz GmbH. Upon request of the Commission of 8 April 2011 Ryanair submitted on 20 June 2011 the marketing services agreement and the side letter, which will be discussed in the following. The Commission transmitted the documents to the German authorities on 11 August 2011 after having translated the main document. The German authorities declared by e-mail of 28 September 2011 that they are not planning to comment at the current stage.
- (42) A second marketing services agreement was concluded between Flughafen Altenburg-Nobitz GmbH (named AOC in the agreement) and Airport Marketing Services Limited (hereinafter Airport Marketing Services) on 28 August 2008. According to the agreement Airport Marketing Services has the exclusive license to offer marketing services on the website of Ryanair. The agreement explains that AOC wants to use the Ryanair website to promote itself as a holiday destination and a business centre while Ryanair offers a route from AOC to London Stanstead in summer (daily) and winter (4 times per week) and one to Girona, 3 times per week only in summer.
- (43) The agreement has an initial duration of two years. AOC pays EUR [...] for year 1 and EUR [...] for year 2. In return AOC receives a 150 word paragraph/s within the Top Five Things to Do section of the AOC destination page. There is no indication as regards the duration, placement or other details of the link.
- (44) Flughafen Altenburg-Nobitz GmbH has the right to chose preferred time slots for the marketing measures. However, due to limited availability these slots cannot be guaranteed. Flughafen Altenburg-Nobitz GmbH has the right to chose websites that will be connected via a link on the Ryanair website. However, this right is limited by the fact that the websites cannot include flights, car rental or accommodation and/or any other services that may be offered on the Ryanair website. Moreover, Ryanair has the last say and can refuse the publication of the website. Flughafen Altenburg-Nobitz GmbH also has to monitor any evidence that the services under the agreement were provided.
- (45) The Commission invites the German authorities to explain which marketing services were rendered under the agreement and to explain the reasons for increasing the price in the second year.

Marketing services agreement of 25 January 2010

- (46) A third marketing services agreement was concluded between Flughafen Altenburg-Nobitz GmbH (named AOC in the agreement) and Airport Marketing Services Limited (hereinafter Airport Marketing Services) on 25 January 2010. According to the agreement Airport Marketing Services has the exclusive license to offer tourism-related marketing services on the website of

Ryanair. The agreement encompasses the purpose for AOC to advertise its business and tourist attractions while Ryanair is offering a route from AOC daily to London Stanstead, 3 times per week to Girona and 2 times per week in summer to Alicante.

- (47) The agreement has an initial duration of one year. AOC pays EUR [...] for one year and receives the following package of marketing services: 2 paragraphs of text in the "Top 5 Paragraphs" section of the Ryanair website, 1 link in the Destination Page, website link for 50 days on the Spanish and Catalan homepage of Ryanair and website link for 40 days on the UK homepage of Ryanair. The rights and duties of AOC as regards time slots, nature of websites and the final say of Ryanair are identical with the ones described in the previous agreement.
- (48) The German authorities are invited to explain for which reasons the amount paid by AOC was EUR [...] in the first year in 2008 and EUR [...] in 2010. The German authorities are also invited to explain which marketing services were rendered under the agreement.

Side letter of 21 September 2010

- (49) The Side letter of 21 September 2010 was signed between Flughafen Altenburg-Nobitz GmbH (named AOC in the agreement) and Airport Marketing Services Limited (hereinafter Airport Marketing Services). The purpose of the agreement is to supplement the original marketing services agreement of 25 January 2010 since AOC wished to purchase further advertising services in the amount of EUR [...] for the winter 2010 period only. The winter period is no longer defined but the side letter expires on 31st March 2011.
- (50) Under the Side letter AOC receives the following item: A link to a website designated by Flugplatz Altenburg-Nobitz GmbH displayed on Ryanair's UK homepage for 12 days for the duration of this Side Letter. Since the Side Letter is a supplement it does not repeat the provisions of the agreement it is amending.

Information provided by German authorities

- (51) According to German authorities Ryanair paid the following for advertising:

Period	Amount	Objective
2003	EUR [...]*	Print advertisements in the "Leipziger Volkszeitung"
2004	EUR [...]*	Print advertisements in the "Leipziger Volkszeitung"
May 2007 - March 2008	EUR [...]*	newspaper ads, direct mailing and other publicity measures
May 2008 - March 2009	EUR [...]*	newspaper ads, direct mailing and other publicity measures

Total sum (2003-March 2009)	EUR 150 000-300 000 [...]*	
------------------------------------	-----------------------------------	--

- (52) German authorities argue that Ryanair provides publicity for AOC and the region on its website. The website is the second popular European website after the Google website and therefore priced accordingly. An adword on Google costs per click between EUR 0.05 and EUR 2.-. Germany calculates that with 100 000-150 000 Ryanair passengers annually at AOC and an adword price of EUR 1 per click one reaches an advertising price of EUR 100 000-150 000 per year, assuming that each passenger carries out only one click. Since passengers carry out not only one click but several ones and there are passengers that already used the click but did not book (so far), German authorities come to the conclusion that the marketing agreement concluded between Flughafen Altenburg-Nobitz GmbH and Ryanair is based on a reasonable price that does not provide a favour to Ryanair.
- (53) First, the Commission notes that only as of 2005 more than 100 000 were reached whereas the marketing services contract started already in 2003. The Commission invites Germany to state the number of Ryanair passengers for each year in service. Second, no information was provided as to the nature and extent of the marketing regarding the region and AOC through the means of the Ryanair website. Third, no explanation was provided on the assumed price of EUR 1 per click for the Ryanair website. Fourth, it is not clear whether the airport operator made an informed assessment of scope and price before signing the marketing agreement. Fifth, it was not explained why the marketing price per passenger amounts to EUR [...]*.
- (54) Only for the years 2008-2010 marketing services to be paid by Flughafen Altenburg-Nobitz GmbH add up to EUR 700 000 - 1.2 million [...]*. The payments for the years 2003-2008 need to be added to this. Although the Commission had requested information on the marketing agreements between Altenburg-Nobitz GmbH and its contracting partners Germany did not provide any information on the marketing agreements concluded as of 2008 and their mechanisms. The information provided by Germany refers to marketing payments in the years 2003-March 2009 in the amount of EUR 150 000 – 300 000 [...]*, which Germany explains are based on the marketing agreement of 7 April 2003.

THE COMPLAINT

(a) Alleged illegal State aid by Flughafen Altenburg-Nobitz GmbH to Ryanair

- (55) The complainant alleges that the contract concluded between Flughafen Altenburg-Nobitz GmbH and Ryanair for ten years for the route from AOC to London-Stansted includes illegal State aid.
- (56) The complainant alleges that the marketing agreement concluded Flughafen Altenburg-Nobitz GmbH and Ryanair in 2002 reduces the passenger fee through a so called "success-premium" by 40%-60% in order to provide for a "payback" arrangement. The marketing agreement contains also a guaranteed price and the guarantee that Ryanair will not have to pay future public fees in

case these fees rise. In his opinion, the marketing agreement is a circumvention of the main contract concluded between Flughafen Altenburg-Nobitz GmbH and Ryanair for the operation of the route.

- (57) The complainant assumes that the airport was in a weak position towards Ryanair and accepted Ryanair's offer that had been previously rejected by other airports. AOC even submitted incorrect information to the aviation authorities as regards "*Hindernisvermessungen*" at the airport - according to the competent Minister of Thuringia, these facts are proven¹¹ - in order to receive the approval for flight operations and to start business with Ryanair.
- (58) The complainant states that the subventions of Flughafen Altenburg-Nobitz GmbH to Ryanair are also indicated in the annual financial statements: They show extremely low revenues from airport fees and seem to indicate that Ryanair does not pay rent or handling fees. Despite the rise in passengers due to the arrival of Ryanair the losses are significantly increasing as shown in the financial statements. The complainant assumes that this is due to the hidden payments to Ryanair. In the years since the start of Ryanair services, the average income from passenger fees reached EUR [...] in 2003 and EUR [...] in 2004. In the years prior to the arrival of Ryanair the average passenger fees reached EUR [...] (2002), EUR [...] (2001) and DM [...] = EUR [...] (2000).
- (59) The complainant alleges that the subventions paid by Flughafen Altenburg-Nobitz GmbH to Ryanair lead to a distortion of competition. The Ryanair route from AOC to London-Stansted, which is subsidised by Flughafen Altenburg-Nobitz GmbH, was in direct competition to the route from Leipzig-Halle to London-Standsted operated by Air Berlin. Air Berlin started operating this route as of February 2005 but could not operate the route profitably due to the subsidised parallel route. Therefore, Air Berlin discontinued the route in January 2008.

(b) Alleged illegal State aid to Flughafen Altenburg-Nobitz GmbH

- (60) The complainant alleges that AOC has received infrastructure and operating aid.
- (61) The complainant explains that the airport cannot receive aid as a compensation for public service obligations since the airport has not been entrusted with a service of general interest. The complainant makes reference to an official answer given by the Minister of Construction and Transport of Thuringia in

¹¹ The Minister of Construction and Transport of Thuringia made the following statement in his speech delivered in the parliament of Thuringia on 28.01.2005 (to address Drs. 4/503 and Drs. 4/516): "Dass ein Flugplatzbetreiber der Luftfahrtbehörde irreführende und fehlerhaft Hindernisvermessungen vorlegt, um eine Freigabe für den Flugbetrieb zu bekommen, ist nach meiner Kenntnis beispieillos. Aber genau so ist es geschehen im Rahmen der Flugbetriebsaufnahme der Firma Ryanair in Altenburg. Das ist durch die Akten eindeutig belegt."

the parliament of Thuringia answering a parliamentary request of 04.02.2005¹².

- (62) The complainant further submits that the Flughafen Altenburg-Nobitz GmbH is viable only with the current subventions of its operating costs through its shareholders and further public subventions. In 2006, an imminent insolvency could only be avoided through shareholders contributions, according to the financial statement of 2006.
- (63) The complainant explains that infrastructure aid has been granted to AOC for the construction of a fence and the extension of the runway by two times 90 metres in 2002. In 2004 the runway was extended by additional 50 metres. This extension was carried out in order to make the runway usable by Boeing 737-800 aircrafts. Those are the aircrafts used by Ryanair, which means that the extension of the runway served for Ryanair. In addition, a control zone D was installed, which created higher personal costs. These costs were presumably covered by shareholders funds in the amount of EUR [...]*
- (64) The complainant further submits that public funding by the Land Thuringia was used to purchase a fire-fighting vehicle and a snow blower (Kehrblasmaaschine zur Schneeräumung).
- (65) The complainant explains that based on publicly available information it is known that until 2007 the amount of EUR 28 million of public funds have been paid in order to modernise the airport according to a online press article citing Landrat Rydzweski¹³. At the time when the complaint was made, it was planned to further invest public funds in the amount of EUR 6.8 million until 2015 for the extension of the runway and the terminal according to a press article¹⁴. Altogether an investment of EUR 15.6 million was planned according to the same press article.
- (66) The complainant alleges that the subventions paid to Flughafen Altenburg-Nobitz GmbH lead to a distortion of competition. First, according to the statements of the airport operator the economic viability of AOC is very feeble and Flughafen Altenburg-Nobitz GmbH will depend in the future on payments of annual operating aid (EUR 500 000 as calculated by the complainant). Therefore, there is no realistic long-term perspective for economic operation of the airport. Second, there is no need in traffic terms for the airport given its close situation to airports Leipzig/Halle, Dresden and Erfurt. Ryanair is the only operator using the airport with a larger size aircrafts. However, its services, which already stagnate, depend on state funding.

¹² Thüringer Landtag, 4. Wahlperiode, Drucksache 4/757, Kleine Anfrage 238 vom 4. Februar 2005: Questions 3 and 4.

¹³ www.airliners.de/airports/nachrichten/artikelseite.php?articleid=10995

¹⁴ Ostthüringer Zeitung vom 14.12.2007.

ASSESSMENT

- (67) The Commission has analysed whether the following measures may qualify as State aid in favour of Flughafen/Flugplatz Altenburg-Nobitz GmbH, Ryanair using the airport:
- (a) The infrastructure investment granted to Flugplatz Altenburg-Nobitz GmbH
 - (b) The annual operating subsidy granted to Flugplatz Altenburg-Nobitz GmbH;
 - (c) Discounted fees paid by Ryanair at AOC airport.

1 Assessment of the infrastructure investment

- (68) At this stage, the Commission is not in a position to establish the precise amount of subsidies which Flughafen/Flugplatz Altenburg-Nobitz GmbH and any predecessor undertaking have received. Whereas the complainant alleges, on the basis of publicly available information, an amount of 28 million EUR, Germany claims that overall infrastructure investment for AOC in the period 2000-2009 reached EUR 4.513 million. The Commission therefore invites Germany and interested parties to provide any information that is useful in order to establish the precise amount of subsidies paid. All the infrastructure financing came directly from the Land Thuringia.

Existence of Aid

- (69) By virtue of Article 107 (1) TFEU *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*
- (70) The criteria laid down in Article 107 (1) TFEU are cumulative. Therefore, in order to determine whether the measure in question constitutes State aid within the meaning of Article 107 (1) TFEU all of the following conditions need to be fulfilled. Namely, the financial support should:
- be granted by the State or through State resources,
 - favour certain undertakings or the production of certain goods,
 - distort or threaten to distort competition, and
 - affect trade between Member States.

Economic activity and notion of undertaking

- (71) The Commission has to establish whether the beneficiary Flugplatz Altenburg-Nobitz GmbH is an undertaking within the meaning of Article 107 (1) TFEU.
- (72) It must first be noted that, according to settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of

its legal status and the way in which it is financed¹⁵ and that any activity consisting in offering goods and services on a given market is an economic activity.¹⁶

- (73) In its "*Leipzig-Halle airport*" judgment the General Court confirmed that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part¹⁷.
- (74) The 2005 Guidelines stipulate that "activities including safety, air traffic control, police and customs" fall outside the scope of State aid rules¹⁸. The Commission already considered in its State aid practice that State financing relating to police functions, fire prevention and operational safety, meteorological service and air traffic control did not normally constitute State aid¹⁹.
- (75) In the case at hand the Commission invites the German authorities to explain which investments are linked to aviation safety and to public policy remit stating the amount of public financing for each of the measures in question. As regards the cost for fire-fighting (investment and operating costs) the German authorities are invited to specify whether the same conditions of financing apply or not in all German airports. In particular, they should specify if certain airports have to support partly or totally the fire fighting costs, whilst at other airports the costs are borne by the public authorities.
- (76) The measures concerning the financing of infrastructure are scope of the decision since they concern the commercial activity of the airport.

State resources and imputability to the State

- (77) As has been stated by the Court²⁰, for the measures to be qualified as State aid in the sense of Art 107(1) EC, (a) they have to derive from the State's resources, either indirectly or directly and (b) they have to be imputable to the State.

¹⁵ Case C-35/96 *Commission v Italy* [1998] ECR I-3851, para 36; C-41/90 *Höfner and Elser* [1991] ECR I-1979, para 21; Case C-244/94 *Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, para 14; Case C-55/96 *Job Centre* [1997] ECR I-7119, para 21.

¹⁶ Case 118/85 *Commission v Italy* [1987] ECR 2599, para 7; Case 35/96 *Commission v Italy* [1998] ECR I-3851, para 36.

¹⁷ Judgment of the Court of First Instance of 12 December 2000 in Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929; Joint Cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG c/ Commission* and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt c/ Commission*, (hereafter: "*Leipzig-Halle airport case*"), [2011], not yet published in ECR, see also Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by the ECJ, Case C-82/01P, ECR 2002 Page I-9297, and Case T-196/04 *Ryanair v Commission* [2008], ECR II-3643, paragraph 88.

¹⁸ Para. 33 of the 2005 Aviation Guidelines.

¹⁹ NN 14/2007 and N 112/2008 – *Deutschland Flughafen Kassel-Calden*.

²⁰ See Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397.

- (78) In the case at hand the measures concerning the financing of infrastructure were financed through the budget of the Land Thuringia. The payments were made *durch das für den Verkehr zuständige Ressort* following the internal political and administrative decision making process. . These resources are imputable to the state.

Economic advantage

- (79) The before mentioned public financing from the state budget reduces the investment costs that the airport operator would normally have to bear and therefore confers an advantage to Flugplatz Altenburg-Nobitz GmbH.
- (80) However, it could be argued that the public financings made to the Flugplatz Altenburg-Nobitz GmbH do not constitute State aid within the meaning of Article 107(1) TFEU if the market economy investor principle can be shown to be applicable in this case. A capital contribution or investment is considered not to involve State aid when it is made in circumstances which would be acceptable for an investor operating under normal market conditions having regard to the information available and foreseeable developments at the date of the investment. This is the situation where the structure and future prospects of a company are such that a normal return can be expected within a reasonable period of time.
- (81) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Commission according to the 2005 Airport Guidelines assesses whether the given measure constitutes aid by considering whether *"in similar circumstances a private shareholder, having regard to the foreseen ability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question"*²¹.
- (82) The German authorities state that there is no business plan for AOC for the years 2002/2003. If the financing of the infrastructure investment was given as a grant to Flugplatz Altenburg-Nobitz GmbH it appears excluded that a private investor would have acted without a business plan, without receiving any consideration, such as shares, in return, and under the same circumstance by investing the amount of EUR 4.5 million into the infrastructure at AOC. If the financing of the infrastructure investment was given through loans to Flugplatz Altenburg-Nobitz GmbH the Commission needs to investigate whether the loans rendered a reasonable return of profit. The German authorities are therefore invited to explain whether the financing of the infrastructure investment was carried out through grants or through loans and detail the conditions of each the grants and the loans.
- (83) The German authorities have not argued that the public shareholders respected the market investor principle when planning the public financing. From the financial statements it is clear that the airport constantly needed public

²¹ C.f. Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, paragraph 46, OJ C 312 of 9 December 2005.

financing in order to cover the losses and to carry on its business. It also appears from the financial statements that the airport has been at the brink of insolvency and was saved through shareholders' contributions.

- (84) The Commission invites the German authorities to submit formal decisions of the shareholders as regards the investments at AOC.
- (85) On this basis, it cannot be concluded that the investment is market conform. Therefore the Commission concludes preliminarily that the public financing provides an advantage to Flugplatz Altenburg-Nobitz GmbH.

Specificity

- (86) Article 107 (1) TFEU requires that a measure, in order to be defined as State aid, favours "certain undertakings or the production of certain goods". In the case at issue, the Commission notes that the advantages in question were granted to Flugplatz Altenburg-Nobitz GmbH only. The public funding is directed at a single undertaking. Thus it is a selective measure within the meaning of Art. 107(1) TFEU.

Distortion of competition and affectation of trade

- (87) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid. In accordance with settled case law²², for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.
- (88) As set out in paragraphs (71) the operation of an airport is an economic activity. Competition takes place not only between air carriers but also between airport operators. Moreover, an aid to a regional airport can have an impact on the air transport sector.
- (89) Any economic advantage granted to Flugplatz Altenburg-Nobitz GmbH from public financing in order to finance its development could strengthen the position of AOC airport vis-à-vis its competitors, the airports Dresden, Leipzig-Halle, Erfurt and Hof-Plauen on the European market of providers of airport services. Therefore, the public funding under examination distorts or threatens to distort competition and affects trade between the Member States.

Conclusion

- (90) For the reasons set out above the Commission concludes that the public financing of the construction measures at AOC involves State aid within the meaning of Article 107 (1) TFEU. The measure at stake was not subject to Commission's approval, therefore Germany has not respected the stand-still obligation of Article 108 (3) TFEU.

²² Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

Compatibility of the infrastructure measures

- (91) For the period before the 2005 Guidelines entered into force, i.e. the years 2000-2005²³, the Commission applies directly Article 107 (3)(c) TFEU for the compatibility of the measure taking into account, in particular, of its past practice in this area. In this regard, the Commission notes that on 19 January 2005 it adopted a decision relating to a framework scheme for the construction and development of regional airports throughout the Federal Republic of Germany²⁴, in which it concluded that the development and improvement of regional airports could give rise to issues of State aid concern but that under certain conditions this could be declared compatible with the Treaty. The 2005 guidelines take in these conditions and consolidate the practice of the Commission in this regard. For this reason the Commission will make reference to the 2005 guidelines only as regards these two periods of time.
- (92) The 2005 Guidelines provide a framework for assessing whether infrastructure aid to airport operators may be declared compatible pursuant to Article 107 (3) of the TFEU.
- (93) In accordance with point 61 thereof, the Commission examines in particular whether:
- the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.);
 - the infrastructure is necessary and proportional to the objective which has been set;
 - the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;
 - all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;
 - the development of trade is not affected to an extent contrary to the common interest.

(i) Construction and operation of the infrastructure meets a clearly defined objective of general interest

- (94) The German authorities state that the importance of AOC airport for the regional economy is shown through the airport concept of the Bund ("Flughafenkonzept des Bundes") and the aviation concept for Middle Germany ("Luftverkehrskonzept für Mitteldeutschland").
- (95) The Commission invites the German authorities to provide the relevant provisions of these two mentioned concepts and other information from which

²³ The 2005 Guidelines were published in the Official Journal on 9.12.2005.

²⁴ State aid N644i/2002 Germany

the objective of general interest can be derived from. The Commission takes account of the fact that there are several other airports in the region such as Erfurt, Dresden and Leipzig-Halle which already offered scheduled and charter traffic to several European and non-European destinations and that these airports can be reached in a travelling time by car in a bit more than one hour. At this stage, the Commission has doubts as to whether the infrastructure measures meet a clearly defined objective of general interest.

(ii) The infrastructure is necessary and proportional to the objective which has been set

- (96) In the absence of a clearly defined objective of general interest the Commission is not in a position to assess whether the infrastructure at AOC airport is necessary and proportional to the objective that has been set. Therefore, the Commission has doubts whether the infrastructure is necessary and proportional. Moreover, the Commission cannot exclude at this stage that the infrastructure will duplicate existing non profitable airports in the same catchment area, which would notably question the necessity of the aid.

(iii) The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

- (97) German authorities did not provide a forecast for the development of traffic at AOC airport or a business plan for the airport. It appears that during longer periods of time Ryanair was the only airline offering scheduled flights at the airport²⁵. During its peak Ryanair offered four destinations from AOC which were then reduced to one.
- (98) Since Ryanair left AOC on 31 March 2011 it seems that no regular scheduled flights have been operated thereafter. The terminal, which has been remodelled and enlarged in 2009, and the runway seem to be used for occasional flights only. The Commission invites the German authorities to provide a plan showing the future and a satisfactory medium-term prospect for use of AOC airport. The plan should take also account of the fact that there are neighbouring airports such as Erfurt, Dresden and Leipzig-Halle offering scheduled and charter flights to several destinations.

(iv) All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

- (99) At this stage, it is not clear whether all airline operators had non-discriminatory and equal access since it is questionable whether the airport charges reductions applied in the same way to all airline operators. The Commission invites the German authorities to provide the relevant airport charges regulations and the annual payments made by each airline serving AOC based thereupon.

²⁵ Press article in "Freie Presse", 16. September 2010, S. 6.

- (100) According to the agreement between AOC and Ryanair, the operator of AOC airport, Flugplatz Altenburg-Nobitz GmbH, had to undertake the infrastructure investments at stake in order to fulfil its obligations under the agreement. These investments were requested by Ryanair. Ryanair was also the main and in some years the only airline using the airport. It would therefore appear that the infrastructure investments are dedicated to Ryanair.
- (101) Having regard to the preceding, the Commission has doubts whether this criterion is fulfilled.

(v) The development of trade is not affected to an extent contrary to the common interest

- (102) German authorities argue that the public contributions do not constitute state aid since AOC is a category D airport and according to point 15 and 39 of the 2005 Guidelines not subject to competition law. In addition, due to the geographical situation of AOC, there is no threat of distortion of competition.
- (103) The Commission notes that for the reasons set out above under paragraph (95), it cannot exclude at present that the funding will be directed at an airport which is in direct competition with other airports in the same catchment area. In such a situation, the development of trade would appear to be affected to an extent contrary to the common interest. Moreover, an effect on the airlines using the airport cannot be excluded, as witnessed by the complainant and the fact that Air Berlin suspended its operations between Leipzig-Halle and London.
- (104) Therefore, the Commission at this stage has doubts as to whether this criterion is complied with.
- (105) In addition to the mentioned criteria²⁶ and in order to establish the necessity, the aid must be limited to the minimum that is necessary to reach the established objective. German authorities did not provide a calculation that shows the funding gap incurred which then would need to be covered by aid.
- (106) In addition, due to the contractual obligations towards Ryanair, AOC was obliged to undertake the infrastructure investments. This raises serious doubts about the necessity of the aid. The Commission invites the German authorities to provide further information whether and to what extent the public financing of the measures in question was aimed at changing the behaviour of the aid beneficiary. The Commission invites Germany also to provide any document or information that could be relevant in order to prove the proportionality of the aid measure at stake.
- (107) Therefore, the Commission has at this stage doubts as to whether the aid is necessary and proportionate.

²⁶ Commission decision of 18.02.2011, NN 26/2009 – Greece- Enlargement of airport Ioannina, point 69 and 70, not yet published.

- (108) On the basis of the considerations above, the Commission has doubts whether the five criteria set out in the 2005 Guidelines and the general principles of necessity and proportionality are complied with in the present case and whether the infrastructure investments can be declared compatible with the internal market.

2. Assessment of the annual operating subsidies

- (109) In the years 2000-2009 the Flugplatz Altenburg-Nobitz GmbH accrued annual losses from the operation of AOC airport. The annual losses are covered by grants from the shareholders in the amount of EUR 7.040 million.

Existence of aid within the meaning of Article 107, paragraph 1, TFEU

- (110) As set out above, Flugplatz Altenburg-Nobitz GmbH is an undertaking that engages in an economic activity.
- (111) The financial contributions to Flugplatz Altenburg-Nobitz GmbH are funded from state resources since all the current shareholders are public entities; these are imputable to the state.
- (112) As the payments relate to the operation of the airport, they relieve the airport operator from the usual costs incurred through its activities and therefore constitute an economic advantage. The advantage is selective because it is granted to the Flughafen Altenburg-Nobitz GmbH.
- (113) However, it could be argued that the public financings made to the Flughafen Altenburg-Nobitz GmbH do not constitute State aid within the meaning of Article 107(1) TFEU if the market economy investor principle can be shown to be applicable in this case. The German authorities do not invoke that the public shareholders have followed the market economy investor principle. They claim that the airport makes revenues but at the same time it can be seen from the financial statements available so far that the airport has been unprofitable.
- (114) From the information available it is not clear whether the public authorities considered a closing of the airport as an alternative. The Commission invites the German authorities to comment on a potential closing scenario and provide the Commission with an analysis of the costs of closure in case such an analysis has been carried out.
- (115) The Commission considers that the market economy investor principle has not been fulfilled for the same reasons as for the investment aid.
- (116) Contributions for the operation of an airport are likely to create distortions of competition between airports and affect trade between Member States for the same reasons as outlined above as regards the infrastructure investments.
- (117) The Commission therefore concludes at this point that the annual contributions to Flugplatz Altenburg-Nobitz GmbH to cover the accrued annual losses from the operation of AOC and other losses appear to be state aid.

Compatibility of the aid with the common market

- (118) The Commission observes that operating aid in principle cannot be declared compatible with the internal market.²⁷ In addition, paragraph 27 of the 2005 Guidelines sets out that the operating aid granted to airports or airlines (such as start-up aid) cannot be declared compatible with the common market but only in exceptional circumstances and under strict conditions in disadvantaged regions of Europe, namely the regions benefiting from the derogation of Article 107, paragraph 3 a) TFEU, the outermost regions and regions with low population density. Since AOC airport is not situated in one of these areas the exception does not apply.
- (119) In accordance with point 63 of the 2005 Guidelines, operating aid may be declared compatible with the common market on the basis of Article 106 (2) TFEU if the aid meets certain conditions, which ensure that it is necessary for the operation of a service of general economic interest and does not affect trade to an extent contrary to the interests of the EU.
- (120) To that end, the Commission needs to verify that the airport has been entrusted with the operation of a service of general interest and that the compensation does not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit.
- (121) According to a statement of the Minister of Construction and Transport of Thuringia, which he made in the Thuringia parliament on 22 March 2005 answering a parliamentary question on the funding of AOC airport, he stated that AOC airport is not subject to a service of general economic interest. He added that AOC is a profit-oriented company that could not receive funding for infrastructure foreseen for services of general economic interest²⁸.

²⁷ Urteil des Gerichtshofs vom 21. Juli 2011, Rs. C-459/10 P, Freistaat Sachsen und Sachsen-Anhalt/Kommission, noch nicht in der amtlichen Slg. veröffentlicht, Rn. 34; Urteil des Gerichtshofs vom 19. September 2002, Rs. C-113/00, Spanien/Kommission, Slg. 2002, I-7601, Rn. 70; Urteil des Gerichtshofs vom 19. September 2000, Rs. C-156/98, Deutschland/Kommission, Slg. I-6857, Randnummer 30; Urteil des Gerichtshofes vom 6. November 1990 in der Rechtssache C-86/89, Italien/Kommission, Slg. 1990, I-3891, Rn. 18; Urteil des Gerichts vom 8. Juli 2010, Freistaat Sachsen und Land Sachsen-Anhalt/Kommission, Rechtssache T-396/08, Randnummern 46-48; Urteil des Gerichts vom 8. Juni 1995, Rs. T-459/93, Siemens SA/Kommission, Slg. 1995, II-1675, Randnummer 48.

²⁸ Thüringer Landtag, 4. Wahlperiode, Drucksache 4/757, Kleine Anfrage 238 vom 4. Februar 2005: Questions 3 and 4: (3) Inwieweit erfüllt der Flughafen Altenburg-Nobitz die Voraussetzungen für eine Förderung aus Mitteln der Gemeinschaftsaufgabe nach dem Rahmenplan zur Gemeinschaftsaufgabe sowie nach den Thüringer Durchführungsbestimmungen zur Gemeinschaftsaufgabe? (4) Welche Maßnahmen zum Ausbau und zur Modernisierung des Flughafens können potenziell mit welcher Förderhöhe aus diesem Programm nach dem Rahmenplan zur Gemeinschaftsaufgabe

- (122) Hence, no public service obligation was awarded to AOC and the aid was therefore not compatible as public service compensation.

Compatibility of the aid with the common market under the Rescue and Restructuring Guidelines

- (123) The annual contributions, which were paid to Flugplatz Altenburg-Nobitz GmbH for the operation of AOC, might have been granted under the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter the Rescue and Restructuring Guidelines)²⁹.
- (124) According to Section 2.2. of the Rescue and Restructuring Guidelines rescue aid is by nature a temporary and reversible assistance. Its primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. Once a restructuring or liquidation plan for which aid has been requested has been established and is being implemented, all further aid will be considered as restructuring aid.
- (125) In order to become an eligible beneficiary of aid under the Rescue and Restructuring Guidelines a company must qualify as a firm in difficulty within the meaning of these Guidelines³⁰. Under the Rescue and Restructuring Guidelines, the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.
- (126) According to the current information it seems probable that Flugplatz Altenburg-Nobitz GmbH could be considered at certain times a firm in difficulty. According to the financial statement of 2006, an imminent insolvency could only be avoided through non-reimbursable shareholder contributions of EUR 419 000 in line with each stake in 2006: "*Mit Beschluss vom 21. Oktober 2006 empfahl der Aufsichtsrat der Gesellschafterversammlung bzw. den Gesellschaftern, [...]*. Auf Basis dieses Aufsichtsratsbeschlusses gewährten die Gesellschafter freiwillige, nicht rückzahlbare Zuschüsse in Höhe von TEUR 419 zur Deckung der laufenden Verluste des Geschäftsjahres*".
- (127) Hence, the financial statement clearly states that the shareholders in 2006 paid EUR 419 000 in order to cover the losses and to avoid an "imminent bankruptcy". So far, no restructuring plan has been provided on the basis of which these annual subsidies might have been granted. The Commission

sowie nach den Thüringer Durchführungsbestimmungen zur Gemeinschaftsaufgabe gefördert werden? Mit welcher Förderhöhe?

Answer to 3 and 4: (3) Der Flughafen Altenburg-Nobitz GmbH kann als gewinnorientiertes Unternehmen eine GA-Infrastrukturförderung nicht erhalten. (4) Entfällt, weil eine GA- infrastrukturförderung nicht möglich ist.

²⁹ OJ C 244 of 1.10.2004, p. 2.

³⁰ Points 9 to 13 Rescue and Restructuring Guidelines.

therefore invites the German authorities to clarify this aspect and to explain whether measures were taken according to the Rescue and Restructuring Guidelines.

3. Assessment of the reduced airport fees and the marketing services agreements

(128) According to the information available it appears that Ryanair paid reduced airport fees to Flughafen Altenburg-Nobitz GmbH during its years of service 2003-2011 at AOC, and in addition received payments from the airport for each arriving passenger. German authorities state that Flughafen Altenburg-Nobitz GmbH collects from Ryanair a fixed landing fee of EUR [...] per aircraft and a passenger fee of EUR [...] per passenger. An extra handling fee does not seem to apply since the fees paid by Ryanair also encompass the handling³¹. However, the passenger fees are offset with a "success fee" of EUR [...] so eventually, through this offsetting mechanism, Ryanair is freed from the passenger fee and even receives EUR [...] per passenger from Flughafen Altenburg-Nobitz GmbH. The operator keeps only the revenues from the landing fee, reduced by the offsetting mechanism. According to the information available at this stage, this offsetting mechanism is only available to Ryanair. In this way Ryanair would therefore receive a discount from the official fees as they are set out in the fee regulation of AOC, described in paragraph (26).

State resources and imputability to the State

(129) The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.³²

(130) In the case at hand, at all material times the State exercised direct or indirect control over the resources under consideration. As mentioned above, at the time as of 2003 when the discounts were provided to Ryanair, AOC was owned by Flugplatz Altenburg-Nobitz GmbH with a majority of public shareholders (in 2005). Before 2005 and currently there are only public shareholders.

(131) Thus, the Commission considers that the discounted fees according to the agreement of 3 March 2003 concluded between Flughafen Altenburg-Nobitz GmbH (named AOC in the agreement) and Ryanair and the marketing agreements amount to a loss of State resources.

(132) However, the Court has also ruled that, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less

³¹ see above paragraph (31)

³² See Case C-482/99 *France v Commission* (hereafter: "*Stardust Marine*") [2002] ECR I-4397.

independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the agreement of 3 March 2003 concluded between Flughafen Altenburg-Nobitz GmbH (named AOC in the agreement) and Ryanair and the marketing agreements, to be considered imputable to the State.³³

- (133) Before Flughafen Altenburg-Nobitz GmbH concluded the contract on air services with Ryanair negotiations took place, in which the competent ministries of the Land Thuringia seemingly had a say. A press article states that negotiations took longer because of the ministries of Thuringia trying to block the deal³⁴. At the same time, the minister of economy of Thuringia, Schuster, claimed that the Land would be able to approve the measures needed. He is quoted by saying that if Ryanair wanted an extended runway the extension would be granted. The article also explains that the start of Ryanair at AOC could reduce passenger numbers at Dresden and Leipzig-Halle airport³⁵.
- (134) The airport lies under the supervision of the ministry of construction and transport of Thuringia, which is the supervising authority (Aufsichtsbehörde) for AOC. The signing of a contract between Flughafen Altenburg-Nobitz GmbH and an air transport company may constitute such an act that could be subject to monitoring or approval by the supervising authority. In addition, the regulation of airport fees has to receive prior approval of the supervising authority before they can be set into action, according to German aviation law § 43 a LuftVZO. Moreover, the regulation fee for AOC of 18.09.2006 foresees the signature of a representative of the ministry of construction and transport.
- (135) The involvement of the ministries and the political level can be seen in the discussion in the Parliament of Thuringia where not only technical questions but also the overall economic viability of the airport was discussed, as laid down in the extensive protocol of the discussion³⁶.

³³ Stardust Marine Judgment, paragraph 52 and 57.

³⁴ Dresdner Neue Nachrichten vom 05.03.2003: "Der Regionalflughafen Altenburg-Nobitz war in den vergangenen Jahren mit mehreren Millionen Euro Fördermitteln modernisiert worden und hatte sich immer wieder um die Ansiedlung eines Billig-Fliegers bemüht. Die Verhandlungen mit Ryanair waren über viele Monate geführt worden. Als letztes Hindernis erwies sich der hinhaltende Widerstand Erfurter Ministerien, die diese Ansiedlung zu blockieren versuchten."

³⁵ <http://www.radio-lotte.de/nachricht/14036>: "Thüringen will mit Millioneninvestitionen die irische Billigfluglinie Ryanair an den Flughafen Altenburg-Nobitz lotsen. Nach Aussagen der "Leipziger Volkszeitung" stehen dafür rund 28 Millionen Euro aus einem Infrastruktur-Sonderprogramm zur Verfügung. Thüringens Wirtschaftsminister Schuster sagte, man sei auch flexibel genug, erforderliche Maßnahmen bereits in diesem Jahr zu bewilligen. Wenn Ryanair beispielsweise eine längere Start- und Landebahn benötige, dann werde diese Verlängerung erfolgen. Sollte Ryanair sich für Altenburg-Nobitz entscheiden, würde Dresden und Leipzig/Halle ein weiterer Passagierverlust drohen. Der einstige Militärflugplatz liegt geografisch in der Mitte. Der Dresdner Flughafen hat in diesem Jahr bislang rund 15 Minus gemacht, Leipzig/Halle rund zwölf Prozent".

³⁶ Thüringer Landtag, 4. Wahlperiode, Plenarprotokoll 4/11, 28. Januar 2005, 11. Sitzung, Freitag, den 28. Januar 2005, Perspektiven des Flughafens Altenburg-Nobitz, S. 1097.

- (136) The marketing agreements with Ryanair were also discussed on the level of public entities. A press article states that the *Kreistag* has approved the payment of EUR 670 000 for marketing measures regarding the start of a new destination by Ryanair³⁷. The Landrat is quoted by saying that without the marketing payments the scheduled services would have come to an end.
- (137) When business at the airport was ailing the public authorities were also involved in discussions about the future of the airport and its main customer Ryanair. In August 2010, the chamber of commerce of Gera, a public body, rallied in favour of a continuation of the low-cost concept and Ryanair at AOC and urged the government of Thuringia to negotiate with Ryanair about destinations and marketing measures³⁸. It seems there had been difficult and controversial discussions on the political level of the Land Thuringia, which were invoked by the CEO of the airport after Ryanair left the airport³⁹. The same article quotes a press officer of the government of Thuringia stating that the Land Thuringia had strong doubts as regards the viability of the future of Ryanair's business at AOC⁴⁰.
- (138) Based on these elements it appears that public bodies were capable to control the activities of AOC and that they were involved in important decisions concerning the economic exploitation of the airport. Therefore, at this stage the Commission takes the preliminary view that the decision concerning the implementation of the agreement of 3 March 2003 and the marketing agreement of 7 April 2003 concluded between Flughafen Altenburg-Nobitz GmbH and Ryanair and the marketing agreements concluded between Flughafen Altenburg-Nobitz GmbH and Airport Marketing Services thereafter are imputable to the public authorities.

Specific economic advantage

- (139) If a fee agreement is designed in a way as to give preferential treatment to a specific undertaking by foregoing State resources, then Article 107 (1) TFEU may apply.

37 <http://www.neues-deutschland.de/artikel/161087.ein-flughafen-an-jeder-muelltonne.html>: "Zuvor hatte der Kreistag beschlossen, dem irischen Billigflieger Ryanair für die Einrichtung einer zusätzlichen Flugverbindung 670 000 Euro Marketingzuschüsse zu gewähren. »Ohne diese Beschlussfassung wäre der Linienflugbetrieb faktisch am Ende gewesen und der Flugplatz hätte seine Bedeutung zwangsläufig verloren«, rechtfertigte der Landrat und Aufsichtsratsvorsitzende der Betreibergesellschaft Flugplatz Altenburg-Nobitz GmbH die Finanzspritze. Zu den bisherigen Verbindungen von und nach Stansted (London), Edinburgh (Schottland) und Girona (Barcelona) soll ab März 2010 zweimal in der Woche eine Verbindung nach Alicante hinzu kommen."

38 <http://www.altenburg-tourismus.de/reiseveranstalter/pressemitteilungen.htm>, Osterländer Volkszeitung vom 24. August 2010, S. 13: "Er forderte deshalb die Landesregierung auf, umgehend mit Ryanair über den Aufbau von drei bis fünf Linienverbindungen zu verhandeln und parallel in den Zielländern die Tourismus-Werbung aufzubauen".

39 <http://www.thueringer-allgemeine.de/web/zgt/wirtschaft/detail/-/specific/Flugplatz-Altenburg-plant-ohne-Ryanair-2061216419>.

40 "Die mögliche Absage von Ryanair «bestätigt die Bedenken, die die Landesregierung seit langer Zeit hat», sagte Zimmermann. Das Konzept mit dem Festhalten am Geschäftsmodell des Billigfliegens sei «nicht belastbar».

- (140) A private investor may grant discounts for commercial reasons, for instance if they are of limited duration or do not discriminate between users of the airport infrastructure, and if they do not jeopardize the economic viability of the airport, but rather improve it. In any case rebates and discounts should reflect economy of scale or other costs saving for the airport operator or be based on some economic rationale so that it is economically rational for the airport operator to grant them.⁴¹
- (141) Moreover, discounts that lead to the results that the airport charges paid by the airlines are lower than the cost of the underlying operation provided by the airport to the airlines would make no sense from an economic point of view, in particular where the operator is in financial difficulties, as they would only have the effects of increasing the losses of the airport operator. Therefore, a market economy airport operator would normally not grant them under normal market conditions. It follows that such discounts would provide an advantage to the airlines which they would not obtain under normal market conditions.
- (142) In order to assess whether the fee payments under the agreements concluded between Flughafen Altenburg-Nobitz GmbH and Ryanair have been granted according to market conditions the Commission needs to test whether it is made in circumstances which would be acceptable for an investor operating under normal market conditions having regard to the information available and foreseeable developments at the date of the investment.
- (143) As mentioned above, German authorities state that Flughafen Altenburg-Nobitz GmbH collects from Ryanair a fixed landing fee of EUR [...] per aircraft and a passenger fee of EUR [...] per passenger. An extra handling fee does not seem to apply since the fees paid by Ryanair also encompass the handling⁴². The passenger fees are offset with a "success fee" of EUR [...] so that Flughafen Altenburg-Nobitz GmbH pays EUR [...] to Ryanair and keeps only the revenues from the landing fee. This represents a discount to Ryanair. On the basis of the information presently available such discounts have not been granted to other airlines operating from the airport; furthermore, based on information available, such discount could not be justified by any objective reasons that a market operator could have accepted.
- (144) German authorities claim that the discounted fees are not designed in a way that they provide a selective economic advantage to one user of the airport since AOC generates revenues.
- (145) German authorities explain that the revenues show that AOC generates more revenues through the contract with Ryanair. The number of passengers increased from 25 802 passengers in 2002, which was the year before Ryanair took up service, to 140 765 in 2009, which is a rise by around five times. At the same time the revenues have risen by three times and a half times from EUR [...] in 2002 to EUR [...]. According to Germany it has to be taken into

⁴¹ Commission decision of 18 February 2011, State aid case NN 26/2009 - Greece – Ioannina airport development.

⁴² see above paragraph (31)

account that revenues do not only encompass passenger traffic but also freight traffic. During the same period freight sunk from [...]* tons to [...]* tons and did therefore practically provide no revenue. German authorities also explain that during the same period the airport fees (Flugplatzentgelte) rose from EUR [...]* to EUR [...]*, while revenues from car parking rose from zero to EUR [...]*.

- (146) The airport seems to have been loss making throughout several years in a row, it is even questionable whether it was at any time profit making during the period 2000-2010. Consequently a private owner should have considered whether a closing of the airport would have been more favourable than a continuation of the activity. The German authorities are invited to provide information regarding the cost of the closing compared with the costs of maintaining the activity.
- (147) As regards the so called marketing services agreements the Commission has doubts whether the agreements could fulfil the market economy investor principle. The marketing agreement of 7 April 2003 stipulated between Flughafen Altenburg-Nobitz GmbH and Ryanair is linked to the development of airport charges, but commissions Ryanair to "design English language advertisements suitable for the Internet medium and undertake sales promotion and public relations". Ryanair also arranges for web links to AOC's homepage and "any other relevant method of promoting the services". The Commission observes that the contract does not describe the nature of the links, the position or content of the links, the duration of the link or any other further description of the marketing measure envisaged. The measures which were enumerated by the German authorities as presumably paid under this contract refer mainly to print advertisements in the "Leipziger Volkszeitung", a German regional newspaper.
- (148) The marketing services agreements signed thereafter on 28 August 2008, 25 January 2010 and the Side Letter of 21 September 2010 were signed between Flughafen Altenburg-Nobitz GmbH and Airport Marketing Services Limited. According to the agreements this entity has the exclusive license to offer marketing services for Ryanair. The Commission invites the parties to further detail the relationship between Airport Marketing Services Limited and Ryanair as regards the underlying licensing agreement, their respective obligations and duties.
- (149) Summarising the marketing services agreements signed on 28 August 2008, 25 January 2010 and the Side Letter of 21 September 2010 they each establish the duty for Ryanair to carry out certain marketing services as enumerated in the contract. Flughafen Altenburg-Nobitz GmbH has the duty to pay an annually fixed price for the services, further described above in section 1.5.4.
- (150) The Commission first observes that the measures enumerated in the agreements will be carried out only through the Ryanair website. It is stated that AOC wants to use this website to promote itself as a holiday destination and a business centre. Second, as regards the contractual rights of Flughafen Altenburg-Nobitz GmbH, the Commission notes that it has the right to chose preferred time slots for the marketing measures. However, due to limited

availability these slots cannot be guaranteed. Third, Flughafen Altenburg-Nobitz GmbH has the right to chose websites that will be connected via a link on the Ryanair website. However, this right is limited by the fact that the websites cannot include flights, car rental or accommodation and/or any other services that may be offered on the Ryanair website. Moreover, Ryanair has the last say and can refuse the publication of the website. Flughafen Altenburg-Nobitz GmbH also has to monitor any evidence that the services under the agreement were provided. The Commission invites the German authorities to provide evidence of the services provided under the mentioned agreements. The Commission notes that the marketing services agreements lead to a further reduction of the fees paid by Ryanair.

(151) The Commission invites the German authorities to provide information on the profitability of Flugplatz Altenburg-Nobitz GmbH by providing the annual balances, the profit and loss statements and the cash-flow statements for the period 2000-2010. German authorities are invited to state for each year of the period 2000-2010 for AOC airport the total costs, broken down into investment costs and operating costs, and further detail the investment costs, the depreciation costs and the costs of the financing of fixed assets including the following:

- the annual capacity by number of passengers and by number of turnarounds of the airport for the period 2000-2011 taking into account capacity restraints such as slots, security, environmental issues and others.
- the annual proportion of the airport capacity by passenger and by turnaround used in the same period by Ryanair.
- The annual amount of investment costs supported by the airport during the same period.
- The proportion of annual investment costs of the airport actually paid by Ryanair.
- The annual amount of operating costs supported by the airport during the same period.
- The proportion of annual operating costs of the airport actually paid by Ryanair.
- The non-aeronautical income of each Ryanair passenger generated during each month of service.

(152) Germany is invited to submit all historic and currently valid airport charges of the airport and to submit all contracts, including marketing contracts or similar contracts, concluded by the airport with the airlines that had used the airport or are still using it. In case of marketing agreements between AOC and other airlines the difference in prices for marketing services by Ryanair and other airlines should be explained.

- (153) The German authorities are further invited to state the actual payments per service and month made under the contracts by Ryanair for each year in service and the payments made by Flughafen Altenburg-Nobitz GmbH to Ryanair during the same period, the payments made under each of the marketing service agreements for each year in service, the exact marketing measures carried out by Ryanair and/or Airport Marketing Services under each agreement and prove of the weblinks to AOC on the Ryanair website. Moreover, the Commission invites the German authorities to provide evidence of the services rendered under the marketing agreements, explaining also the added value of these services for Altenburg compared to the official English website for tourism in Thuringia.
- (154) The Commission invites Germany to clarify whether the "success fee" for Ryanair in the amount of EUR [...] per passenger are paid in addition to the marketing services agreements.
- (155) The German authorities are also invited to detail how the extra services included in the agreement of 3 March 2003 with Ryanair, such as rental car desk, bus service to the train stations, handling, promotional tours etc. were priced and paid by Ryanair.
- (156) At the current stage, the German authorities have not provided any evidence that the reduced fees paid by Ryanair would have been offered by a market economy investor in the same way and under the same conditions as set out in the before mentioned agreements. The Commission therefore takes the preliminary view that Ryanair has received a selective economic advantage granted through discounted fees based on the before mentioned agreements, the payment of a success fee and the marketing agreements.

Distortion of competition and affectation of trade

- (157) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade, the latter must be regarded as affected by that aid⁴³. In accordance with settled case law⁴⁴, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.
- (158) The reduction of airport fees reduces the normal operating costs of the airline benefitting from such reduction. Therefore the airline is capable of strengthening its position on the market. Moreover, the air transport sector is characterised by intense competition between operators from different Member States, in particular since the entry into force of the third stage of liberalisation of air transport ("third package") on 1 January 1993⁴⁵. It follows that the discounted fees affect trade between Member States and distort or threaten to distort competition in the air transport sector.

⁴³ Case 730/79, Philip Morris [1980] ECR I-2671, para 11.

⁴⁴ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717, para 46.

⁴⁵ See Council Regulations (EEC) No 2407/92, 2408/92, 2409/92 published in OJ L 240, 28.8.1992.

Conclusion

- (159) Under these conditions the Commission takes the preliminary view that the discounted airport fees paid by Ryanair during the years of service at AOC and the marketing fees paid by the airport amount to State aid within the meaning of Article 107 (1) TFEU.

Compatibility of discounted airport fees with the internal market

- (160) German authorities explain that based on the contracts with Ryanair is able to generate more income. However, Germany has not shown under which legal basis the aid could be considered compatible. The Commission first of all observes that operating aid in principle cannot be declared compatible with the internal market.⁴⁶
- (161) The contract between Ryanair and Altenburg-Nobitz GmbH was concluded on 3 March 2003, the marketing agreement between the two parties on 7 April 2003. The 2005 guidelines entered into force on 9.12.2005. For the period prior to the entering into force of the 2005 guidelines the EU-Treaty is directly applicable.
- (162) On the basis of Article 107(3)(c), the Commission can declare compatible aid granted to air carriers with a valid operating licence issued by a Member State for new air routes linking a regional airport in category C or D (or exceptionally category B) to another EU airport when the route will ultimately be viable, if the amount of aid is strictly linked to the additional start up costs, is digressive and granted for a limited time and linked to the net development of the number of passengers transported, non discriminatory and transparent, and provided the aid measure provides for a sanction mechanism in the event that the carrier does not respect the commitments entered into.
- (163) It therefore only follows the constant practice of the Commission that aid can be declared compatible with the common market if:
- it contributes to an objective of common interest, this is say it finances new routes connecting a regional airport of category C or D, or exceptionally B, with another EU airport, when the route will ultimately be viable,
 - the amount of aid is necessary and proportional to the additional costs of launching the route and has an incentive effect;

⁴⁶ Urteil des Gerichtshofs vom 21. Juli 2011, Rs. C-459/10 P, Freistaat Sachsen und Sachsen-Anhalt/Kommission, noch nicht in der amtlichen Slg. veröffentlicht, Rn. 34; Urteil des Gerichtshofs vom 19. September 2002, Rs. C-113/00, Spanien/Kommission, Slg. 2002, I-7601, Rn. 70; Urteil des Gerichtshofs vom 19. September 2000, Rs. C-156/98, Deutschland/Kommission, Slg. I-6857, Randnummer 30; Urteil des Gerichtshofes vom 6. November 1990 in der Rechtssache C-86/89, Italien/Kommission, Slg. 1990, I-3891, Rn. 18; Urteil des Gerichts vom 8. Juli 2010, Freistaat Sachsen und Land Sachsen-Anhalt/Kommission, Rechtssache T-396/08, Randnummern 46-48; Urteil des Gerichts vom 8. Juni 1995, Rs. T-459/93, Siemens SA/Kommission, Slg. 1995, II-1675, Randnummer 48.

- it is granted in a transparent and non-discriminatory manner
 - it provides for sanctions for non implementation
 - it does not distort competition to an extent contrary to the common interest.
- (164) Contribution to an objective of common interest, new and ultimately viable air routes: The Commission recognises that a regional airport can constitute an important regional factor. AOC is a category D airport (“small regional airport”), with an annual passenger volume of less than 1 million passengers. The Commission has no information on the viability or otherwise of the routes established by Ryanair from AOC.
- (165) Necessity, proportionality and incentive effect: The reduction granted through the two agreements signed in 2003 between Altenburg-Nobitz GmbH and Ryanair makes reference to the route London-Stansted. While the agreement of 3 March 2003 between Ryanair and Flughafen Altenburg-Nobitz GmbH explicitly refers to the route AOC to London-Standsted, the marketing agreement of 7 April 2003 in turn makes reference to the agreement of 3 March 2003. The Commission invites the German authorities to explain whether the route to London-Stansted was considered a new route or new schedule.
- (166) Start-up aid has to be limited in time, proportional to the goal to be achieved and digressive in order to meet its objective, that is to persuade air carriers to set up new routes from regional airports which will become economically viable in the medium-term, and provide an incentive effect, that is to encourage air lines to establish links and increase their efficiency. The contracts of 2003 between Ryanair and Altenburg-Nobitz GmbH foresee a duration of 10 years. The aid does not follow a downward trend but instead increases after the fifth year: The "success fee" ("net charge per departing passenger including all charges") to be paid by Flughafen Altenburg-Nobitz GmbH to Ryanair increases in the lowest category from EUR [...]* (year 1-5) to EUR [...]* (year 6-10) and in the highest from EUR [...]* (year 1-5) to EUR [...]* (year 6-10), see paragraph (39). Furthermore, the marketing agreements appear to indicate that the amount of aid actually increases over time, rather than decrease.
- (167) The Commission considers that a start-up aid of a duration of 10 years is not necessary or proportional, as the experience from the airline sector, which has been collected for the preparation of the 2005 guidelines, suggests that a period of maximum three to five years should be sufficient for an airline to find out whether a destination is economically viable or not. In addition, the start-up aid is not digressive. The Commission furthermore considers that the German authorities have not shown that the intensity of the aid, namely a reduction, compared to the fee regulation, is necessary for making the new routes economically viable. Hence the Commission has at this stage doubts as to the necessity and proportionality of the aid.
- (168) With respect to the incentive effect, the Commission considers that due to the absence of a digression of the aid, there is unlikely an incentive effect. In addition, the incentive effect could not be present if the route had to be

subsidised indefinitely; it requires that the payment should be made only in respect of additional expenses directly related to the launching of the new route or schedule, and that after a few years (generally three) the route could be exploited by the airline without further start up subsidy. The Commission doubts that these conditions are respected in this case. Hence at this stage it has serious doubts as to the incentive effect of the aid.

- (169) The aid has to be granted in a transparent and non-discriminatory manner. Germany did not provide any information on this matter. The official fee regulation has not been respected and accordingly at this stage the Commission therefore has doubts as to whether this criterion is met.
- (170) No sanction mechanism appears to have been put in place in the event that Ryanair fails to implement its side of the contract concluded with the airport. The Commission has doubts whether this condition is respected.
- (171) Distortion of competition contrary to common interest: The Commission notes that the aid might have negative effects on other airlines, which might have operated from AOC and which were offered different fees. Moreover, the aid was granted for the route to London-Stansted which was at the time not only served by AOC but also by other airports such as Leipzig-Halle. As the complainant alleges, Air Berlin operated a route between Leipzig-Halle and London-Standsted but finally in January 2008 discontinued because the route was allegedly non profitable due to the subsidised parallel route.
- (172) In view of these elements, the Commission has doubts as to whether the aid to Ryanair can be declared compatible with the common interest.
- (173) The German authorities so far did not show that the aid fulfilled the requirements in order to be compatible. According to the case-law of the Court⁴⁷, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met.
- (174) For the period after entering into force of the 2005 Guidelines, the Commission will therefore examine a compatibility of the aid as a possible start-up aid under the 2005 Guidelines.
- (175) The 2005 Guidelines take into account that small airports often have not the critical mass of passengers to reach a break-even point and that as a consequence *"airlines are not always prepared, without appropriate incentives, to run the risk of opening routes from unknown and untested airports"*, explains paragraph 74 of the 2005 Guidelines. For this reason the Commission accepts that under a set number of conditions public aid can be granted to create an incentive for *"new routes or new schedules from regional airports and to attract the passenger numbers which will enable them to break even within a limited period"*.

⁴⁷[1] C-364/90, Italy/Commission, point 20.

- (176) If the criteria as set out in the 2005 Guidelines are complied with the start-up aid is considered compatible with the internal market under Article 107 (3) (c) TFEU. The Commission invites the German authorities to submit all the information necessary to enable it to assess whether the measures in question can be considered as compatible with the 2005 Guidelines.
- (177) According to point 75 of the 2005 Guidelines it is not acceptable to grant start-up aid for a new route corresponding to a high-speed train link. The Commission invites the German authorities to clarify whether this requirement is complied with.
- (178) According to point 79 of the 2005 Guidelines:
- (179) *(a) ... "the aid is paid to air carriers with a valid operating licence issued by a Member State pursuant to Council Regulation (EEC) No 2407/92⁴⁸ on licensing of air carriers".*
- (180) The Commission invites the German authorities to identify which airlines received aid and to clarify whether those are carriers with a valid operating licence pursuant to Regulation 1008/2008.
- (181) *(b) "... the aid is paid for routes linking a regional airport in category C or D to another EU airport."*
- (182) AOC is a category D airport
- (183) *(c) "... aid will apply only to the opening of new routes or new schedules, (as defined in the 2005 Guidelines), which will lead to an increase in the net volume of passengers".*
- (184) The marketing services agreement of 28 August 2008 signed between Altenburg-Nobitz GmbH and Airport Marketing Services makes reference to the routes from AOC to London-Standsted and Girona. The Commission invites the German authorities to explain whether under the marketing services agreement of 28 August 2008 which of the routes were considered new routes or new schedules.
- (185) The marketing services agreement of 25 January 2010 signed between Altenburg-Nobitz GmbH and Airport Marketing Services, amended by the Side Letter of 21 September 2010, makes reference to the routes from AOC to London-Standsted, Girona and Alicante. According to a press article, the route from AOC to Girona was cancelled during the winter schedule as of October 2008. The article quotes a Ryanair spokesperson explaining that this was due to a lack of profitability based on higher kerosene prices⁴⁹. It seems that the route from AOC to Girona has been reintroduced thereafter. The Commission

⁴⁸ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p.8)

⁴⁹ <http://www.airliners.de/verkehr/netzwerkplanung/altenburg-verliert-spanien-verbinding/16403>. The article also mentions that Ryanair was the only airline at that time serving AOC.

invites the German authorities to explain whether under the marketing services agreement of 25 January 2010, amended by the Side Letter of 21 September 2010, the routes to London-Standsted, Girona and Alicante were considered a new route or new schedule and explain which route was considered a new route.

- (186) Based on the information currently available, the Commission has doubts whether this criterion has been complied with.
- (187) *(d) "... the route receiving the aid must ultimately prove profitable, i.e. it must at least cover its costs, without public funding. For this reason start-up aid must be digressive and of limited duration."*
- (188) The marketing services agreement of 28 August 2008 has an initial duration of two years. The agreement sets out a fixed price to be paid in 2008 and a price, [50-60%]* higher, to be paid by Flughafen Altenburg-Nobitz GmbH to Ryanair in 2009. Therefore, the payments under the agreement are not digressive.
- (189) The marketing services agreement of 25 January 2010 has an initial duration of one year. It concerns the same routes as the previous marketing services agreement of 28 August 2008 plus the route to Alicante. The price is fixed for one year. Compared to the second year price of the previous agreement the price has almost [...]*. Therefore, the payments under the agreement are not digressive.
- (190) The Side Letter of 21 September 2010 amends the marketing services agreement of 25 January 2010 for the "winter 2010 period". The period is not further defined but the Side Letter expires only on 31st March 2011. The price is fixed for this period. The Commission invites the German authorities to explain whether winter 2010 period refers to the winter flight schedule 2010.
- (191) In addition, the Commission has no information whether the airline demonstrated, on the basis of a business plan or any other calculation, the viability of the route during a considerable period of time after the contribution has ended. It seems probable that the routes to Girona and Alicante were unviable as indicated in paragraph (10). Altogether the services from AOC seemed to prove unviable and Ryanair left AOC.
- (192) Therefore, the Commission has doubts, whether this condition has been complied with.
- (193) *(e) "...the amount of aid must be strictly linked to the additional start-up costs incurred in launching the new route or frequency and which the air operator will not have to bear once it is up and running"*.
- (194) The 2005 Guidelines enumerate as additional eligible start-up costs such as installation costs or marketing and advertising costs which arise at the outset of the start of a new route. On the other hand, aid cannot be granted in relation to standard operating costs.

- (195) The information received so far does not show which cost categories have been covered through the discounted fees. The Commission invites the German authorities to explain for the years 2000-2010 whether Ryanair paid the operating costs at AOC and whether Ryanair paid a pro rata per utilisation of the full costs of the airport. At the current stage the Commission cannot exclude that the discounted fees were granted for regular operating costs. In view of the above, the Commission has doubts whether this condition has been complied with.
- (196) *(f) "...digressive aid may be granted for a maximum period of three years. The amount of aid in any one year may not exceed 50% of total eligible costs for that year and total aid may not exceed an average of 30% of eligible costs".*
- (197) The aid for the route to Girona is mentioned in the marketing services agreements valid for 2008, 2009, 2010 and winter 2010, which may exceed three years, if the Side Letter encompasses the winter flight schedule until end of March 2011. In addition, from the agreements it cannot be deduced that the aid was digressive since the price rose in the second year under the marketing services agreement of 28 August 2008 and it rose again under the marketing services agreement of 25 January 2010. Moreover, as stated further above it appears that the discounts are granted on regular operating cost, thus, they might exceed the amount of the eligible costs.
- (198) The aid for the route to Alicante is mentioned only as of 2010, less than three years. However, the Commission has doubts whether the aid is digressive and whether the calculation based on the total of eligible costs has been carried out accordingly. Moreover, as stated further above it appears that the discounts are granted on regular operating cost, thus, they might exceed the amount of the eligible costs.
- (199) The Commission has therefore doubts, whether this condition is complied with.
- (200) *(g) "...aid payments must be linked to the net development of the number of passengers transported".*
- (201) The following marketing services agreements of 2008 and 2010 as well as the Side Letter of 2010 do not contain a link to the net development of the number of passengers transported. The agreements only name the way of marketing on the Ryanair website but they do not contain provisions to measure the success of the marketing measures by statistics or keeping track of passengers travelling to AOC because they learned about the destination on the website.
- (202) The Commission has therefore doubts, whether this condition is complied with. Moreover, the Commission has doubts whether the aid potentially granted to Ryanair is available for all companies without discrimination.
- (203) As regards the further requirements set out in point 79 in the 2005 Guidelines the Commission notes that Germany did not notify the start-up aid granted to an airline at AOC (point 79 (h)), that the German authorities could not show

any business plan or analysis prior to granting the start-up aid (point 79 (i)) and that the publicity requirement was not fulfilled (point 79 (j)). At the current stage, the Commission has doubts whether the German authorities have provided for appeal procedures to deal with possible complaints with regard to the discounted fees according to point 79 (k) and whether penalty mechanisms as set out in point 79 (l) of the 2005 Guidelines have been complied with.

- (204) At the current stage the Commission has no information whether the start-up aid was combined with other types of aid such as aid of a social nature and compensation for discharging public services. In addition, point 80 of the 2005 Guidelines states that start-up aid *"cannot be combined with other aid granted to cover the same costs, including aid paid in another State"*. Therefore, the Commission has doubts, whether this condition has been complied with.
- (205) In view of the above, the Commission considers at this stage that not all conditions for compatibility as set out in the 2005 Guidelines have been satisfied in the present case. Accordingly, the Commission has doubts whether the discounted fees paid by Ryanair during its years of service at AOC can be considered compatible with the internal market pursuant to Article 107 (3) (c) TFEU.
- (206) The discounted fees paid by Ryanair do not appear to quantify for any other exception provided for by the Treaty. Therefore, at the current stage the Commission cannot exclude that the discounted fees paid by Ryanair during its years of service at AOC involve illegal and incompatible State aid.

DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Germany to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately. L'Allemagne transmettra à la Commission une version non-confidentielle de ses observations et des informations utiles transmises.

Elle invite vos autorités à transmettre immédiatement une copie de cette lettre au bénéficiaire potentiel de l'aide. Dans ce contexte, l'Allemagne veillera à ce que ne soient pas divulguées au entreprise concernée des informations relatives à d'autres entreprises et couvertes par le secret professionnel au sens de la communication de la Commission C(2003) 4582 du 1er décembre 2003 sur le secret professionnel dans les décisions en matière d'aides d'Etat⁵⁰.

⁵⁰ JO C 297 du 9 décembre 2003, p. 6.

The Commission wishes to remind Germany that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Germany that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication. Les intéressés seront priés de fournir également une version non confidentielle de leurs observations.

Dans le cas où cette lettre contiendrait des éléments confidentiels qui ne doivent pas être publiés, vous êtes invités à en informer la Commission, dans un délai de vingt jours ouvrables à compter de la date de réception de la présente. Dans ce contexte et aux fins de l'établissement d'une version non confidentielle, l'Allemagne est invitée à consulter les entreprises citées dans la présente décision afin de s'assurer que cette dernière ne contient pas d'informations couvertes par le secret professionnel au sens de la communication précitée. Si la Commission ne reçoit pas de demande motivée à cet effet dans le délai prescrit, elle considérera que vous acceptez la publication du texte intégral de la lettre. Cette demande et les informations susmentionnées demandées par la Commission devront être envoyées par lettre recommandée ou par télécopie à l'adresse suivante:

European Commission
Directorate-General for Competition
B-1049 Brussels
Fax No: +0032 (0) 2 2961242

Stateaidgreffe@ec.europa.eu

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-president