EUROPEAN COMMISSION

Brussels, 01.10.2014

C(2014) 5063 final

| | | |
|---|---|---|
| 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 […]. | | PUBLIC VERSION<br><br>This document is made available for information purposes only. |

**COMMISSION DECISION**

**of 01.10.2014**

**on the State Aid SA.27339 (2012/C) (ex 2011/NN)**
**implemented by Germany for Zweibrücken airport and airlines using the airport**

(Text with EEA relevance)

(Only the English version is authentic)

**COMMISSION DECISION**

**of 01.10.2014**

**on State Aid SA 27339 (2012/C) (ex 2011/NN)**
**implemented by Germany for Zweibrücken airport and airlines using the airport**

(Text with EEA relevance)

Only the English version is authentic

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,[1]

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above[2] and having regard to their comments,

Whereas:

## 1. PROCEDURE

(1) In a parliamentary question of December 2008, MEP Hiltrud Breyer raised the issue of the public financing of Zweibrücken Airport.[3] She alleged that in the period 2005-2006, the *Land* Rhineland-Palatinate ("*Land*") had funded the *Flugplatz GmbH Aeroville Zweibrücken* ("FGAZ") with EUR 2.4 million, which FGAZ in turned used to fund its 100% subsidiary, the *Flughafen Zweibrücken GmbH* ("FZG"). She further

[1] With effect from 1 December 2009, Articles 87, and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (hereinafter: "TFEU"). The two sets of Articles are in substance identical. For the purposes of this Decision references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

[2] OJ C 216, 21.07.2012, p. 56.

[3] Written question E-6470/08 of 2 December 2008 by Hiltrud Breyer (Verts/ALE) to the Commission regarding subsidisation of Zweibrücken airport by the Land Rhineland-Palatinate.

alleged that during the same period, construction works on the airport costing EUR 6.96 million were fully paid for by the *Land*.

(2) The parliamentary question was answered by Commissioner Tajani on 6 January 2009. In addition, it was registered as a complaint under CP 5/2009. On 22 January 2009, 24 September 2010, and 15 March 2011, the Commission requested further information from Germany, which it provided by letters dated 23 March 2009, 27 January 2011, and 19 May 2011.

(3) On 8 April 2008, the Commission also requested further information from the airline Ryanair, which was provided on 15 July 2011. A German translation of Ryanair's submission was forwarded to Germany on 18 August 2011, and Germany declared on 26 September 2011 that it did not intend to comment on Ryanair's submission at that time.

(4) By letter dated 22 February 2012, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty ("the opening decision") in respect of the public funding of the operator of Zweibrücken Airport and incentives in favour of airlines using the airport.

(5) By letter dated 24 February 2012, the Commission requested further information after the opening decision. Germany submitted its comments on the opening decision on 4 May 2012 and responded to the Commission's request for further information on 16 April 2012.

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*[4]. The Commission invited interested parties to submit their comments on the alleged aid.

(7) The Commission received comments from four interested parties, namely Ryanair, Airport Marketing Services ("AMS"), Germanwings and TUIFly. It forwarded them to Germany, which was given the opportunity to react within one month; its comments were received by letter dated 26 October 2012.

(8) In addition, the Commission received further comments from Ryanair on 20 December 2013, 17 January 2014 and 31 January 2014. Those submissions were forwarded to Germany, which did not wish to comment on them.

(9) By letters dated 6 November 2013, 14 March 2014, and 2 April 2014 the Commission requested further information. Germany responded to the Commission's requests for further information on 16 December 2013, 15 January 2014, 5 April 2014, 15 April 2014, 24 April 2014, 11 June 2014 and 27 June 2014.

(10) By a letter dated 25 February 2014, the Commission informed Germany of the adoption of the 2014 Aviation Guidelines[5] on 20 February 2014, of the fact that those guidelines would become applicable to the case at hand from the moment of their

[4] OJ C 216, 21.07.2012, p. 56.

[5] Communication from the Commission – Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

publication in the *Official Journal of the European Union*, and gave Germany the opportunity to comment on the guidelines and their application within 20 working days of their publication in the *Official Journal*.

(11) By letters dated 24 February 2014, the Commission also informed the third parties of the adoption of the 2014 Aviation Guidelines on 20 February 2014, of the fact that those guidelines would become applicable to the case at hand from the moment of their publication in the *Official Journal of the European Union*, and gave the third parties the opportunity to comment on those guidelines and their application within 20 working days of their publication in the *Official Journal*.

(12) The 2014 Aviation Guidelines were published in the *Official Journal of the European Union* on 4 April 2014. They replaced the 1994 Aviation Guidelines[6] as well as the 2005 Aviation Guidelines[7].

(13) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within one month of their publication date.[8]

(14) Comments on the application of the 2014 Guidelines were received from Germany on 8 May 2014. Germany agreed with the application of the 2014 Aviation Guidelines in this case. The third parties did not submit any comments.

(15) By letter dated 17 July 2014, Germany agreed exceptionally to waive its rights deriving from Article 342 of the Treaty in conjunction with Article 3 of Council Regulation 1/1958[9] and to have this Decision adopted and notified pursuant to Article 297 of the Treaty in English.

## 2. BACKGROUND TO THE INVESTIGATION AND CONTEXT OF THE MEASURES

### 2.1. History and Development of Zweibrücken Airport

(16) Zweibrücken Airport was a military airfield until 1991, when it was abandoned by the U.S. military. From 1992 until 1999, the airfield was the object of a conversion project co-financed by the Union[10]. The Union funding was used to render the

---

6 Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids in the Aviation Sector (OJ C 350, 10.12.1994, p. 5).

7 Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p.1).

8 OJ 113, 15.4.2014, p. 30.

9 Regulation No 1 determining the languages to be used by the European Economic Community (OJ 017, 6.10.1958, p.385).

10 Commission Decision of 22. December 1993 – K (93) 3964/6 - KONVER I- and Commission Decision of 21. December 1995 – K (95) 3208 - KONVER II. For Rhineland-Palatine the conversion projects included the project "military airfield Zweibrücken". Union financing reached EUR 9 million.

airfield available for civilian aviation, and the necessary measures encompassed the eradication of obstacles, the modernisation and installation of a tower and the drainage of the runway. The private investors of the project also envisaged the subsequent creation of a business park, a multimedia park and leisure installations.

(17) From 2000 until 2006, the airfield was not generally used for commercial aviation. It was used by military planes, private planes, leisure flights and only occasional commercial flights. The majority of the passengers flying from and to Zweibrücken Airport were transported by military flights, whilst the remainder used company-owned planes or taxi flights. Attempts to attract commercial operators failed. Part of the reason was the existence of a NATO air combat training zone (POLYGONE), which severely restricted the ability of civilian operators to reach or leave Zweibrücken during the training zone's operating hours.

(18) It was only after the establishment of a control zone (CTR Zweibrücken), regulating the use of the airspace by civilian and military aircraft, that a commercial operator could be attracted. Commercial traffic with scheduled and charter flights started with Germanwings' inaugural flight to Berlin on 15 September 2006. Charter operator TUIFly commenced operations on 30 March 2007. Ryanair operated its only route from Zweibrücken (to London-Stansted) in the period between 28 October 2008 and 22 September 2009, thereafter ceasing its services at Zweibrücken airport.

(19) The annual capacity of Zweibrücken Airport is currently around 700 000 passengers, but could reach up to 1 million passengers in view of the capacity of the runway and handling areas.

(20) Table 1 indicates the development of Zweibrücken Airport in terms of passenger numbers and aircraft movements from 2006 to 2012.

**Table 1: Passenger Numbers 2006 - 2012**[11]

| Year | Passengers | Aircraft Movements |
|---|---|---|
| 2006 | 78 000 | 23 160 |
| 2007 | 288 000 | 26 474 |
| 2008 | 327 000 | 27 000 |
| 2009 | 338 000 | 21 000 |
| 2010 | 265 000 | 16 000 |
| 2011 | 224 000 | 14 500 |
| 2012 | 242 880 | 13 230 |

[11] http://www.flughafen-zweibruecken.de/de/wir-ueber-uns-de/daten-und-fakten-de .

## 2.2. Geographic Situation of Zweibrücken airport

(21) Zweibrücken Airport is situated 4 km south-east of the City of Zweibrücken in the German *Land* Rhineland-Palatinate. The nearest[12] other airports are:

(a) *Saarbrücken Airport* (approximately 39 km, or approximately 29 minutes by car)

(b) *Frankfurt-Hahn Airport* (approximately 128 km, or approximately 84 minutes by car)

(c) *Frankfurt (Main) Airport* (approximately 163 km, or approximately 91 minutes by car)

(d) *Luxemburg Airport* (approximately 145 km, or approximately 86 minutes by car)

(e) *Karlsruhe/Baden-Baden Airport* (approximately 105 km, or approximately 88 minutes by car)

(f) *Metz-Nancy Airport* (approximately 129 km, or approximately 78 minutes by car)

(g) *Strasbourg Airport* (approximately 113 km, or approximately 87 minutes by car)

(22) According to the study provided by "*Desel Consulting*" and the "*Airport Research GmbH*" in 2009[13], on average about 15% of passengers per year originate from other Member States (Luxembourg and France). The remaining passengers originate from within Germany, mostly from the region of *Kreis* South-West Saarpfalz, the City of Saarbrücken, the City of Saarlouis, and the region of Saarpfalz-Kreis.

## 2.3. Legal and economic set-up of Zweibrücken Airport

(23) Zweibrücken Airport is owned and operated by FZG. FZG is a 100% subsidiary of FGAZ, with whom it has concluded a profit and loss transfer agreement ("P&L Agreement"). The P&L Agreement ensures that all of FZG's losses will be covered by and all profits transferred to FGAZ.

(24) FGAZ, in turn, is in shared ownership. The *Land* Rhineland-Palatinate owns 50% of the shares, while the remaining 50% are owned by the *Zweckverband Entwicklungsgebiet Flugplatz Zweibrücken* ("ZEF"), an association of public territorial entities in Rhineland-Palatinate. The public owners of FGAZ cover its

[12] All distances in road kilometres, based on the fastest route. Source: maps.google.com, accessed 25 June 2014.

[13] Desel Consulting und Airport Research Center GmbH, "Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025", Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009, p. 56-57.

financing needs by providing annual capital injections. According to Germany, FGAZ does not itself carry out any activities related to aviation. As far as aviation is concerned, FGAZ simply passes the public funding on to FZG. FGAZ does, however, carry out some activities related to marketing plots of land in the vicinity of the airport.

## 3. DESCRIPTION OF THE MEASURES AND GROUNDS FOR INITIATING THE PROCEDURE

(25) The Commission investigated several measures involving Zweibrücken Airport. The Commission assessed whether those measures constituted State aid and whether any State aid could be considered compatible with the internal market.

(26) The following measures were investigated as potentially constituting State aid to FGAZ and FZG:

(a) direct public financing by *Land* Rhineland-Palatinate and ZEF of Zweibrücken Airport's costs as regards:

- infrastructure investments (2000-2009)
- operating costs (2000-2009);

(b) a bank loan and participation in the Land Rhineland-Palatinate's internal cash pool.

(27) The following measures were investigated as potentially constituting State aid to the airlines operating from Zweibrücken:

(a) discounts on airport charges for various airlines (Germanwings, TUIFly, and Ryanair);

(b) the marketing contracts with Ryanair.

### 3.1. Public financing by *Land* Rhineland-Palatinate and ZEF of Zweibrücken Airport

#### *3.1.1. Detailed description of the measure*

(28) The public financing of Zweibrücken Airport took place in two different forms. First, the *Land* Rhineland-Palatinate and the ZEF supported specific infrastructure investments of FZG with direct grants. Secondly, the owners of FGAZ annually injected capital into FGAZ. The purpose of these capital injections, which cover FGAZ's own losses, is to allow FGAZ to comply with its obligations under the P&L Agreement, according to which FGAZ has to cover the losses of FZG.

(29) The direct grants supporting specific infrastructure investments made between 2000 and 2005 and between 2006 and 2009 are listed in the Table 2 and Table 3.

**Table 2: Infrastructure Investments 2000-2005**

| Zuwendungs-bescheid vom | Maßnahmen | Gesamtkosten der Investitions-maßnahmen | Landesmittel | Mittel des Trägers | Ausgezahlte Mittel insgesamt | Davon Landesmittel für Baumaßnahmen |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| 2000 | | | | | | |
| 05/06/2000 | Wendehämmer, Bodengeräte, usw. | […]* | […] | […] | […] | […] |
| 30/11/2000 | Flugzeughalle 25 x 25 | […] | […] | […] | […] | […] |
| 30/11/2000 | Flugzeughalle 56 x 18 | […] | […] | […] | […] | […] |
| 24/11/2000 | Renovierung Halle 360 | […] | […] | […] | […] | […] |
| 01/12/2000 | Renovierung Halle 370 | […] | […] | […] | […] | […] |
| Gesamt 2000 | | […] | […] | […] | […] | […] |
| | | | | | | |
| | | | | | | |
| 2001 | | | | | | |
| 23/07/2001 | TODA 1. Phase | […] | […] | […] | […] | […] |
| 22/11/2001 | Umorg. Sicherheitsbereich | […] | […] | […] | […] | […] |
| Gesamt 2001 | | […] | […] | […] | […] | […] |
| | | | | | | |
| | | | | | | |
| 2002 | | | | | | |
| 16/07/2002 | außerord. Rep. Start- u. Landebahn | […] | […] | […] | […] | […] |
| Gesamt 2002 | | […] | […] | […] | […] | […] |
| | | | | | | |
| | | | | | | |
| 2003 | | | | | | |
| 14/04/2003 | Überarb. Markierungen Flugbetr. fläche | […] | […] | […] | […] | […] |
| 15/09/2003 | 2. Phase TODA | […] | […] | […] | […] | […] |
| Gesamt 2003 | | […] | […] | […] | […] | […] |
| | | | | | | |
| | | | | | | |
| 2004 | | | | | | |
| 26/01/2004 | Gebäude 320 | […] | […] | […] | […] | […] |
| 01/11/2004 | Luftsicherheitsmaßn. | […] | […] | […] | […] | […] |
| Gesamt 2004 | | […] | […] | […] | […] | […] |
| | | | | | | |
| | | | | | | |
| 2005 | | | | | | |
| 04/08/2005 | Feuerlöschfahrzeug | […] | […] | […] | […] | […] |
| 13/12/2005 | Feuerlöschfahrzeug | […] | […] | […] | […] | […] |
| Gesamt 2005 | | […] | […] | […] | […] | […] |

* covered by the obligation of professional secrecy

**Table 3: Infrastructure Investments 2006-2009**

| Zuwendungs bescheid vom | Maßnahme | Gesamtkosten der Investitions-maßnahme | Landesmittel | Mittel des ZEF | Mittel des Trägers | ausgezahlte Mittel des Landes | ausgezahlte Mittel des ZEF | Davon Landesmittel für Baumaß-nahme |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |
| **2006** | | | | | | | | |
| 22/11/2006 | Trinkwasseranlage | […] | […] | | […] | […] | | |
| 21/11/2006 | Verbesserung Verkehrssicherheit | […] | […] | […] | […] | […] | […] | […] |
| 13/12/2006 | Erweiterung des Terminals | […] | […] | […] | […] | […] | […] | […] |
| Gesamt 2006 | | […] | […] | | […] | […] | | […] |
| | | | | | | | | |
| **2007** | | | | | | | | |
| 23/11/2007 | Erweiterung Terminal, Mehrkosten | […] | […] | […] | […] | […] | […] | […] |
| 30/01/2007 | Ausrüstung Abfertigung von Luftfahrz. | […] | […] | […] | […] | […] | […] | […] |
| 30/09/2007 | Sicherheitsmaßnahmen | […] | […] | […] | […] | […] | […] | […] |
| 27/09/2007 | Verbesserung der Verkehrssicherheit | […] | […] | […] | […] | […] | […] | […] |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 31/10/2007 | LFZ- Enteisungsfahrzeug | […] | […] | […] | […] | […] | […] | […] |
| 09/12/2007 | Luftsicherheitsgeräte | […] | […] | […] | […] | […] | […] | […] |
| Gesamt 2007 | | […] | […] | | […] | […] | | […] |
| | | | | | | | | |
| **2008** | | | | | | | | |
| 23/11/2007 | Erweiterung Terminal, Mehrkosten | […] | […] | […] | […] | […] | […] | […] |
| 28/03/2008 | Erweiterung Terminal, Mehrkosten | […] | […] | […] | […] | […] | […] | […] |
| 17/06/2008 | Sicherheit Vorfeld 1 | […] | […] | […] | […] | […] | […] | […] |
| 09/08/2008 | Schlepper, Funk | […] | […] | […] | […] | […] | […] | […] |
| 21/10/2008 | Vorfeldbeleuchtung | […] | […] | […] | […] | […] | […] | […] |
| 27/10/2008 | Heizgerät | […] | […] | […] | […] | […] | […] | […] |
| 09/11/2008 | Sanierung Landebahn | […] | […] | […] | […] | […] | […] | […] |
| 31/10/2008 | Umbau Terminal | […] | […] | […] | […] | […] | […] | […] |
| 24/11/2008 | Wetterbeobachtungssystem | […] | […] | […] | […] | […] | […] | […] |
| 24/11/2008 | Geräte, Fahrzeuge | […] | […] | […] | […] | […] | […] | […] |
| Gesamt 2008 | | […] | […] | | […] | […] | | […] |
| | | | | | | | | |
| 2009 | | | | | | | | |
| 12/08/2009 | Landebahnsanierung | […] | […] | […] | […] | […] | […] | […] |
| 02/09/2009 | Erstellung DES | […] | […] | […] | […] | […] | […] | […] |
| 16/10/2009 | Guard Lights | […] | […] | […] | […] | […] | […] | […] |
| 19/10/2009 | Flugzeugschlepper,Förderband | […] | […] | […] | […] | […] | […] | […] |
| Gesamt 2009 | | […] | […] | […] | […] | […] | […] | […] |

(30) The total investment amount between 2000 and 2009 amounted to EUR 27 987 281, whereas the total amount of grants from the *Land* amounted to EUR 21 588 534. The biggest single investments were the extension of the runway in 2001/2003 (EUR […]), the modernisation of the terminal in 2006 (EUR […]), and the modernisation of the runway in 2008/2009 (EUR […]).

(31) As far as the capital injections by the *Land* Rhineland-Palatinate / ZEF into FGAZ and the coverage of FZG's losses by FGAZ are concerned, Table 4 provides the relevant data.

(32) It must furthermore be noted that while *Land* and ZEF both held 50% of the shares in FGAZ between 2000 and 2009 and in principle provided equal parts of the capital injections, the *Land* in reality subsidised ZEF's share. Until the end of 2005, the *Land* covered, in addition to its own share of 50% of the required capital injections, 90% of ZEF's share as well. Afterwards, the *Land* reduced that latter percentage, first to 80% in 2006 and then to 60% from 2007 onward. In consequence, the *Land* covered between 95% (until 2005) and 80% (from 2007 onward) of the annual losses of FGAZ.

**Table 4: Capital Injections and Results of Business Activities**

| Year | Capital Injections of *Land* Rhineland-Palatinate/ZEF into FGAZ | Annual result FGAZ | Annual results FZG | EBITDA FZG |
|---|---|---|---|---|
| 2000 | […] | […] | […] | […] |
| 2001 | […] | […] | […] | […] |
| 2002 | […] | […] | […] | […] |
| 2003 | […] | […] | […] | […] |
| 2004 | […] | […] | […] | […] |
| 2005 | […] | […] | […] | […] |
| 2006 | […] | […] | […] | […] |
| 2007 | […] | […] | […] | […] |
| 2008 | […] | […] | […] | […] |
| 2009 | […] | […] | […] | […] |
| **Total** | […] | […] | […] | […] |

*3.1.2. Reasons for Opening the Formal Investigation Procedure*

(33) The opening decision distinguishes between public financing of investments in the infrastructure of Zweibrücken Airport and public financing of its operating costs.

3.1.2.1. Infrastructure investments

*Existence of aid*

(34) The opening decision first noted that as regards investments into the airport infrastructure, FZG is an undertaking for the purposes of Article 107(1) of the Treaty. It recalled that in the *Leipzig / Halle* judgment[14], the General Court confirmed that an entity which constructs and operates airport infrastructure while levying a charge on the users is carrying out an economic activity. The only exception would be certain activities that could be qualified as an exercise of public power; those activities would be qualified as non-economic in nature, and therefore

[14] Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission* (hereinafter: "*Leipzig/Halle judgment*") [2011] ECR II-1311, in particular paragraphs 93-94; confirmed by case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] not yet reported.

not subject to State aid rules. The opening decision also asked Germany to submit further information on which activities could be qualified as being non-economic in nature.

(35) The opening decision also observed that FGAZ did not carry out any airport-related activities itself, but merely passed on the public funding it received to FZG. However, it noted that FGAZ did carry out some economic activities with respect to plots of land located in the vicinity of the airport. Because of those activities, the opening decision considered that FGAZ also constituted an undertaking for the purposes of Article 107(1) of the Treaty.

(36) Considering that the direct grants for investment projects were financed from the *Land*'s budget, and that the capital injections in favour of FGAZ (and ultimately FZG) stemmed from the public budget of the *Land* and ZEF, the opening decision concluded that the measures were financed through public resources.

(37) As regards the question of whether FGAZ and FZG received an advantage, the opening decision observed that public funding does not constitute an advantage where the public body granting the funding acted like a Market Economy Operator ("MEO"). The opening decision noted that Germany had not presented any evidence that in granting the public funding, it acted like a MEO. Rather, it was apparent that, unlike a private investor, in granting the funding the public authorities had regional and social policy considerations in mind. As it could, therefore, not be concluded that the public authorities acted like a MEO, the opening decision reached the preliminary conclusion that the public funding provided an advantage to FGAZ / FZG.

(38) The opening decision next noted that the public funding was only granted to FGAZ / FZG, meaning that it was selective in nature.

(39) Finally, the opening decision explained that because there was increasing competition between regional airports, any advantage granted to Zweibrücken Airport was liable to distort competition. It particularly referred to Saarbrücken Airport, located only 39 kilometres by road away from Zweibrücken Airport. Noting further the traffic development forecasts for Zweibrücken Airport, the opening decision also observed that the advantage would probably have an effect on trade between Member States.

(40) In conclusion, the opening decision found that since all required elements were fulfilled, the public financing of infrastructure investments at Zweibrücken Airport constituted State aid.

*Compatibility*

(41) The opening decision observed that the 2005 Aviation Guidelines provide the framework against which to assess the compatibility of the public financing of infrastructure investments. They set out a number of criteria, which the Commission has to take into account for the assessment of compatibility pursuant to Article 107(3)(c) of the Treaty. Pursuant to point 61 of the 2005 Aviation Guidelines, such public financing is compatible where:

(a) the construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.);

(b) the infrastructure is necessary and proportional to the objective which has been set;

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

(d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner; and

(e) the development of trade is not affected to an extent contrary to the Union interest.

(42) In addition, State aid to airports – as any other State aid measure – should have an incentive effect and should be necessary and proportional in relation to the targeted legitimate objective in order to be compatible.

(43) As regards the question whether the construction and operation of the infrastructure meets a clearly defined objective of common interest, the opening decision noted that Zweibrücken Airport serves to improve the accessibility of the part of *Land* Rhineland-Palatinate in which it is located. It furthermore recalled the German submission that the Airport promotes the economic development of the region. However, the opening decision also recalled that the airport only commenced its commercial aviation services in 2006, and that other airports, above all Saarbrücken Airport, are located in its vicinity and provide connectivity to the region. On the basis of the latter finding, the opening decision expressed doubts as to whether the public funding of Zweibrücken's infrastructure served an objective of common interest or merely duplicates the already available infrastructure in the region.

(44) With respect to the necessity and proportionality of the infrastructure, Germany had submitted that only those investments had been undertaken that were necessary to ensure the compliance of the Airport with all relevant safety standards. The opening decision, however, noted that Zweibrücken Airport was located in such close vicinity to Saarbrücken Airport that it had to be presumed to be in competition with it. Other airports might also stand in direct competition with Zweibrücken Airport, in particular as regards freight or leisure travel. Under these circumstances, the opening decision expressed doubts as to whether the infrastructure at Zweibrücken was necessary and proportionate as regards the stated objective.

(45) As regards the infrastructure's prospects, the opening decision recalled Germany's submission that the passenger numbers were expected to increase to approximately 335 000 in 2015 and possibly to more than 1 000 000 by 2025. Germany had also submitted that it expected Zweibrücken to become profitable by 2015. However, the opening decision observed that Zweibrücken Airport had generated increasing losses since the start of commercial aviation in 2006, which casts doubt on the ability of the Airport to generate profits in the future. These doubts are reaffirmed by the proximity of Saarbrücken Airport, which could be in competition with Zweibrücken

for the same passengers. In the light of this, the opening decision expressed doubts as to the medium-term prospects for use of the airport infrastructure.

(46) The opening decision finally expressed doubts as to whether all potential users had access to the infrastructure in an equal and non-discriminatory manner. It also raised the question of whether the development of trade would be affected to an extent contrary to the Union's interest, notably in the light of its vicinity to Saarbrücken Airport.

3.1.2.2. Operating aid

*Existence of aid*

(47) The opening decision first recalled its previous conclusion that both the FGAZ and FZG are undertakings for the purposes of Article 107(1) of the Treaty. It also recalled that since the capital injections stemmed directly from public authorities, they constitute a transfer of State resources and are imputable to the State. Considering further that operating aid relieves the beneficiary of some of the expenditure connected to its business, the capital injections granted FGAZ and FZG an economic advantage which they would not have obtained under normal market conditions. Finally, it recalled that operating aid is liable to distort competition and affect trade between Member States in the same way that public financing of infrastructure investments is. It concluded that the operating aid in the form of capital injections to the benefit of FGAZ and FZG constituted State aid.

*Compatibility – SGEI Decision*

(48) Germany had argued that Zweibrücken Airport was entrusted with providing a service of general economic interest ("SGEI") and that operating aid was exempted from notification and compatible with the internal market on the basis of the 2005 SGEI Decision[15]. After observing that Zweibrücken Airport served less than 1 000 000 passengers per year and therefore complied with the condition of Article 2(1)(d) of the 2005 SGEI Decision, the opening decision expressed doubts whether the operation of the Airport constitutes an SGEI.

(49) More particularly, the opening decision rejected Germany's argument that a contribution to the regional and economic development of the region was sufficient to classify the entire operation of the airport as an SGEI. The opening decision stressed that the region was already well served by other airports and that it was therefore not apparent why it would be necessary to entrust Zweibrücken Airport with an SGEI to provide airport services.

(50) The opening decision also explained that on the basis of the available information it was not clear whether the conditions of Article 4 of the 2005 SGEI Decision were met. The general obligation to operate the airport, contained in §45 Luftverkehrs-Zulassungs-Ordnung (Air Traffic Licensing Regulation, "LuftVZO"), did not fulfil the conditions listed in Article 4 of the 2005 SGEI Decision, and this obligation would in any event disappear if it were decided to close the airport. It was further

[15] Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

observed that due to missing data, the Commission had not been able to assess compliance with Article 5 of the 2005 SGEI Decision.

(51) The opening decision finally observed that since the 2012 SGEI Decision[16] only exempted State aid for airports with less than 200 000 passengers from notification, any aid to Zweibrücken Airport would have to be notified to the Commission for the period from 31 January 2014 onward, even if it could be considered to comply with the 2005 SGEI Decision.

*Compatibility – 2005 Aviation Guidelines*

(52) The opening decision recalled that operating aid is generally not compatible with the internal market, and that it can only exceptionally be declared compatible under strict conditions. According to point 27 of the 2005 Aviation Guidelines, operating aid can only be declared compatible for airports located in the most disadvantaged regions of the Union, that is to say, those falling under Article 107(3)(a) of the Treaty as well as the most remote regions and sparsely populated areas. It observed that Zweibrücken Airport was located in any of those areas, so that the aid could not be considered compatible under point 27 of the guidelines.

(53) As regards the possibility of declaring the operating aid compatible pursuant to Section 4.2. of the 2005 Aviation Guidelines, the opening decision pointed out that the compatibility criteria in that section are similar to those listed in the 2005 SGEI Decision. As the Commission had reached the preliminary conclusion that the l conditions of the 2005 SGEI Decision were not fulfilled, it reached the same conclusion as regards the conditions of the 2005 Aviation Guidelines.

(54) The opening decision finally also noted that, since 31 January 2012, the rules contained in Section 4.2. of the 2005 Aviation Guidelines are supplemented by the provisions of the 2012 SGEI Framework[17]. This means that any public funding that is covered by the 2005 SGEI Decision, but not the 2012 SGEI Decision, would, from 31 January 2014 onward, need to fulfil both the requirements laid down in Section 4.2. of the 2005 Aviation Guidelines and the provisions of the 2012 SGEI Framework.

*Compatibility – Rescue & Restructuring Guidelines*

[16] Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

[17] Commission Communication on a European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11.1.2012, p. 15).

(55) The opening decision finally commented on the possible compatibility of the capital injections pursuant to the Rescue & Restructuring Guidelines[18]. It observed that since the airport only commenced its commercial operation in 2006, it could be considered to constitute a "new undertaking" in the sense of the Rescue & Restructuring Guidelines, excluding therefore their application. It also noted that no restructuring plan had been presented on the basis of which the aid could have been granted.

(56) Accordingly, on the basis of the available information, it was concluded that the operating aid to FZG / FGAZ could not be declared compatible with the internal market.

### 3.2. Potential aid in connection with a bank loan and participation in the *Land* Rhineland-Palatinate's internal cash pool

#### *3.2.1. Detailed description of the measure*

(57) On 20 October 2009, the FZG obtained a loan of […] million from *Sparkasse Südwestpfalz*. The interest rate was set at 2.05% per annum until 15 October 2012, after which the parties could renegotiate the conditions. The *Land* Rhineland-Palatinate granted FZG a 100% guarantee of the loan, without demanding any remuneration or collateral in return.

(58) Since 26 February 2003, FGAZ has also been entitled to participate in a "cash-pool" (that is to say, a financing pool) established by *Land* Rhineland-Palatinate's Ministry of Finance. The cash-pool is a refinancing mechanism open to undertakings in which the *Land* holds at least 50% of the shares.

(59) The maximum loan amount that FGAZ could draw from the cash-pool was set at EUR 3.5 million from 16 January 2009 onward and raised to EUR 6 million on 1 October 2009. FGAZ does not have to provide collateral, the interest rates are set at call money rate, and the loans are repaid whenever FGAZ has liquidity available.

(60) Germany explained that the cash-pool functions as follows: the FGAZ requests funds from the cash-pool to ensure its liquidity, and the *Land* provides those funds from the cash-pool. The interest rates charged are market-based call money rates. If the balance of the cash-pool itself is negative, the *Land* replenishes it by taking up loans on the market in its own name. Germany further explained that the *Land* essentially passes on the conditions it obtains on the capital market to the participants in the cash-pool, thereby allowing the participants – the undertakings in which the *Land* holds a majority of the shares – to refinance themselves under the same conditions as the *Land* itself.

(61) Germany submited that until May 2006, the FGAZ's balance with the cash-pool was always positive, and only thereafter started to be negative. Germany provided the

[18] Communication from the Commission: Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty (2004) (OJ C 244, 1.10.2004, p. 2).

data set out in Table 5 on the FGAZ's balance with the cash-pool between 2006 and 2009.

**Table 5: FGAZ's balance with the cash-pool between 2006 and 2009**

| Year | Deposits | Withdrawals | Balance on 31.12. |
|---|---|---|---|
| **2006** | […] | […] | […] |
| **2007** | […] | […] | […] |
| **2008** | […] | […] | […] |
| **2009** | […] | […] | […] |

*3.2.2. Reasons for opening the formal investigation procedure*

3.2.2.1. Existence of aid

(62) The opening decision first stated that FZG and FGAZ constitute undertakings for the purposes of Article 107(1) of the Treaty. It next observed that it was clear that the guarantee and the cash-pool were imputable to the State and granted from public resources. As regards the loan itself, however, the opening decision asked for further information from Germany on the question of whether the grant of the loan by *Sparkasse Südwestpfalz*, a public bank, was imputable to the State.

(63) The opening decision applied the MEO test to determine whether the loan, the guarantee, or the cash-pool had provided an advantage to FZG / FGAZ. It noted that as regards the loan and the cash-pool, it had to assess whether both complied with the conditions set out in the 2008 Reference Rate Communication[19]. As no information on the relevant reference interest rate had been provided, the Commission asked Germany to provide all the information necessary to assess whether the loan and cash-pool complied with the conditions set out in the 2008 Reference Rate Communication.

(64) With respect to the guarantee granted by the *Land* Rhineland-Palatinate, the opening decision observed that whether or not the guarantee constituted State aid had to be

[19] Communication from the Commission on the revision of the method for setting the reference and discount rates of 12 December 2007 (OJ C 14, 19.1.2008, p. 6).

assessed pursuant to the Guarantee Notice[20]. Noting that sufficient information was not available, the opening decision requested Germany to supply all information necessary to assess the guarantee under the Guarantee Notice.

(65) Considering next that the loan, the guarantee, and the cash-pool were only available to FGAZ / FZG, the opening decision found that they were selective. It also considered that – as was the case regarding the public financing of infrastructure and operating aid – it could not be excluded that the loan, guarantee, and cash-pool distorted competition.

(66) On the basis of the available information, the opening decision accordingly concluded that the loan, the public guarantee, and the cash-pool constituted State aid within the meaning of Article 107(1) of the Treaty. The possible compatibility of those measures was not assessed.

### 3.3. Discounts on airport charges for Ryanair, Germanwings and TUIFly

#### *3.3.1. Detailed description of the measure*

(67) The schedule of charges presented by Germany entered into force on 1 October 2005. According to that schedule, the landing charges are determined by reference to the aircraft's maximum take-off weight ("MTOW") and the number of passengers on board. For scheduled flights with more than 50 passengers, however, a lump sum of EUR 6 per passenger is envisaged. That lump sum covers all airport charges, including the security charge of EUR 3.58.

(68) A series of discounts are available where certain conditions are fulfilled:

(a) New scheduled connections: the Airport grants a 100% discount on landing, handling and passenger charges for a period of twelve months for any airline operating a new route from Zweibrücken, as long as the new destination is served daily during the summer schedule and at least three times per week during the winter schedule. If the airline bases an aircraft at the airport, the 100% discount can be extended for an additional six months.

(b) New charter connections: the Airport grants a 100% discount on landing, handling and passenger charges for any airline newly operating from Zweibrücken until a threshold of 100 000 passengers is reached; consequently, for these first 100 000 passengers, no landing, handling or passenger charges have to be paid. The airline has to serve the new destination daily during the summer schedule and at least three times per week during the winter schedule. Airlines fulfilling certain further conditions – such as increasing the frequency of their services by 50% - 100% in two consecutive summer schedules and

[20] Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

reaching a certain passenger-threshold – are granted a further 100% discount for an additional 50 000 – 100 000 passengers.

3.3.1.1. Charges paid by Germanwings

(69) In August/September 2006, Germanwings and FZG concluded an agreement regarding the establishment of the route Zweibrücken – Berlin-Schönefeld, starting in September 2006. That contract envisaged charges of EUR […] per passenger, covering landing, parking, passenger and security charges. The charges were discounted by […] for the first year of operation. From 16 September 2007 onward, Germanwings paid EUR […] per passenger, while from 1 January 2008 onward that payment was reduced to EUR […] per passenger. On 9 January 2011, Germanwings discontinued its service to and from Zweibrücken.

3.3.1.2. Charges paid by TUIFly

(70) Germany provided a contract between FZG and TUIFly, according to which TUIFly had to pay a lump sum of EUR […] per passenger, covering all relevant charges. Nevertheless, it further submitted that TUIFly was exempted from all charges for the first […] passengers. After that passenger number was reached on 1 August 2010, TUIFly paid a lump sum of […] per passenger.

3.3.1.3. Charges paid by Ryanair

(71) Ryanair served the route Zweibrücken – London-Stansted between 28 October 2008 and 22 September 2009. For the first year of operation, FZG and Ryanair had agreed on […]. In return, Ryanair committed to reach at least […] passengers per year. According to Germany, Ryanair paid […].

3.3.1.4. Services received by Germanwings, TUIFly and Ryanair

(72) The contracts between FZG and the various airlines all contain a section on additional services and charges. Table 6 contains a comparison of the most important additional services and the prices charged to those airlines.

**Table 6: Additional Services and Charges**

| **Service** | **Price TUIFly** | **Price Germanwings** | **Price Ryanair** |
|---|---|---|---|
| **Air Starter Unit** | […] | […] | […] |
| **Ground Power Unit** | […] | […] | […] |
| **Aircraft cleaning** | […] | […] | […] |

| | | | |
|---|---|---|---|
| **(standard)** | | | |
| **Aircraft cleaning (over night stop)** | […] | […] | […] |
| **Aircraft De-icing** | […] | […] | […] |
| **De-icing Fluid and Water** | […] | […] | […] |
| **Empty Wall Space for Advertising** | […] | […] | […] |
| **Car Rental Till** | […] | […] | […] |
| **Hangar Access for ad hoc Technical Maintenance** | […] | […] | […] |
| **At least 4 Press Conference per year** | […] | […] | […] |
| **Two Journeys for Journalists per year, organised by airport** | […] | […] | […] |
| **PC, Printers, Phones, Fax and SITA-Equipment** | […] | […] | […] |

*3.3.2. Reasons for opening the formal investigation procedure*

3.3.2.1. Existence of aid

(73) The opening decision first observed that since FZG, which granted the discounts on the airport charges to the various airlines, was entirely owned and controlled by the State, those discounts had to be considered to have been granted by foregoing State resources. It was further considered that the State was very likely to have been involved in the actual conclusion of the contracts with the various airlines, and that the relevant public supervisory authority had to approve the airport's schedule of charges, with the consequence that the granting of discounts on the airport charges to various airlines was imputable to the State.

(74) In order to answer the question of whether the discounts provided an advantage to the respective airlines, the opening decision recalled that it had to be assessed whether FZG acted like a MEO in granting the discounts. To comply with the MEO test, it was necessary to demonstrate that the decision to grant the discounts was based on sound economic logic and improved the airport's profitability. In addition,

the revenue generated by the Airport in connection with a contract with a particular airline could not be lower than the costs of providing airport services to that airline.

(75) The opening decision noted that there was no indication that Germany had compared expected costs and revenues over the duration of the respective airline contracts. Germany had only provided a medium-term business plan covering the period 2011 – 2015. In this light, the opening decision considered it to be doubtful whether the revenues generated from the agreements with the airlines were sufficient to cover the costs related to providing them with airport services. It noted that since it commenced its commercial operations, FZG had generated increasing losses, and that the agreements did not include clause, common in other agreements, allowing FZG to recover the discounts in case the airlines decided to terminate their operations from Zweibrücken.

(76) The opening decision also considered that if Zweibrücken Airport had acted like a MEO, it would have had to consider whether closing the airport was less costly than continuing its operation. It requested Germany to provide information regarding the costs of closure of the airport in comparison to the costs of continuing its operation. Finally, the opening decision noted that the discounts seemed to include the security charges which FZG had to pay to the security service. It observed that any price charged to the airlines which did not allow FZG to recover those costs would constitute an advantage to the airlines. In conclusion, the opening decision expressed serious doubts as regards the compliance of the discounts granted to various airlines with the MEO principle.

(77) Considering, finally, that the airlines operated on a competitive market and that any advantage granted to them would allow them to strengthen their position on that market, the opening decision found that the discount granted on the charges was likely to affect trade between Member States and to distort or threaten to distort competition.

(78) The opening decision reached the preliminary conclusion that the discounted charges constituted State aid to the respective airlines (Germanwings, TUIFly, and Ryanair).

3.3.2.2. Compatibility

(79) The opening decision assessed whether the discounted charges could be considered to constitute compatible start-up aid pursuant to section 5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed doubts as to whether the various conditions for the compatibility of start-up aid were fulfilled.

(80) In particular, the opening decision observed that:

(a) it was doubtful whether the discounted charges fulfilled the conditions of point 79(c) of the 2005 Aviation Guidelines, since it was not clear whether and how the discounts were tied to an increase in passenger numbers;

(b) it was doubtful whether the discounted charges fulfilled the conditions of point 79(d) of the 2005 Aviation Guidelines, since it was not clear whether the discounts were degressive and limited in duration;

(c) it was doubtful whether the discounted charges fulfilled the conditions of point 79(e) of the 2005 Aviation Guidelines, since it was not clear which costs were covered by the discounted charges;

(d) it was doubtful whether the discounted charges fulfilled the conditions of point 79(f) of the 2005 Aviation Guidelines, since the measure did not appear to be linked to the eligible costs;

(e) it was doubtful whether the discounted charges fulfilled the conditions of point 79(h) of the 2005 Aviation Guidelines, since there was no indication that FZG made its intention to grant the discounts public and offered them to other airlines as well;

(f) it was doubtful whether the discounted charges fulfilled the conditions of point 79(i) of the 2005 Aviation Guidelines, since no business plans on the profitability of the benefiting routes had been made available and it was not clear whether there had been any impact on competing routes;

(g) it was doubtful whether the discounted charges fulfilled the conditions of point 79(j) of the 2005 Aviation Guidelines, since there was no indication that the required list had been produced;

(h) it was doubtful whether the discounted charges fulfilled the conditions of points 79(k) and 79(l) of the 2005 Aviation Guidelines; and

(i) it was doubtful whether the discounted charges fulfilled the conditions of point 80 of the 2005 Aviation Guidelines, since it was not clear whether the discounted charges were cumulated with other types of aid.

(81) In conclusion, the Commission reached the preliminary conclusion that the discounted charges could not be considered compatible start-up aid, since they do not fulfil all the conditions listed in Section 5 of the 2005 Aviation Guidelines.

### 3.4. The marketing contracts with Ryanair and AMS

#### *3.4.1. Detailed description of the measure*

(82) Two marketing services agreements were concluded with Ryanair and its subsidiary AMS. Under a first contract, concluded between Ryanair and FZG, the latter paid EUR […] to Ryanair for various marketing activities carried out by Ryanair.

(83) A second contract was concluded on 6 October 2008 between the *Land* Rhineland-Palatinate, represented by the Ministry of Economics, Traffic, Agriculture and Viticulture, and AMS. Neither FGAZ nor FZG are parties to that contract. Under the contract, AMS provided various marketing activities, such as placing links to websites determined by the *Land* on Ryanair's website and including short texts

about *Land* Rhineland-Palatinate on Ryanair's website. During the first year, the *Land* paid AMS a total of EUR […], while for the second year the services were to be reduced and the *Land* would have had to pay EUR […].

(84) As Ryanair discontinued its services to and from Zweibrücken after less than one year, the marketing services agreement for the second year was eventually cancelled and the price for the first year was reduced to […] of the agreed upon price. In practice, the *Land* Rhineland-Palatinate then paid a total of EUR 320 833 to AMS for marketing services. It appears that AMS carried out all the agreed activities.

*3.4.2. Reasons for opening the formal investigation procedure*

3.4.2.1. Existence of aid

(85) The opening decision first observed that the payments by the *Land* Rhineland-Palatinate to AMS/Ryanair involve State resources and are imputable to the State. To the extent that the price paid by Rhineland-Palatinate exceeded the economic value of the services rendered by AMS/Ryanair, they constitute a loss of State resources.

(86) To assess whether the marketing services agreements granted AMS/Ryanair an advantage, the Commission again had to apply the MEO principle. It observed that at Zweibrücken Airport, only Ryanair had received marketing support to such an extent, that the payments were apparently not conditional on the marketing measures having a measurable impact (such as an increase in the number of passengers), and that it was not known whether *Land* Rhineland-Palatinate had any control over the provision of the marketing services by AMS / Ryanair. The opening decision noted further that the marketing services agreement was clearly tied to the route Zweibrücken – London-Stansted, so that it could be considered an incentive for that new route established by Ryanair in October 2008. Considering that Ryanair directly profited from the marketing activities, it was concluded that Ryanair should have covered at least a part of the related costs. In conclusion, the Commission doubted whether *Land* Rhineland-Palatinate had behaved like a MEO, thereby granting an advantage to AMS / Ryanair.

(87) As the marketing support was only granted to AMS / Ryanair, it was clear that the measure was selective. For the same reasons as outlined with respect to the discounted airport charges, the opening decision also found that the measure affected trade between Member States and distorted or threatened to distort competition. It accordingly concluded that the marketing support constituted State aid within the meaning of Article 107(1) of the Treaty.

3.4.2.2. Compatibility

(88) The opening decision assessed whether the marketing support granted to AMS / Ryanair could be considered to constitute compatible start up aid pursuant to Section

5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed its doubts as to whether the various conditions for the compatibility of start-up aid were fulfilled. The reasons were essentially the same as those listed in recital (80) of this Decision regarding the compatibility of the discounted charges. Accordingly, it reached the conclusion that the marketing support does not constitute compatible start-up aid.

## 4. COMMENTS FROM GERMANY

### 4.1. Public financing by *Land* Rhineland-Palatinate / ZEF of Zweibrücken Airport

*4.1.1. Infrastructure*

*4.1.1.1.* Existence of aid

*Economic activity and advantage*

(89) The German authorities first recalled that they did not agree with the Commission's position that the construction of airport infrastructure constitutes an economic activity. Pointing out that the Commission mainly referred to the General Court's judgment in the *Leipzig-Halle* case, Germany noted that an appeal against that judgment was still pending before the Court of Justice, reserving its position until the Court of Justice has decided.

(90) Secondly, the German authorities asserted that none of the infrastructure investments made before 2006, when Zweibrücken Airport commenced its commercial operations, were subject to State aid rules. Until 2006 the airport served only for general aviation and military aviation purposes, and the German authorities claimed that providing airport services for those purposes did not constitute an economic activity. In any event, it was asserted that because of the small scale of the operations at Zweibrücken Airport until 2006 (there were never more than 30 000 passengers per year until 2006), any public funding did not distort or threaten to distort competition and had no effect on trade between Member States.

(91) Thirdly, the German authorities submitted that the majority of investments supported with public grants fell within the public policy remit. It was emphasised that most investments were necessary in order to guarantee the safety of operations at the airport (in particular following an order from the relevant safety supervisory authority and complaints by the pilot association "Cockpit"). All of the measures connected to ensuring the safety of operations at the airport were therefore regarded as falling under the public policy remit.

(92) Germany strongly objected to the notion that any measures falling within the public policy remit might, if only partially, confer an advantage on the airport in question if

that funding was not granted on a non-discriminatory basis to all other airports in the Member State. Germany contended that funding for measures falling within the public policy remit did not constitute State aid, independent of the question whether one or all airports have to bear the costs for such measures. In this regard, there should be a uniform interpretation of the concept of "public policy remit", especially in the light of the different ways in which Member States define the concept.

(93) Germany submitted a list of investments which were made in relation to the public policy remit between 2006 and 2009 (for comparison, the total investment during that period amounted to EUR 22 476 812).

**Table 7: Overview of costs falling into the public policy remit submitted by Germany**[21]

| | Measures | Costs | Total costs |
|---|---|---|---|
| **2006** | […] | […] | […] |
| **2007** | […] | […] | […] |
| | […] | […] | |
| | […] | […] | |
| | […] | […] | |
| **2008** | […] | […] | […] |
| | […] | […] | |
| | […] | […] | |
| | […] | […] | |
| | […] | […] | |
| **2009** | […] | […] | […] |
| | […] | […] | |
| **Grand total** | **EUR 19 707 315** | | |

(94) Germany stated that it considers the provision of airport security measures pursuant to §8 *Luftsicherheitsgesetz* (Air Security Law), measures assuring operational safety, air control and air safety measures pursuant to §27c(2) *Luftverkehrsgesetz* (Air Traffic Law), meteorological services, and fire brigade services to fall within the public policy remit, whether as investments or operating expenses.

(95) Germany argued that as regards air control and air safety measures, the financing of those activities has to be seen in the light of §27c(2) *Luftverkehrsgesetz.* Under that provision, a distinction is made between certain airports where the financing of those safety measures at federal level is regarded as being essential for reasons of safety and transport policy, and other, regional airports where such measures are not regarded as strictly necessary from a federal perspective. This is why it is justified

[21] Submitted as Annex 8 to Germany's submission of 27 January 2011.

that the *Land* publicly finances air control and safety measures at regional airports such as Zweibrücken, since otherwise the airport would have to bear those costs itself. Therefore, the funding of air control and air safety measures, whether financed directly by the State on the federal level or by the *Länder*, is considered by Germany to be part of public policy in all cases.

(96) Furthermore, according to Germany, costs for the fire brigade are not regulated on the federal level, but fall within the competence of the *Länder*, which is why the fire brigade is not financed by the State at all airports. Germany argued that the difference in treatment is rooted in historical as well as objective reasons. Mainly, it lies in the nature of the airport business that smaller regional airports cannot bear the high fixed costs which a fire brigade creates, and that therefore these will be borne by the respective *Land*.

(97) Concerning the renovation of the runway, Germany submitted that the related measures fall within the public policy remit as they were urgently needed in order to guarantee the safe utilisation of Zweibrücken Airport. Germany argued in this regard that use even for military purposes would not have been possible without those measures. Therefore, the renovation was necessary to ensure that military use and general aviation would be possible at all. Germany therefore claims that the costs for renovation are not exclusively connected to commercial aviation.

(98) In this regard, Germany stated that the type of renovation and the costs connected with it were necessitated by the military history of the airport. According to Germany, the works entailed certain dangers, since the presence of unexploded bombs from the war could not be excluded. In fact, two unexploded bombs were apparently removed in the course of the renovation.

(99) Otherwise, the renovation works included, *inter alia*, adapting the runway to modern standards regarding width, renewal of drainage, navigation lights and guard lights, signs, emergency power supply with network parallelism, and extension of the fence and the taxiway. The renovations concerning lights, signs and the lifting of the taxiway had been requested in complaints by the pilot association "Cockpit". Another substantial part of the renovation was the reorganisation of airport security, including new fences, doors, video supervision and intercom, installation of sliding doors, cable channels, etc.

(100) Germany, finally, argued that closing Zweibrücken Airport was never considered a viable option, as the continuous operation of the airport was necessitated by the military and general aviation purposes it serves. In this regard, Germany furthermore argued that a closure and deconstruction of the airport would be associated with unjustifiable costs surpassing by far the costs invested. Germany did not, however, present any estimate of the costs related to a closure, or a comparison of those costs with continuing operations.

(101) In this light, Germany submitted that providing airport services to commercial aviation makes economic sense. Germany argued that the great majority of costs would need to be incurred in any event in order to provide airport services to military

and general aviation users (infrastructure etc.), so that also serving commercial aviation only causes limited additional costs while creating additional revenue.

*Distortion of competition and effect on trade*

(102) Germany asserted that the public financing of Zweibrücken Airport's infrastructure does not distort competition and has no effect on trade between Member States. Germany submitted further that neither a distortion of competition nor an effect on trade could be deduced from the mere fact that other airports are located in the vicinity of Zweibrücken. Germany argued that Zweibrücken Airport is not in competition with the airports listed in the opening decision, above all not with Saarbrücken Airport.

(103) With regard to the relationship between Zweibrücken and Saarbrücken Airports, Germany stated that the two airports complement each other, rather than being in competition. Germany explained that the two airports have different profiles, stemming from their different infrastructure: Saarbrücken Airport has higher quality passenger infrastructure (such as a modern terminal building), and concentrates on scheduled flights and business travellers; Zweibrücken Airport, on the other hand, has a longer runway with a higher weight capacity, making it more suitable for heavier aircraft flying long distance or transporting freight. According to Germany, Zweibrücken Airport therefore concentrates on charter flights and freight.

(104) Building on the perceived complementarity between Zweibrücken and Saarbrücken airports, Germany declared that a closer cooperation between the two airports is envisaged. Germany submitted further that the respective regional governments have already decided to cooperate more closely in the future, envisaging the creation of a joint airport ("Saar-Palatinate-Airport") with two locations (Saarbrücken and Zweibrücken). According to Germany, the cooperation should lead to synergies and save funds. Finally, Germany emphasised that demand for aviation services in the region (the two airports taken together already have 750 000 passengers), maintaining that only Saarbrücken and Zweibrücken together can properly satisfy this demand, in particular because the other neighbouring airports cannot serve as substitutes. According to Germany, the new "Saar-Palatinate-Airport" would therefore not be in competition with the neighbouring airports, such as Luxembourg, Metz-Nancy-Lorraine, and Frankfurt-Hahn.

4.1.1.2. Compatibility

(105) Germany explained that, even if the public financing of infrastructure measures was considered to constitute State aid, it would be compatible with the internal market as it complies with the conditions set out in point 61 of the 2005 Aviation Guidelines. Before discussing each required element, Germany stressed that the infrastructure investments made in Zweibrücken were relatively minor compared to those found to

be compatible with the internal market at other publicly funded regional airports and only served to convert existing military infrastructure for civilian use.

*Construction and operation of the infrastructure meets a clearly defined objective of common interest*

(106) First of all, Germany submitted that the public support for infrastructure investments meets a clearly defined objective of common interest: the infrastructure investments were made in a C-assisted region with the objective of improving regional economic structures. Germany pointed out that Union funding (which was provided from 1991 onwards through the programmes KONVER I, KONVER II and PERIFRA) was used to convert the military infrastructure for civilian use, financing for example the modernisation and installation of a tower and the drainage of the runway. Germany claimed that it cannot understand why the Commission has doubts as to the objective of common interest after having participated in the financing of the conversion of the former military airfield.

(107) Providing historical context, Germany explained that the withdrawal of US armed forces from the Zweibrücken airfield in 1991 caused significant structural problems in the Zweibrücken region, such as an unemployment rate of 20% in the city of Zweibrücken. Germany stated that converting the airfield into a civilian airport therefore served the purpose of creating jobs and improving the regional economic infrastructure. Germany submitted further that the services provided by the airport are indispensable for the region and that the regional economy is highly dependent on easily accessible aviation infrastructure.

(108) Germany claimed that the Commission's only reason for doubting compliance with that criterion again appears to be the proximity and perceived competition with Saarbrücken Airport. In response, Germany again referred to the complementarity of the two airports, excluding any competition between them. In addition, it further argued that proximity to other regional airports was not of importance as regards the question of whether the subsidised infrastructure meets an objective of common interest. Germany stated further that the only relevant factor was the interest of the *Land* Rhineland-Palatinate, as it was concerned with serving the common interests in its own territory and not having to rely on infrastructure located in other regions.

*The infrastructure is necessary and proportional to the objective*

(109) Germany explained that the infrastructure is necessary and proportional to the objective which has been set. According to Germany, the infrastructure investments were always limited to complementing and extending existing infrastructure, without creating unnecessarily elaborate or expensive additional facilities. It emphasised that no new airport was created in Zweibrücken, but that a former military airport was simply converted to civilian use. Germany also stressed that the infrastructure is necessary to create jobs. According to Germany, throughout *Land* Rhineland-Palatinate, about 5 000 jobs were directly or indirectly created in connection with the existence of Zweibrücken Airport. Out of those 5 000 jobs, 2 708 were created

directly and indirectly at the airport or the surrounding conversion area until 2011. Those jobs also helped save social costs (EUR 25 million per year) and create tax income. Germany stated further that jobs are especially important in this area with an unemployment rate which is currently 2% above the average of the *Land*. Germany submitted that two expert opinions underline the importance of the airport for the regional economy[22].

(110) Germany again emphasised that the proximity to Saarbrücken Airport does not undermine the necessity and proportionality of the infrastructure in Zweibrücken. According to Germany, the infrastructure in Zweibrücken is necessary for large and heavy aircraft because they can only land in Zweibrücken, since the runway at Saarbrücken does not provide the necessary length. Germany submits further that Zweibrücken also offers the possibility of night-flights, which is important for freight flights.

*The infrastructure has satisfactory medium-term prospects for use*

(111) Germany stated that the infrastructure has satisfactory medium-term prospects for use Germany emphasised that passenger numbers for Zweibrücken Airport increased from only 17 732 passengers in 2005 to 223 165 passengers in 2011. It explained that under that criterion only the projected passenger numbers are relevant, and that the relevant projections demonstrate an increasing demand in the region. Referring to the forecast study provided by "Desel Consulting" and the "Airport Research GmbH" in 2009, Germany argued that by 2025 an increase to at least 1 350 000 passengers at Zweibrücken Airport could be expected.

(112) Germany once more asserted that the proximity of Saarbrücken Airport did not diminish Zweibrücken's medium-term prospects for use. It submitted forecasts showing that Saarbrücken Airport could also expect increasing passenger numbers and that the envisaged cooperation between the two airports would ensure that they will not compete for the same passengers in the future.

*Equal and non-discriminatory access to the infrastructure*

(113) Germany stated that all potential users of the infrastructure have access to it in an equal and non-discriminatory manner. The schedule of charges from 2005 in principle applies uniformly to all users of the airport under the same conditions. While Germany submitted that some deviations from the official schedule of charges were agreed upon in practice for scheduled and charter flights, it maintained that

[22] Prof. Dr. Heuer und Prof. Dr. Klophaus, unter Mitarbeit von Dr. Berster and Wilken, Deutsches Zentrum für Luft - und Raumfahrt, Januar 2006, "Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Zweibrücken", S. 146; Desel Consulting und Airport Research Center GmbH, "Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025", Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009, p. 85.

reduced charges for the first year and discounts were offered to all airline companies on a non-discriminatory basis, with comparable quotas.

*The development of trade is not affected to an extent contrary to the Union interest; the general principles of necessity and proportionality*

(114) Germany explained that the development of trade is not affected to an extent contrary to the common interest based on the arguments already made. According to Germany, the measures were necessary because Zweibrücken Airport cannot be substituted by Saarbrücken Airport. Germany stated further that the infrastructure investments were limited to measures necessary to ensure the operational safety of the airport. It stressed, in this context, that the modernisation of the runway would have been necessary even if the Airport had not been made available for commercial aviation.

*4.1.2. Operating aid*

4.1.2.1. Existence of aid

(115) As regards the question of whether operating an airport is an economic activity, Germany repeated that until the Airport started providing services for commercial aviation in 2006, it merely served general aviation and military aviation purposes. In this respect, Germany submitted that financing the operation of the airport with respect to those activities did not constitute an economic activity.

(116) Germany further argued that the majority of the losses of FZG that are covered by FGAZ via the P&L Agreement stem from FZG performing tasks falling within the public policy remit. According to Germany, covering costs related to the performance of public powers cannot constitute State aid.

(117) As regards the remaining elements of the definition of State aid in Article 107(1) of the Treaty, Germany referred to the arguments it submitted in this regard with respect to the infrastructure investment measures, holding that they equally apply here.

4.1.2.2. Compatibility

*2005 SGEI Decision*

(118) Germany argued that the annual payments covering the losses of FZG comply with the principles of the 2005 SGEI Decision. Germany asserted that the Airport's operating license, which imposes a duty to operate, constitutes the entrustment act. In addition, German stated that the Airport has been at least "in fact" entrusted with the

provision of an SGEI. According to Germany, even if, however, the Commission were to find that no entrustment act existed, the operating aid to the Airport would nevertheless comply with the principles of the SGEI rules and would therefore have to be considered to be compatible with the internal market.

(119) Germany furthermore rejected the Commission's suggestion that the duty to operate pursuant to the airport's operating licence would automatically come to an end if the airport was to cease its operations. It asserted that the financial support granted to the airport serves to enable the airport to continue operating and thereby to fulfil its duty to operate, that is to say, to provide the SGEI with which it has been entrusted. Germany argued further that preventing the closure of the facility is the essence of the duty to operate.

(120) Referring to the wide discretion of Member States to define what constitutes a SGEI, Germany pointed out that it had discretion to determine the necessity and extent of entrusting the airport with an SGEI. In as far as the Commission had referred to the proximity to Saarbrücken Airport, Germany again stressed that without the two airports the region would suffer from a severe under-supply of airport services, necessitating the entrustment of both airports with an SGEI.

*Sections 4.2. and 4.3. of the 2005 Aviation Guidelines*

(121) Germany asserted that even if the operating aid were to be considered not to have been exempted from notification under the 2005 SGEI Decision, it would be compatible pursuant to the 2005 Aviation Guidelines.

(122) At the outset, Germany stressed that a large part of the losses covered result from the Airport performing activities falling within the public policy remit. In addition, it pointed out that the P&L Agreement does not cover costs that an airport operator "normally" would have to bear. It argued in this context that a large part of the costs not related to the performance of activities falling within the public policy remit stem from the particular history of Zweibrücken airport and are, in this sense, not "normal costs". Germany submitted that the Airport has the obligation to cater to general aviation and had to incur costs to convert the existing military infrastructure.

(123) In any event, Germany asserted that the conditions of sections 4.2. and 4.3. of the 2005 Aviation Guidelines were fulfilled "in fact". In particular, Germany stated that, as only the actual losses are covered, the presence of overcompensation can be excluded.

### 4.2. Potential aid in connection with a bank loan and participation in the *Land* Rhineland-Palatinate's internal cash pool

(124) With respect to the bank loan, Germany submitted that the *Sparkasse Südwestpfalz*, which granted the loan, operates as a normal commercial bank and acted as such in granting the loan, so that the decision to grant the loan is not imputable to the State.

Germany stated further that when taking up the loan, the FZG compared offers from various banks, and the *Sparkasse* loan complied with market terms.

(125) As regards the 100% guarantee of the loan granted by the *Land*, Germany submitted that it is normal commercial practice for a shareholder to guarantee the loans taken out by its subsidiaries. In any event, Germany argued that the loan was used exclusively for the modernisation of the runway, necessitated by safety concerns and thus falling within the public policy remit. As the measure financed by the loan was thus not subject to State aid rules, it argued that the guarantee granted by the *Land* does not constitute aid either. Finally, Germany asserted that even if the guarantee were to be considered to be subject to State aid rules, no advantage was conferred on FZG, since the interest rate on the guaranteed loan was still higher than comparable loans granted to FGAZ that were not secured by a guarantee.

(126) Concerning the internal cash pool, Germany claimed that the *Land*'s internal cash-pool is a normal financing mechanism used in the relationship between mother companies and subsidiaries. Germany stated that the cash-pool is a financial instrument which was established by the *Land* in 2002. The *Land*'s institutions and foundations and all undertakings governed by private law of which the Land owns more than 50%, can participate in the cash pooling facility. Germany explained that the daily account balance of the cash pool is managed by the "Landeshauptkasse" of the *Land*.

(127) According to Germany, the cash pool is not financed directly out of the budget of the *Land*, but from the surplus cash of the participants. Germany explains further that any surplus of cash in the cash pool is invested on the capital markets; in the same way, a deficit is balanced by loans obtained on the capital market. Thus, Germany was of the opinion that any financial support from the cash-pooling facility is not granted through State resources, and is also not imputable to the State.

(128) Germany pointed out that even though no collateral is required from the undertakings benefiting from the cash-pool, they are under the *Land*'s supervision and as majority shareholder of FGAZ the *Land* could always request securities.

(129) In Germany's opinion it makes economic sense that the mother company enables its subsidiaries to finance themselves at rates comparable to those available to the mother company – in this case the *Land* Rhineland-Palatinate – itself. According to Germany, the financing derived from the cash pool could therefore not be compared to a classical loan. Germany finally asserted that the *Land* has never injected resources from its regular budget into the cash-pool, but has rather taken up capital on the market where necessary.

(130) Asserting that the loan, the guarantee and the cash-pool do not constitute State aid, Germany did not submit any arguments concerning their compatibility.

### 4.3. Discounts on airport charges for Ryanair, Germanwings and TUIFly

(131) Germany submitted that the contracts between Zweibrücken Airport and the various airlines did not contain any State aid, as they were not imputable to the State in the first place. It asserted that the negotiation and conclusion of those agreements was the responsibility of FZG, falling within the scope of its purely commercial tasks. According to Germany, while the contracts were discussed with FZG's supervisory board, the *Land* Rhineland-Palatinate was only indirectly involved via its representatives on the supervisory board of FGAZ. Germany stated further that the *Land* did not directly participate in any negotiations on discounts with the airlines. Germany submitted that imputability could, finally, not stem from the fact that the schedule of charges had to be approved by a public supervisory authority according to § 43a LuftVZO, which is a general regulatory requirement applying to public and private airports alike.

(132) Germany was further of the opinion that the discounts granted to various airlines did not confer any selective advantage upon them, as the discounts were equally available to all interested airlines. It submitted that the discounts would only have granted a selective advantage if they had not been available on a non-discriminatory basis and if one airline had paid higher or lower charges than others, without there being any objective reason for this differentiation.

(133) According to Germany, at the same time, granting the discounts is said to have made economic sense for FZG, as it allowed the airlines to establish themselves at an airport that was new to commercial aviation. Germany submitted that by granting the discounts, the Airport distributed the risk involved in establishing a new route between itself and the airlines, while also allowing both sides to profit from increasing passenger numbers. Germany asserted that without the discounts, the airlines would not have been willing to establish themselves in Zweibrücken.

(134) Germany stated that the rebates for the airlines have to be regarded as a possibility to generate additional income for FZG, as the fixed costs for operating the airport had to be incurred in any event (to serve general and military aviation) while the establishment of new airlines only causes very marginal additional variable costs. According to Germany, because serving new airlines did not lead to noticeable incremental costs, it was not necessary to prepare *ex ante* business plans to determine whether a contract with an airline would be incrementally profitable.

(135) According to Germany the reduced airport fees are not selective because they were granted on a non-discriminatory basis. Therefore, Germany was of the opinion that there was no distortion of competition. Germany asserted that the airlines were not able to create a stronger position on the market based on these fees.

(136) Asserting that the discounts to various airlines do not constitute State aid, Germany did not submit any arguments concerning their compatibility.

### 4.4. The marketing contracts with Ryanair and AMS

(137) Germany stressed that the marketing contracts concluded between the *Land* and AMS are independent from FZG. German asserted that the objective of the marketing contracts was to buy marketing services at market price that would primarily promote *Land* Rhineland-Palatinate as a destination for tourism and economic activities. According to Germany, as the marketing services agreement was not directed specifically at promoting the airport, there was no link between the marketing measures and passenger numbers. Germany stated that the marketing measures incidentally also aimed at promoting Zweibrücken Airport.

(138) Stressing that by concluding the marketing services agreement the *Land* simply purchased marketing services at market price, Germany submitted that the marketing contract did not contain State aid and did not have to be assessed as an aid measure benefiting an airline pursuant to the 2005 Aviation Guidelines.

## 5. COMMENTS FROM INTERESTED PARTIES

### 5.1. Ryanair

#### *5.1.1. Discounted airport charges*

(139) Ryanair asserted that the discounts granted to various airlines by FZG did not contain State aid, as they complied with the MEO principle. First, Ryanair argued that in applying the MEO principle to the relationship between airport and airlines, it should only be asked whether the contract was incrementally profitable for the airport. Ryanair considered that all infrastructure and fixed operating costs should be treated as sunk costs. According to Ryanair, when assessing whether the contract complied with the MEO principle, the Commission should thus only take the incremental costs of the airport, which are directly related to providing airport services to the airline in question, into account, and examine whether the total revenue derived from the contract outweighs those incremental costs. In this context, Ryanair emphasised that none of the infrastructure costs were incurred in connection with the agreement between Ryanair and FZG, and they could thus not count as incremental costs connected to that agreement.

(140) In assessing the revenue, on the other hand, Ryanair asserted that the Commission must also take account of network externalities that would have been expected to materialise when FZG and Ryanair concluded the services contract in 2008. Ryanair stated that the fact that those network externalities did not materialise, in the end, could not have been foreseen and is therefore of no relevance.

(141) Ryanair further explained that the discount did not selectively favour Ryanair. Ryanair asserted that the discount available for the first year of operations was offered in recognition of the significant commercial risk it took when establishing scheduled year-round operations to an airport that was unknown at that time.

According to Ryanair, in the case of Zweibrücken it would have made no sense for Ryanair to accept such a commercial risk without an incentive scheme.

(142) Ryanair furthermore stated that a similar arrangement was open to any other airline, that is to say, the discount on airport services fees for the first year of operation was available to all airlines starting new routes from Zweibrücken. In particular, Ryanair stressed that its contract with FZG contained a clause providing that "*[t]his Agreement is entered into on a non-exclusive basis. The Parties agree that the conditions granted to Ryanair according to the Agreement are also available, on a transparent and non-discriminatory basis, to any other airline that would commit itself to an equivalent volume of airline activity at the Airport.*"[23]

(143) In any event, Ryanair put forward that the agreements between itself and FZG cannot contain State aid as they are not imputable to the State. Ryanair claimed that the evidence used by the Commission in order to show imputability to the State is not sufficient, as it may reflect the public authorities' interest in the airport's commercial relations and future, but does not show any actual involvement of any of the public authorities in FZG's negotiations and agreements with Ryanair.

(144) Furthermore, Ryanair submitted a series of notes prepared by Oxera, and an analysis prepared by Professor Damien P. McLoughlin.

*Oxera Note 1 - Identifying the market benchmark in comparator analysis for MEO tests. Ryanair State aid cases, prepared for Ryanair by Oxera, 9 April 2013*

(145) Oxera believed that the Commission's approach of only accepting comparator airports in the same catchment area as the airport under investigation is flawed.

(146) Oxera argued that market benchmark prices obtained from comparator airports are not tainted by State aid given to surrounding airports. Therefore, it is possible to robustly estimate a market benchmark for the MEO tests.

(147) This is because:

(a) comparator analyses are widely used for MEO tests outside of the field of State aid;

(b) companies affect each other's pricing decisions only to the extent that their products are substitutes or complements;

(c) airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the reports submitted face only limited competition from State-owned airports within their respective catchment areas (less than 1/3 of commercial airports within the catchment areas of the comparator airports are fully State owned, and none of them were subject to State aid investigations (as of April 2013));

[23] Airport Services Agreement between Ryanair and FZG of 22 September 2008, Section 3.

(d) even where comparator airports face competition from State-owned airports within the same catchment area, there may be reasons to believe their behaviour is in line with the MEO principle (for example, where there is a large private ownership stake or where the airport is privately managed);

(e) MEO airports will not set prices below incremental cost.

*Oxera Note 2 - Principles underlying profitability analysis for MEO tests. Ryanair State aid cases, prepared for Ryanair by Oxera, 9 April 2013*

(148) Oxera argued that the profitability analysis undertaken by Oxera in its reports submitted to the Commission follows the principles that would be adopted by a rational private sector investor and reflects the approach apparent from Commission precedents.

(149) The principles underlying the profitability analysis are:

(a) the assessment is undertaken on an incremental basis;

(b) an *ex ante* business plan is not necessarily required;

(c) for an uncongested airport, the single till approach is the appropriate pricing methodology;

(d) only those revenues associated with the economic activity of the operating airport should be considered;

(e) the entire duration of the agreement, including any extensions, should be considered;

(f) future financial flows should be discounted in order to assess profitability of the agreements;

(g) incremental profitability of Ryanair agreements to the airports should be assessed on the basis of estimates of the internal rate of return or net present value (NPV) measures.

*Analysis of Professor Damien P. McLoughlin - Brand building: why and how small brands should invest in marketing, prepared for Ryanair, 10 April 2013*

(150) The paper aimed to set out the commercial logic underlying regional airports' decisions to buy advertising on Ryanair.com from AMS.

(151) The paper argued that there are a large number of very strong, well known, and habitually used airports. Weaker competitors must overcome static buying behaviour of consumers to expand their business. Smaller regional airports need to find a way to consistently communicate their brand message to as wide an audience as possible. Traditional forms of marketing communication require expenditure beyond their resources.

*Oxera Notes 3 and 4 – How should AMS Agreements be treated within the profitability analysis as part of the market operator test?, 17 and 31 January 2014*

(152) Ryanair submitted further reports by its consultant Oxera. In these reports, Oxera discussed the principles which, according to the airline, should be taken into account as part of the MEO test in the profitability analysis of, on the one hand, airport services agreements between Ryanair and airports and, on the other hand, the marketing services agreements between AMS and the same airports[24]. Ryanair emphasised that those reports do not in any way change its position presented earlier that the airport services agreements and the marketing services agreements should be analysed under separate MEO tests.

(153) The reports indicated that the profits generated by AMS should be included as revenues in a joint analysis regarding profitability while the expenses of AMS would have to be incorporated in the costs. To do this, the reports suggested the application of a cash-flow-based methodology to the joint profitability analysis, meaning that the expenditure by airports on AMS could be treated as incremental operating expenses.

(154) The reports emphasised that marketing activities contribute to the creation and support of the brand's value, which helps to generate effects and benefits not only for the duration of the contract, but also after its termination. This would especially be the case if, due to the fact that Ryanair has concluded an agreement with this airport, other airlines establish themselves at the airport, which will in turn attract more shops to install themselves there and therefore bring in more non aeronautical revenues for the airport. According to Ryanair, if the Commission proceeds to undertake a joint analysis of profitability, those benefits have to be taken into account by treating the expenses of AMS as incremental operating costs, net of AMS payments.

(155) Furthermore, Ryanair is of the opinion that a terminal value would have to be included in the projected incremental profits at the end of the airport services agreement in order to take into account the value generated after the termination of the agreement. The terminal value could be adapted on the basis of a "renewal"-probability, measuring the expectation that profits will persist after the termination of the agreement with Ryanair or if similar conditions are agreed with other airlines. Ryanair considered that it would then be possible to calculate a lower limit for benefits generated jointly by the agreement with AMS and the airport services agreement, reflecting the uncertainties of incremental profits after the termination of the airport services agreement.

(156) To supplement this approach, the reports presented a synthesis of the results of studies on the effects of marketing on the value of a brand. Those studies recognise that marketing can support the value of a brand and can help to build a customer base. According to the reports, in the case of an airport, marketing on Ryanair.com increases the visibility of the brand in particular. The reports moreover stated that

[24] Oxera, "*How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?"* prepared for Ryanair, on 17 January 2014.

smaller regional airports wishing to increase their air traffic can therefore especially increase the value of their brand by concluding marketing services agreements with AMS.

(157) The reports lastly indicated that a cash-flow-based approach is to be preferred over a capitalisation approach, in which the costs of marketing services provided by AMS would be treated as capital expenditure on an intangible asset (that is, the value of the brand).[25] The capitalisation approach would only take into account the proportion of marketing expenditure that is attributable to the intangible assets of an airport. The marketing expenses would be treated as capital expenditure in an intangible asset, and then depreciated for the duration of the contract, taking into consideration a residual value at the foreseen termination of the airport services agreement. This approach would not take into account the incremental profits which the conclusion of the airport services agreement with Ryanair would bring in and it is also difficult to calculate the value of the intangible asset due to the expenses of the brand and the time period of use of the asset. The cash-flow method is more appropriate than a capitalisation approach, since the latter would not capture the positive benefits to the airport that are expected to arise as a result of signing the airport services agreement with Ryanair.

*5.1.2. Marketing services agreements*

(158) Ryanair stressed that AMS' marketing services agreements are separate from Ryanair's agreements with airports and should be assessed separately, since they cannot be considered a single beneficiary. The agreements were negotiated independently, related to different services, and were not subject to any linkage that would justify their consideration as a single alleged State aid measure. The conclusion of a marketing services agreement with AMS is not a condition for the operation of routes by Ryanair to and from an airport. Ryanair stressed that the marketing services agreement of AMS was concluded with the Ministry, the co-owner of the airport, and it benefitted the airport but was not intended to improve the load factor or yield on Ryanair routes.

(159) As to the value of marketing, Ryanair claimed that marketing space on Ryanair's website is a scarce resource and demand for that space is high, including from businesses other than airports. According to Ryanair, even legacy airlines now realise the value of their websites for marketing and advertising. Ryanair submitted that airports choose to build a brand by advertising on Ryanair.com or on other airline websites. Ryanair stated further that this increased brand recognition can benefit the airports in a number of mutually reinforcing and complementary ways. Zweibrücken Airport is far less renowned internationally than either Aéroport de Paris or Heathrow Airport, and it therefore needs to invest in advertising to improve its brand

[25] Oxera, "*How should AMS agreements be treated within the profitability analysis as part of the market economy operator test? – Practical application"* prepared for Ryanair, on 31 January 2014.

recognition and maximise the number of inbound passengers. Ryanair concluded that the *Land* had a double motivation to conclude the marketing services agreement with AMS: first, a purely commercial one, as a 50% co-owner of the operator of the Zweibrücken Airport; secondly, as part of its duty to promote tourism and business opportunities in the *Land*. Ryanair is therefore of the opinion that the *Land* purchased valuable marketing services at market price.

### 5.2. Airport Marketing Services (AMS)

(160) AMS submitted that the Commission should not, contrary to what is suggested in the opening decision, treat FZG's agreement with Ryanair and the *Land*'s marketing services agreement with AMS as connected, but rather as two separate business transactions. AMS stated that it is a subsidiary of Ryanair with a real commercial purpose of its own, created in order to develop an activity that does not belong to the core business of Ryanair. AMS clarified that it is used by Ryanair as an intermediary to sell advertising space on its website. AMS submitted further that, in principle, AMS' marketing services agreements with airports are negotiated and concluded separately from Ryanair's agreements with the same airports. AMS claimed that the agreement between AMS and the *Land* does not grant any advantage to Ryanair; Ryanair does not pressure its partners to conclude marketing services agreements with AMS and Ryanair's route performance is generally the same on routes to airports with an AMS marketing services agreement and to those without such an agreement.

(161) AMS further submitted that in purchasing marketing services, FZG acted in line with the MEO principle, as advertising on Ryanair.com is said to represent a high real value for the *Land* and that the price charged by AMS was the market price for these services. AMS argued that the prices at which advertising space is provided by AMS, and the volumes in which it is acquired, do not discriminate between public and private advertisers. AMS stated further that public and private bodies are said to compete for access to the limited space to advertise on Ryanair.com. This means, according to AMS, that no State aid can be contained in AMS' arrangements with public airports, as AMS could just as easily sell the website space to a private company, at a comparable price.

(162) AMS also emphasised that it makes inherent sense for a small regional airport to purchase marketing services from AMS. AMS asserted that those airports typically have a need to increase their brand recognition and that advertising on an airline website can increase the number of more profitable foreign passengers (foreign passengers generate more non-aeronautical revenue than outbound passengers originating from the region where the airport is located). AMS stressed that the *Land* acted not only as the co-owner of the airport's operator, with a direct interest in the enhancement of its brand image and revenues, but also as the authority entrusted with the task of promoting tourism and business opportunities in *Land* Rhineland-Palatinate through various means including, in particular, advertising.

### 5.3. Germanwings

(163) By way of background, Germanwings briefly explained why it first decided to take up operations from Zweibrücken. It indicated that it chose Zweibrücken over Saarbrücken because of the better runway in Zweibrücken, pointing out that the topography of the runway in Saarbrücken was difficult. It also explains that in 2006, when Germanwings decided to fly from Zweibrücken, Zweibrücken was better equipped for instrument landing (CAT system) and the flying time to Berlin was slightly shorter. Germanwings asserted that due to unprofitability of the Berlin route it decided to discontinue its services from Zweibrücken in 2011.

(164) Germanwings first asserted that its contracts with FZG do not contain State aid because it is not imputable to the State. It claimed that various press releases by politicians cannot demonstrate that the State was involved in negotiating or concluding these contracts, and that the obligation to have a schedule of charges approved by the supervisory authority pursuant to § 43a LuftVZO did not apply to individual agreements.

(165) Secondly, Germanwings claimed that in concluding the various agreements FZG acted like a MEO. It stressed that the MEO principle does not require that an investor makes no losses in the short term, but that doing so may be a normal business strategy to be profitable in the medium to long term. The idea that an airport cannot impose charges that do not cover its costs, which Germanwings finds reflected in the opening decision, is said to stem from Article 102 of the Treaty and to only be applicable in the antitrust context, so that it should not be applied in State aid cases.

### 5.4. TUIFly

(166) By way of background, TUIFly explained why it first moved its operations from Saarbrücken Airport to Zweibrücken Airport. TUIFly stated that it moved to Zweibrücken Airport because of safety concerns at Saarbrücken Airport. TUIFly asserted that during bad weather, the infrastructure and topographical features of Saarbrücken Airport meant that a fully-loaded TUIFly aircraft of type B737-800 could not properly land at the airport, thereby forcing those airplanes to divert to Zweibrücken Airport even before it had commenced its commercial operations. According to TUIFly, apart from causing delays and inconveniences for passengers, those diversions were associated with additional costs and organisational issues for the airline. TUIFly maintained that the severe safety concerns at Saarbrücken Airport made its operations there unsustainable and a move to Zweibrücken Airport unavoidable. In addition, it noted that the short runway in Saarbrücken meant that some fully loaded planes could not start, with the consequence that medium distance

flights (such as to the Canary Islands) had to start with half-empty tanks and stop for refuelling in Spain or Portugal.

(167) TUIFly claimed that its agreement with FZG did not contain any State aid, and that the charges paid by TUIFly conformed to market rates. It asserted that the conditions at Zweibrücken Airport and in the surrounding region are such that, in order for an airline to operate profitably from Zweibrücken, low airport charges are necessary. In particular, TUIFly referred to the state of the passenger infrastructure at Zweibrücken Airport, the lack of suitable public transportation (railway) to and from the airport, the Airport's location in a region with low purchasing power, the initially bad state of the runway, the absence of crew accommodation, etc. TUIFly also claimed that unlike Saarbrücken Airport (or any other airport where TUIFly operates), Zweibrücken Airport does not have the status of a "customs airport", with the consequence that TUIFly is obliged to pay a "custom charge" of between EUR […] and EUR […] per flight. According to TUIFly, this represents an additional cost of approximately EUR […] per passenger and increases TUIFly's total operating costs by more than EUR […] per year.

## 6. COMMENTS FROM GERMANY ON THIRD PARTY COMMENTS

### 6.1. Comments on Ryanair's comments

(168) Germany welcomed the fact that Ryanair's submissions confirm Germany's position that neither Zweibrücken Airport, nor the airlines operating from Zweibrücken, have received State aid. It also agreed that the contract between the *Land* Rhineland-Palatinate and AMS has to be assessed separately from the contract between FZG and Ryanair, that the former had real value for the *Land*, and that it was concluded at market price. Germany stressed, in particular, the importance of tourism for the region, maintaining that the agreement with AMS served to promote tourism.

### 6.2. Comments on AMS's comments

(169) As AMS confirmed Germany's position that the contract between AMS and the *Land* Rhineland-Palatinate did not contain any State aid, Germany refrained from commenting on individual submissions in detail.

### 6.3. Comments on Germanwings' comments

(170) Germany limited its response to Germanwings' submission to commenting on a number of factual suggestions put forward by Germanwings. In particular, it stressed that contrary to what Germanwings appears to suggest, there was no competition between Zweibrücken and Saarbrücken, but that the two airports always considered themselves to complement each other. Germany asserted that the choice of an airline to serve one airport or another is the result of a strategic decision of that airline, on which Germany could not comment.

## 7. ASSESSMENT

(171) By virtue of Article 107(1) of the Treaty *"…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."*

(172) The criteria in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measure in question constitutes aid within the meaning of Article 107(1) of the Treaty all of the following conditions need to be fulfilled. Namely, the financial support must:

(a) be granted by the State or through State resources;

(b) favour certain undertakings or the production of certain goods;

(c) distort or threaten to distort competition; and

(d) affect trade between Member States.

### 7.1. Public financing by *Land* Rhineland-Palatinate / ZEF of Zweibrücken Airport

*7.1.1. Existence of aid*

7.1.1.1. Economic activity and notion of undertaking

(173) According to settled case law, the Commission must first establish whether the FGAZ and FZG are undertakings within the meaning of Article 107(1) of the Treaty. 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 financed.[26] Any activity consisting in offering goods or services on a given market is an economic activity.[27]

(174) In its *Leipzig / Halle Airport* judgment the Court of Justice confirmed that the operation of an airport for commercial purpose and the construction of the airport infrastructure constitute an economic activity.[28] Once an airport operator engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) of the Treaty, and the Treaty rules on State aid are therefore capable of applying to advantages granted by the State or through State resources to that airport operator.[29]

(175) Regarding the moment in time from which on the construction and operation of an airport became an economic activity, the Commission recalls that the gradual development of market forces in the airport sector does not allow for a precise date to be determined. However, the Court of Justice of the European Union has recognized the evolution in the nature of airport activities and in its judgment in *Leipzig / Halle Airport*, the General Court held that from 2000 onward the application of State aid rules to the financing of airport infrastructure could no longer be excluded. Consequently, from the date of the judgment in *Aéroports de Paris* (12 December 2000)[30], the operation and construction of airport infrastructure must be considered as an economic activity falling within the ambit of State aid control.

*Single economic unit*

(176) Before examining the nature of the activities carried out by FGAZ and FZG, however, the Commission recalls that two separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking.

(177) As the Court of Justice held, *"[i]n competition law, the term 'undertaking' must be understood as designating an economic unit … even if in law that economic unit*

---

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

27 Case 118/85 *Commission v Italy* [1987] ECR 2599; Case 35/96 *Commission v Italy* [1998] ECR I-3851.

28 *Leipzig/Halle judgment*, in particular paragraphs 93-94; confirmed by case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] not yet reported; see also Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by case C-82/01P *Aéroports de Paris v Commission* [2002] ECR I-9297 and case T-196/04 *Ryanair v Commission* ("Charleroi judgment") [2008] ECR II-3643.

29 Cases C-159/91 and C-160/91 *Poucet v AGV and Pistre v Cancave* [1993] ECR I-637.

30 *Leipzig-Halle judgment*, paragraphs 42-43.

*consists of several persons, natural or legal.*"[31] In this respect, the Court has ruled that several entities can be deemed to perform an economic activity together, thereby constituting an economic unit, under specific conditions.[32]

(178) To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links.[33]

(179) In this case, the Commission considers that FGAZ and FZG are so closely connected that they must be considered to constitute one single economic unit for the purposes of State aid rules. First, it must be recalled that FZG is a 100% subsidiary of FGAZ, giving FGAZ the power to control FZG via the shareholder assembly. In addition, FGAZ and FZG are connected via a P&L agreement, which according to Germany means that the two entities are treated as a single economic unit under German tax law. The members of FZG's supervisory board are, according to its statute, always identical to those on the FGAZ's supervisory board. In both undertakings, FGAZ and FZG, the management is appointed by the respective supervisory board (which, as indicated, is identical for both entities). In practice, […] was at all material times the managing director for both FGAZ and FZG (in addition, a second managing director was appointed only for FZG, but not for FGAZ). As sole managing director of FGAZ, […] therefore represented FGAZ in the shareholder assembly of FZG, with FGAZ being the sole shareholder.

(180) In practice, the available information demonstrates that important decisions regarding Zweibrücken Airport are regularly taken at the level of FGAZ, with instructions then being passed down to FZG. The information provided by Germany regarding the decision-taking process with respect to the modernisation of the runway in 2008/2009 is instructive in this regard. The supervisory board of FGAZ first took the decision to modernise the runway. FGAZ's shareholder assembly then directed FGAZ's management to call a shareholder assembly of FZG. The management of FGAZ then represented FGAZ as the sole shareholder in FZG's shareholder assembly and directed FZG's management to implement FGAZ's decision to modernise the runway.

(181) In conclusion, the Commission considers that the links between FGAZ and FZG are sufficiently close to treat the two entities as one economic unit. In particular, FZG is economically and legally entirely dependent on FGAZ and does not have a

---

31 Case C-170/83 *Hydrotherm* [1984] ECR I-2999, paragraph 11. See also case T-137/02 *Pollmeier Malchow v Commission* [2004] ECR II-3541, paragraph 50.

32 The joint exercise of an economic activity is normally assessed by analysing the existence of functional, economic and organic links between the entities. See for instance, case C-480/09 P *AceaElectrabel Produzione SpA* v *Commission*, [2010] ECR I-13355, paragraphs 47-55; Case C-222/04 *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze SpA and Others* [2006] ECR I-289, paragraph 112.

33 Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* [2010] ECR I-13355 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* [2006] ECR I-289, paragraph 112.

commercial will of its own. For the purpose of the application of Union State aid law, FGAZ/FZG therefore form one undertaking.

*Economic activity*

(182) FGAZ/FZG are engaged in constructing, maintaining and operating Zweibrücken Airport. FGAZ/FZG offer airport services and charge users – commercial aviation operators as well as non-commercial general aviation users – for the use of the airport infrastructure, thereby commercially exploiting the infrastructure. Following from the case law cited in recitals (174)-(175), it must therefore be concluded that FGAZ/FZG were engaged in an economic activity as from the date of judgment in *Aéroports de Paris* (that is to say, 12 December 2000) onward.

(183) In this context, the Commission stresses that the economic activity of FGAZ/FZG did not commence only with the start of commercial aviation at Zweibrücken in 2006.

(184) First, it is clear from the submission of Germany that Zweibrücken had already previously attempted – unsuccessfully – to attract commercial aviation to the airport, demonstrating the intent to enter into this market.

(185) Secondly, maintaining that constructing and operating an airport only amounts to an economic activity once commercial aviation has successfully been attracted would lead to unacceptable conclusions: there is no cause to dissociate the preparatory activity of building or enlarging infrastructure from the subsequent commercial use to which it is put; indeed, the nature of the development activity must be determined according to whether or not the subsequent use of the infrastructure which has been built amounts to an economic activity.[34] In its judgment in the *Leipzig / Halle Airport* case, the General Court clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part.

(186) Finally, it must be pointed out that offering airport services for general aviation purposes also constitutes an economic activity. The same is true as regards the provision of airport services to military users for remuneration.[35] FGAZ / FZG therefore already engaged in an economic activity before 2006.

(187) It is therefore concluded that from 12 December 2000 onward, FGAZ/FZG were engaged in an economic activity and constitute, as a single economic unit, an undertaking for the purposes of Article 107(1) of the Treaty.

---

[34] *Leipzig/Halle judgment*, paragraph 95. See also, by analogy, Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, paragraph 26.

[35] See minutes of FGAZ's supervisory board of 2 October 2006, indicating that the airport is remunerated for offering services to military users.

*Public policy remit*

(188) While FGAZ/FZG must therefore be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty, it must be recalled that not all activities of an airport owner and operator are necessarily of an economic nature.[36]

(189) The Court of Justice[37] has held that activities that normally fall under a State's responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities may include, for example, security, air traffic control, police, customs, etc. The financing has to be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities.[38]

(190) Therefore, the financing of activities falling within the public policy remit or of infrastructure directly related to those activities in general does not constitute State aid.[39] At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature.[40]

(191) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities.[41] Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves as non-economic. Therefore, an analysis of the legal framework applicable to the airport operator is necessary in order to assess whether under that legal framework airport managers or airlines are required to bear the costs of the provision of some activities that might be non-economic in themselves but are inherent to the deployment of their economic activities.

(192) Germany submitted that the costs arising from the following activities (whether as investment costs or operating expenses) are to be considered as falling within the public policy remit: airport security measures pursuant to

---

36 Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

37 Case C-118/85 *Commission* v *Italy* [1987] ECR 2599, paragraphs 7 and 8, and Case C-30/87 *Bodson/Pompes funèbres des régions libérées* [1988] ECR 2479, paragraph 18.

38 Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova* [1997] ECR I-1547; Commission Decision N309/2002 of 19 March 2003; Commission Decision N438/2002 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector, OJ C 284, 21.11.2002.

39 Commission Decision N309/2002 of 19 March 2003.

40 See, in particular, Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

41 See, amongst others, Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 36, and case-law cited.

§8 *Luftsicherheitsgesetz* (Air Security Law, hereinafter: "LuftSiG"), measures assuring operational safety, air control and air safety measures pursuant to §27c(2) *Luftverkehrsgesetz* (Air Traffic Law, hereinafter: "LuftVG"), meteorological services, and the fire brigade.

(193) The Commission is of the view that measures pursuant to §8 LuftSiG, measures pursuant to §27c(2) LuftVG (including meteorological services), and the fire brigade service can, in principle and subject to the analysis in recitals (195) *et seq.* below, be considered to constitute activities falling within the public policy remit.

(194) With respect to measures relating purely to operational safety, however, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport.[42] Subject to a more detailed review with respect to individual activities and costs, the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling within the public policy remit. Any undertaking wishing to operate an airport has to ensure the safety of the installations, such as of the runway and aprons.

(195) As regards the legal framework, Germany has submitted that for the fire brigade there are no legal rules strictly imposing those costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for the fire brigades falls within the legal competence of the *Länder* and those costs are usually remunerated by the relevant regional authorities. The remuneration is limited to the extent necessary to cover those costs.

(196) As regards air traffic control and meteorological services, the Commission notes that §27d and §27f LuftVG provide that the costs related to §27c LuftVG are covered by the State for a number of specific airports. While the Commission does not, in this case, need to decide whether the provision may grant an advantage to those airports that profit from State financing pursuant to §27d and §27f LuftVG, it is clear that the law envisages that all other airports have to bear the relevant costs themselves. In this light, costs related to air traffic control and meteorological services must be considered to constitute normal operating expenses of at least those airports not addressed by §27d and §27f LuftVG.

(197) With respect to measures pursuant to §8 LuftSiG, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) LuftSiG only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities listed in §8(1), (2) LuftSiG may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FGAZ/FZG relieved that undertaking of costs it had to bear pursuant to §8(3) LuftSiG, that public financing is not exempted from scrutiny under Union State aid rules.

[42] Commission decision of 20 February 2014 in State aid case SA.35847 (2012/N) – Czech Republic – Ostrava Airport, not yet published in the Official Journal, recital 16.

*Conclusions on public policy remit*

(198) In the light of the above considerations, the Commission finds it appropriate to draw more specific conclusions regarding investment costs and operating expenses allegedly falling with the public policy remit.

(199) As regards operating expenses incurred between 2000 and 2009, the Commission accepts that operating expenses linked to the fire brigade qualify as public policy remit expenses, in so far as the remuneration of those costs is strictly limited to what is necessary to pursue those activities. As regards operating costs linked to measures taken pursuant to §8 LuftSiG, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to §8(3) LuftSiG qualify as public policy remit costs. With respect to air control and air safety measures as well as meteorological services pursuant to §27c(2) LuftVG, and noting that Zweibrücken is not one of the airports for which a corresponding need has been recognised by the Federal government pursuant to §27d(1) and §27f(1) LuftVG, the Commission finds that operating costs linked to air control and air safety measures as well as meteorological services cannot qualify as public policy remit costs. Also, operating costs related to ensuring the operational safety of the airport do not qualify as public policy remit costs.

(200) Considering investments made between 2000 and 2009, the Commission accepts that investments directly related to the fire brigade qualify as public policy remit expenses. Moreover, the remuneration by the relevant public authorities was limited to the extent necessary to cover those costs. As regards investments linked to measures taken pursuant to §8 LuftSiG, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to §8(3) LuftSiG qualify as public policy remit costs. With respect to investments linked to air control and air safety measures as well as meteorological services pursuant to §27c(2) LuftVG, and noting that Zweibrücken is not one of the airports for which a corresponding need has been recognised by the Federal government pursuant to §27d and §27f LuftVG, the Commission finds that investments linked to air traffic control and air safety measures as well as meteorological services cannot qualify as public policy remit costs. Also, investments related to ensuring the operational safety of the airport do not qualify as public policy remit costs. In particular, this means that the investments into the modernisation and extension of the runway, as well as the installation of guard lights etc., cannot be qualified as falling within the public policy remit.

(201) In any case, regardless of the legal classification of those costs as falling within the public remit or not, it has been demonstrated that they must be borne by the airport operator, under the applicable legal framework. Accordingly, were the State to pay for those costs, the airport operator would be relieved from a cost that it should normally have incurred.

*Economic activity and use by the military*

(202) The Commission observes that Zweibrücken Airport is also used by the German and other military forces, including for training purposes. This is despite the fact that Zweibrücken is not a military airfield, but a civilian airport.[43]

(203) The Commission considers that, in principle, the provision of airport services to the military, including by civilian airports, can constitute an activity falling within the public policy remit. It is not clear, however, to what extent Germany is of the opinion that the public financing of the Airport merely covers the costs arising from catering to the airport services needs of the military. The Commission observes that particularly as regards the operating costs, Germany does not include costs arising from the presence of the military as falling within the public policy remit. The same is in principle true for the investments, where Germany does not point to investments being strictly related to the military users of the airport.

(204) However, Germany does maintain that the continuing use of the airport by the military is one reason why investments into the safety of the airport (runway etc.) were absolutely necessary and why closure of the airport was not an option.

(205) The Commission observes, in this context, that Zweibrücken Airport appears to be offering airport services to the military for remuneration. The supervisory board minutes of FGAZ of 2 October 2006 recount a discussion about military exercises in Zweibrücken. The management stresses that one of the reasons in favour of allowing such exercises to take place is the revenue generated thereby, which indicates that, from the perspective of FGAZ/FZG, offering airport services to the military is an economic activity. The discussion further touches upon whether FZG should allow military exercises in Zweibrücken in the future, which suggests that it is within the discretion of FGAZ/FZG whether or not to cater to the military.

(206) The Commission further considers that the failure of Germany to identify any particular costs incurred, either in terms of investments or operating costs, specifically related to the military users of the airport may be taken to indicate that the military is, indeed, just another customer of Zweibrücken Airport.

(207) In conclusion, the Commission considers the provision of airport services to the military to be an economic activity at Zweibrücken Airport, noting in particular the failure to identify any costs individually linked to the presence of the military at Zweibrücken Airport and the (partially) economic justification given by FGAZ/FZG's for catering to the military.

(208) Even in the alternative scenario – namely if the Commission would have concluded that the costs arising due to the military's presence could be covered by the State as falling within the public policy remit –, it would still have to be observed that the public funding of the airport's non-economic activity of catering to the military should not be allowed to lead to a cross-subsidisation of the airport's economic

[43] Zweibrücken is not listed in the Military Aeronautical Information Publication Germany (MIL AIP Germany), containing a list of all military airports in Germany.

activities. In particular, it would not be possible to consider the entire investment into assets also used by the military (runway etc.) or fixed operating costs as falling within the public policy remit.

7.1.1.2. State resources and imputability to the State

(209) In order to constitute State aid, the measures in question have to be financed from State resources and the decision to grant the measure must be imputable to the State.

(210) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it.[44] Resources of local authorities are, for the application of Article 107 of the Treaty, State resources.[45]

(211) In this case, the relevant measures – namely direct investment grants to FZG and annual capital injections in favour of FGAZ/FZG – were granted directly from the budget of the local authorities. The investment grants came directly from the *Land* Rhineland-Palatinate, while the capital injections were co-financed by the *Land* and the ZEF, an association of local public territorial entities.

(212) Thus, the Commission considers that they are financed through State resources and are also imputable to the State.

7.1.1.3. Economic advantage

(213) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say, in the absence of State intervention.[46] Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention.[47] Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.

(214) The Commission further recalls that "*capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid*".[48] In this case, in order to

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

45 Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais* [2011], not yet reported, paragraph 108.

46 Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60 and case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, paragraph 41.

47 Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

48 Case C-482/99 *France v Commission* ("*Stardust Marine*") [2002] ECR I-4397, paragraph 69.

determine whether the public financing of Zweibrücken Airport grants FGAZ/FZG an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the direct investment grants and capital injections to that of a MEO who is guided by prospects of profitability in the long-term.[49]

(215) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEO principle is whether "*in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question*"[50].

(216) In *Stardust Marine* the Court stated that, *"[…] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation*."[51]

(217) Furthermore, the Court declared in the EDF case that, *"[…] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen.*"[52]

(218) In order to be able to apply the MEO principle, the Commission has to place itself at the time when each decision to provide public funds to FGAZ / FZG was taken. The Commission must also base its assessment on the information and assumptions which were at the disposal of the relevant local authorities at the time when the decision regarding the financial arrangements of the infrastructure measures at stake was taken.

*Direct investment grants*

(219) The Commission notes that the direct investment grants covered a portion of the investment costs incurred by FGAZ/FZG in the context of its economic activity. The operator of an airport normally has to bear all the costs related to the construction

---

49 Case C-305/89 *Italy v Commission* ("*Alfa Romeo")* [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia v Commission* [2000] ECR II-03871, paragraph 84.

50 Case 40/85 *Belgium v Commission* [1986] ECR I-2321.

51 *Stardust Marine*, paragraph 71.

52 Case C-124/10P *European Commission v Électricité de France* ("*EDF*") [2012], not yet reported, paragraph 85.

and operation of the airport (with the exception of those costs that fall within the public policy remit and do not generally have to be borne by the airport operator under the applicable legal framework), including the investment costs, so that covering a part of those costs relieves the FGAZ/FZG of a burden it would normally have to bear.

(220) Germany did not explicitly argue that the direct investment grants complied with the MEO principle. It rather submitted that closing the airport was never a realistic option for the local authorities and that, given the need to operate the airport, it was economically sensible to also open it to commercial aviation. At other points, Germany argued that the investments in the airport were motivated by the will to economically invigorate the region, and that public subsidies were necessary since the revenue generated by the commercial exploitation of the airport would not be sufficient to cover the related costs.

(221) Germany also stressed that the infrastructure is necessary to create jobs (about 5 000 in all of *Land* Rhineland-Palatinate, out of which 2 708 jobs depend directly and indirectly on the airport), save social costs (EUR 25 million per year) and create tax income. Germany stated further that jobs are especially important in this area with an unemployment rate which is currently 2% above the average of the *Land*. Germany also submitted that two expert opinions underline the importance of the airport for the regional economy[53].

(222) However, social and regional considerations cannot be taken into account when conducting the MEO test. Moreover, even if the Commission were to take those social and regional considerations into account, the studies submitted by Germany show that, in June 2012, FZG only provided115 jobs, at Zweibrücken Airport itself. Those studies confirm that the commercial area around the converted airport provides a total of 2 708 direct and indirect jobs. However, out of those, only 7.8%, so 210 jobs, are concerned with transport and storage, that is to say, activities which are directly connected to the presence of the airport.

(223) While it could, in principle, be accepted that even non-repayable grants to a company that is entirely owned by the State could qualify as market-conform investments, Germany has not presented a business plan or *ex ante* calculations regarding the expected profitability of the investment grants. The only projections that were presented are a study from 2003 outlining which commercial aviation passenger numbers could lead to profitability and the 2010 projection of expected annual results between 2011 and 2015. The latter expected that the FZG would become profitable only in 2015, assuming that the passenger numbers would rise to more than 500 000 passengers per annum.

---

[53] Prof. Dr. Heuer und Prof. Dr. Klophaus, unter Mitarbeit von Dr. Berster and Wilken, Deutsches Zentrum für Luft - und Raumfahrt, Januar 2006, "Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Zweibrücken", S. 146; Desel Consulting und Airport Research Center GmbH, "Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025", Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009, p. 85.

(224) The infrastructure investments at Zweibrücken airport entail significant costs (see investments costs detailed in Table 2 and Table 3, net of any public policy remit investments as identified in recitals (198) to (200) and investment that took place before 12 December 2000), and a long period of negative results (foreseeably at least until 2015).

(225) Despite the inherent and significant uncertainties related to the project, such as its long-term nature, there was neither an *ex ante* business plan, nor a sensitivity analysis of any underlying profitability assumptions. This is not in line with the type of analysis that a prudent investor would have undertaken for such a project.

(226) Finally, the Commission notes that since 2000, FGAZ/FZG have generated losses every year, with an increasing tendency since 2005.

(227) Firstly, the direct investment grants were non-repayable in nature and did not yield a return on investment. Secondly, Germany has not presented any evidence that the investment grants were put at the disposal of FZG on market terms. Thirdly, Germany does not rely on the MEO principle. The Commission therefore finds that the direct investment grants by the *Land* in favour of FZG granted after 12 December 2000 conferred an economic advantage on FZG (to the extent that the investment grants were not purely related to public policy remit activities as concluded in recitals (198), (199), and (200)).

*Annual capital injections*

(228) The annual capital injections by the *Land* Rhineland-Palatinate and ZEF served to cover FGAZ's annual losses, which were in turn almost entirely brought about by the annual losses of FZG (see Table 4). In the end, the annual capital injections therefore served to cover a part of the normal investment and operating expenses of FGAZ/FZG, thereby relieving the undertaking of an economic burden it would normally have to bear.

(229) For the same reason as outlined in recitals (222) to (228) with respect to the direct investment grants to FZG, the Commission also finds that the annual capital injections in favour of FGAZ/FZG were not provided under normal market conditions. Notably, Germany has not submitted that the capital injections were normal market investments. Germany has not presented any evidence demonstrating *ex ante* profitability considerations, nor has it explained why a MEO would continue injecting capital into an undertaking that constantly generates losses. In this light, the annual capital injections must be qualified as granting an economic advantage to FGAZ/FZG.

*Conclusion*

(230) In view of the foregoing, the Commission considers that in the absence of an *ex ante* business plan or other sensible profitability studies, a MEO would not have taken the decision to embark on the investment project in question and to cover, on a continuous annual basis, increasing losses of FGAZ/FZG. Therefore, the decision of *Land* Rhineland-Palatinate and ZEF to grant those measures confers an economic advantage on FGAZ/FZG which it would not have obtained under normal market conditions.

7.1.1.4. Selectivity

(231) To fall within the scope of Article 107(1) of the Treaty, a State measure must favour "*certain undertakings or the production of certain goods*". Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of State aid.

(232) In the case at hand, the direct investment grants and the annual capital injections only benefit FGAZ/FZG. Both measures are thus selective by definition within the meaning of Article 107(1) of the Treaty.

7.1.1.5. Distortion of competition and effect on trade

(233) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as affected by that aid.[54] The economic advantage granted by the direct investment grants and the annual capital injections in this case to the airport operator strengthen its economic position, as the airport operator was able to set up its business without bearing all of the inherent investment and operating costs.

(234) As assessed in recital (173) *et seq.*, the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, in particular with respect to low cost carriers and charter operators, airports that are not located in the same catchment areas and even in different Member States can also be in competition with each other to attract those airlines.

(235) As mentioned in point 40 of the 2005 Aviation Guidelines and reaffirmed in point 45 of the 2014 Aviation Guidelines, it is not possible to exclude even small airports from the scope of application of Article 107(1) of the Treaty. Furthermore, point 45 of the 2014 Aviation Guidelines explicitly states that "*the relatively small size of the*

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

*undertaking which receives public funding does not, as such, exclude the possibility that trade between Member States might be affected*."

(236) Zweibrücken Airport currently serves approximately 242 000 passengers per year, and has served as many as approximately 340 000 passengers per year in the past. The forecast provided by Germany established that passenger numbers could rise to more than 1 million passengers per year in 2025. As observed in recital (21), Zweibrücken Airport is located in the immediate vicinity of Saarbrücken Airport (39 kilometers) and within two hours' drive from six other airports. According to the air traffic projection study provided by Germany, on average 15% of passengers using Zweibrücken Airport originate from other Member States (France and Luxembourg). There are international flights from Zweibrücken airport to destinations such as Mallorca or Antalya. The runway at Zweibrücken is of sufficient length (3000 m) and allows airlines to serve medium-haul international destinations. In the light of these facts, it must be considered that public funding to FGAZ/FZG distorts or threatens to distort competition and has at least a potential effect on trade between Member States.

(237) Apart from these general considerations, the Commission also considers that Zweibrücken Airport is or has been in direct competition with Saarbrücken Airport. First, it must not be overlooked that TUIFly, formerly Saarbrücken Airport's biggest client, left that airport and moved to Saarbrücken in 2007. Secondly, for a substantial period of time flights to Berlin were offered from both Zweibrücken (Germanwings) and Saarbrücken (Air Berlin and Luxair) in parallel, demonstrating competition both between the airports and the airlines. FZG's airport services agreement with Germanwings even envisaged higher service charges to be paid to FZG in the event that Air Berlin should terminate its Berlin service from Saarbrücken.

(238) In addition to these indicators for competition between Zweibrücken and Saarbrücken Airports, there is also evidence that despite the official submission by Germany that the two airports never perceived themselves as being in direct competition, officials of the *Land* Rhineland-Palatinate clearly perceived the existence of competition. In two internal notes of the Rhineland-Palatinate government written in 2003, the position defended by the authors is that cooperation between Zweibrücken and Saarbrücken Airports was not possible / advisable at that time. Rather, one note explained that at least as long as FRAPORT AG was involved with Saarbrücken Airport, the relationship between the two airports would be one of competition.[55] The notes further state that "*from the perspective of Rhineland-Palatinate, it can be expected that Zweibrücken Airport will prevail in this competition in the long term*".[56] Those statements indicate that at least in 2003, the perceived relationship between the two airports was indeed one of competition.

---

55 *Vorlage für den Ministerrat, Gemeinsame Kabinettssitzung der Regierung des Saarlandes und der Landesregierung von Rheinland-Pfalz am 27. Mai 2003*, Ministerium für Wirtschaft, Verkehr, Landwirtschaft und Weinbau, 15 May 2003.

56 *Einschätzung der rheinland-pfälzischen Innenministeriums*, 15 May 2003.

(239) Against this background, the public financing granted to FGAZ/FZG must be considered as being liable to distort competition and have an effect on trade between Member States.

7.1.1.6. Conclusion

(240) In the light of the considerations in recitals (173)-(239), the Commission considers that the public funding granted to FGAZ/FZG in the form of direct investment grants and annual capital injections between 2000 and 2009 constitutes State aid within the meaning of Article 107(1) of the TFEU.

*7.1.2. Lawfulness of the aid*

(241) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and must not put the proposed measures into effect until the notification procedure has resulted in a final decision.

(242) As the funds have already been put at the disposal of FGAZ/FZG, the Commission considers that Germany has not respected the prohibition of Article 108(3) of the Treaty.[57]

*7.1.3. Compatibility*

7.1.3.1. The applicability of the 2014 and 2005 Aviation Guidelines

(243) Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) of the Treaty that State aid is not compatible with the internal market. The aid in question can be assessed on the basis of Article 107(3)(c) of the Treaty, which stipulates that: *"aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"*, may be considered to be compatible with the internal market.

(244) In this regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the Treaty.

(245) According to the 2014 Aviation Guidelines, the Commission considers that the *Commission notice on the determination of the applicable rules for the assessment of unlawful State aid*[58] applies to unlawful investment aid to airports. In this respect, if the unlawful investment aid was granted before 4 April 2014, the Commission will

[57] Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127.

[58] OJ C 119, 22.5.2002, p. 22.

apply the compatibility rules in force at the time when the unlawful investment aid was granted. Accordingly, the Commission will apply the principles set out in the 2005 Aviation guidelines in the case of unlawful investment aid to airports granted before 4 April 2014.[59]

(246) According to the 2014 Aviation Guidelines, the Commission considers that the provisions of the notice on the determination of the applicable rules for the assessment of unlawful State aid should not apply to pending cases of illegal operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period.[60]

(247) The Commission has already concluded in recital (242) that the direct and annual capital injections constitute unlawful State aid granted before 4 April 2014.

7.1.3.2. Distinction between investment and operating aid

(248) In view of the provisions of the 2014 Aviation Guidelines referred to in recitals (245)-(246), the Commission has to determine whether the measure in question constitutes unlawful investment or operating aid.

(249) According to point 25(r) of the 2014 Aviation Guidelines, investment aid is defined as "*aid to finance fixed capital assets; specifically, to cover the 'capital costs funding gap'*". Moreover, according to point 25(r) of the Guidelines investment aid can relate both to an upfront payment (that is to say cover upfront investment costs) and to aid paid out in the form of periodic instalments (to cover capital costs, in terms of annual depreciation and costs of financing).

(250) Operating aid, on the other hand, means aid covering all or part of the operating costs of an airport, defined as "*the underlying costs of the provision of airport services, including categories such as costs of personnel, contracted services, communications, waste, energy, maintenance, rent, administration, etc., but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit*".[61]

(251) In the light of those definitions, it can be considered that the direct capital injections, which were all linked to particular investment projects, constitute investment aid in favour of FGAZ/FZG.

(252) In contrast, the part of the annual capital injections that was used to cover annual operating losses[62] of FGAZ/FZG, net of the costs included in the EBITDA that fall

59 Point 173 of the 2014 Aviation Guidelines.
60 Point 172 of the 2014 Aviation Guidelines.
61 Point 25(v) of the 2014 Aviation Guidelines.
62 Expressed in Earnings Before Interest, Taxes, Depreciation and Amortisation ("EBITDA").

within a public policy remit as established in recitals (198), (199) and (200) and the costs incurred prior to 12 December 2000, constitute operating aid in favour of FGAZ/FZG.

(253) Finally, the part of the annual capital injections that covers losses of FGAZ/FZG that are not already included in the EBITDA (that is to say, the annual depreciation of assets, costs of financing, etc.), minus costs falling within a public policy remit as established in recitals (198), (199), and (200) and the costs incurred prior to 12 December 2000, constitute investment aid.

7.1.3.3. Compatibility of investment aid

(254) According to paragraph 61 of the 2005 Aviation Guidelines, the Commission must examine whether the following cumulative conditions are met:

(a) the construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.);

(b) the infrastructure is necessary and proportional to the objective which has been set;

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

(d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner; and

(e) the development of trade is not affected to an extent contrary to the Union interest.

(255) In addition, State aid to airports – as any other State aid measure – must have an incentive effect and be necessary and proportional in relation to the aimed legitimate objective in order to be compatible.

(256) Germany asserted that the investment aid in favour of FGAZ/FZG complies with all the compatibility criteria in the 2005 Aviation Guidelines.

*a) Contribution to a clearly defined objective of common interest*

(257) The Commission recalls that the 2005 Aviation Guidelines do not set out precise criteria according to which it will be assessed whether investment aid to an airport contributes to a clearly defined objective of common interest. However, a mere duplication of existing airport infrastructure cannot be considered to serve an objective of common interest.

(258) In this respect, the Commission therefore has to assess, first, whether Zweibrücken Airport duplicates existing airport infrastructure in the region.

*Duplication: Overlap between Zweibrücken and Saarbrücken Airports*

(259) The Commission recalls that Zweibrücken Airport is located in the immediate vicinity of Saarbrücken Airport. The linear distance between the two airports is approximately 20 kilometres, which translates into approximately 39 road kilometres. The traveling time by car between the two airports is approximately 30 minutes. In addition, at least 6 other airports are located within less than 2 hours traveling time from Zweibrücken Airport.

(260) The close proximity between the two airports means that both serve virtually identical catchment areas. The various studies presented by Germany in this case,[63] as well as in the parallel formal investigation procedure regarding Saarbrücken Airport[64] confirm that the majority of passengers using the two airports stem from Western Rhineland-Palatinate and Saarland.

(261) The profiles of Saarbrücken and Zweibrücken Airports are also relatively similar. When commercial aviation commenced in Zweibrücken in 2006, the first client was Germanwings, offering a route to Berlin. The same route was served from Saarbrücken by Luxair and, from 2007 onward, by Air Berlin. Zweibrücken's second big client was TUIFly, offering flights to various vacation locations, mainly in the Mediterranean. Before serving Zweibrücken, TUIFly had been one of Saarbrücken Airport's biggest clients.

(262) Zweibrücken also attempted to break into the low-cost market more broadly by contracting with Ryanair, which, however, only maintained the London-Stansted route for less than a year. Eventually Germanwings also abandoned the airport, with the consequence that since the end of 2011 Zweibrücken Airport concentrates almost exclusively on vacation charter flights and some air freight.

(263) Vacation charter flights are and were, however, also offered from Saarbrücken. Importantly, it appears that the main destinations served from Zweibrücken are also frequently served from Saarbrücken. By way of example, the summer 2014 flight schedule demonstrates that the two most frequent destinations served from Zweibrücken are Antalya and Palma de Mallorca, making up as much as 70% of the weekly flights. At the same time, both destinations are served from Saarbrücken as well with a similar frequency: in the week of 16 June 2014 – 23 June 2014, 16 flights departed from Zweibrücken to Antalya or Palma de Mallorca, while 18 flights to those same destinations departed from Saarbrücken.

---

63 Desel Consulting und Airport Research Center GmbH, "Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025", Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009; Intraplan Consult GmbH, " Luftverkehrsprognose Flughafen Saarbrücken - Vorgehensweise und Ergebnisse", October 2010.

64 Commission decision of 1 October 2014 in State aid case SA.26190 – Germany – Saarbrücken Airport, not yet published in Official Journal.

*Duplication: capacity, passenger numbers, and annual results*

(264) After Zweibrücken Airport entered the market for commercial aviation, the passenger numbers increased rapidly, from 78 000 passengers in 2006 to 338 000 passengers in 2009. Following this period of rapid growth, the numbers started to decrease, falling to 242 000 passengers in 2012. Considering that the capacity at Zweibrücken is 700 000 passengers, the airport has therefore never operated at more than 50% of its available capacity, and is currently operating at approximately 35% of the available capacity.

(265) In comparison, the passenger numbers at Saarbrücken were essentially steady at around 450 000 passengers per annum until Zweibrücken entered the commercial aviation market, when passenger numbers dropped from 487 000 passengers in 2005 to 350 000 passengers in 2007. After adapting the airport charges, Saarbrücken Airport managed to attract Air Berlin in 2007, which led to a rebound and increasing passenger numbers, reaching a maximum of 518 000 passengers in 2008. In 2012, 425 000 passengers used Saarbrücken Airport. Considering that Saarbrücken's capacity is currently also 700 000 passengers per annum, only between 50-75% of its available capacity was used. In this regard it must be noted that the capacity of Saarbrücken Airport could be higher (namely 750 000 – 800 000 passengers per annum) if it were not limited with respect to the number of security checks on passengers the Airport can handle per hour. This limitation arises from the fact that Saarbrücken Airport only has two security scanners available at the moment.

(266) The Commission also notes that both Saarbrücken and Zweibrücken Airports were loss-making during the period under investigation (2000-2009). Notably, at both airports the annual losses increased sharply from 2006 onward, when Zweibrücken entered the commercial aviation market.

*Duplication: evidence of direct competition between the two airports*

(267) The Commission has already observed in recitals (237) and (238), that there are some indications that Zweibrücken Airport found itself in direct competition with Saarbrücken Airport. First, it must again be recalled that TUIFly, formerly Saarbrücken Airport's biggest client, left that airport and moved to Zweibrücken Airport in 2007.[65] Secondly, for a substantial period of time, flights to Berlin were offered from both Zweibrücken (Germanwings) and Saarbrücken (Air Berlin and Luxair) in parallel, demonstrating competition both between the airports and the

[65] The Commission notes that TUIFly submitted that its decision to leave Saarbrücken and move to Zweibrücken was motivated by security concerns related to Saarbrücken's runway. On the other hand, Germany has asserted in the context of the formal investigation procedure in case SA.26190 that decisions of airlines to leave Saarbrücken were never justified with reference to Saarbrücken's infrastructure. The Commission is not in a position to speculate as to the precise motives of TUIFly in moving from Saarbrücken to Zweibrücken.

routes served by airlines. FZG's airport services agreement with Germanwings even envisaged higher services charges to be paid to FZG in the event that Air Berlin should terminate its Berlin service from Saarbrücken.

(268) In addition to the further indicators already mentioned (see recital (238)), the Commission also points to the minutes of FGAZ's supervisory board meeting of 26 June 2009. In summarizing the report from the management board, the minutes recount a meeting between FGAZ's management, Ryanair, and the Rhineland-Palatinate Ministry of Economics. During that meeting, which discussed the future of Ryanair's relationship with Zweibrücken, the representative of the Ministry *"pointed out to [Ryanair] that the Rhineland-Palatinate Government would consider it a very unpleasant act if Ryanair were to start serving Saarbrücken"*. Rather than demonstrating complementarity between the two airports, that note rather indicates that the two airports were competing for business.

*Duplication: freight*

(269) The Commission further observes that Zweibrücken Airport is also engaged in handling air freight. While freight is not a significant aspect of operations at Saarbrücken Airport, it forms a central element of Frankfurt-Hahn Airport's business model. As stated in recital (21), Frankfurt-Hahn Airport is located only approximately 128 km or approximately 84 minutes by car away from Zweibrücken. In addition, freight is also handled at Luxemburg airport, located approximately 145 km, or approximately 86 minutes by car (see recital (21)) away from Zweibrücken Airport.

(270) In this regard, the Commission notes that freight is usually more mobile than passenger transport.[66] In general, the catchment area for freight airports is considered to have a radius of at least around 200 kilometres and 2 hours travelling time. To a certain extent the industry seems to suggest that up to a half a day of trucking time (that is to say, up to 12 hours driving time by trucks) would in general be acceptable.[67]

(271) Considering that the catchment area for freight is typically much larger than for passengers, Frankfurt-Hahn and Luxemburg Airports provide sufficient air freight capacity for the region.

*Duplication: discussion of findings*

66 For example Leipzig/Halle airport was in competition with Vatry airport (France) for the establishment of the DHL European hub. See *Leipzig/Halle judgment*, paragraph 93.

67 Response of Liege airport to the public consultation on the 2014 Aviation Guidelines.

(272) On the basis of the considerations outlined in recitals (259)-(270), the Commission finds that Zweibrücken Airport duplicates the airport infrastructure available at Saarbrücken Airport. More particularly, the Commission considers that even before Zweibrücken entered the commercial aviation market, the region was well connected by the existing airports, primarily Saarbrücken Airport, and that Zweibrücken Airport does not increase the connectivity of the region.

(273) Moreover, any aviation service demand not satisfied by Saarbrücken Airport could easily be met by the other 6 airports that can be reached within less than 2 hours traveling time. In particular as regards leisure flights, traveling times of up to 2 hours are commonly accepted. The same is true as regards demand for air freight services.

(274) Germany has not presented any evidence that projected passenger numbers required the market entry of Zweibrücken Airport. In particular, while the entry into the commercial aviation market took place in 2006, the earliest passenger number projection study provided dates from September 2009.[68] It cannot therefore be maintained that the public funding since 2000 was aimed at satisfying demand for aviation services that would otherwise not be met.

(275) The Commission also notes that in 1997 Saarbrücken Airport projected its own passenger numbers to rise to 676 000 by 2010.[69] As Zweibrücken Airport was, at that time, not yet active on the commercial aviation market, it can be assumed that that projection was the most reliable passenger forecast for the region. As Saarbrücken has a capacity of 700 000 – 800 000 passengers per annum, it is clear that the passenger numbers forecasted in 1997 could be satisfied by Saarbrücken Airport alone for a significant period of time.

(276) The Commission is furthermore of the opinion that even the actual passenger numbers at Zweibrücken and Saarbrücken Airports do not demonstrate that Saarbrücken's capacity is insufficient to satisfy demand in the region. It is true that the combined passenger numbers at Saarbrücken and Zweibrücken reached approximately 850 000 passengers in 2008 and 810 000 in 2009, which is more than the maximum capacity of Saarbrücken Airport. At the same time, the Commission considers that those numbers project a somewhat distorted image of the real demand in the region: first, the high passenger numbers appear to be driven by direct competition between the Berlin routes offered from Zweibrücken and Saarbrücken (and Germanwings and Air Berlin / Luxair, respectively), which temporarily attracted additional passengers. However, once Germanwings terminated its unprofitable route to Berlin, the demand on the route decreased. Secondly, the Commission finds (see section 7.3) that Germanwings, TUIFly and Ryanair all benefited from incompatible State aid granted to them by FGAZ/FZG. Insofar as this might have translated into reduced ticket prices, it is doubtful that the thus-subsidised

[68] Desel Consulting und Airport Research Center GmbH, "Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025", Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009.

[69] Commission decision of 1 October 2014 in State aid case SA.26190 – Germany – Saarbrücken airport, not yet published in Official Journal.

passenger numbers at Zweibrücken represented the real demand in the region. Finally, it must be noted that the joint passenger numbers have dropped since 2009: the joint passenger numbers for Zweibrücken and Saarbrücken were approximately 670 000 in 2012, and thus below the capacity limit of Saarbrücken Airport.

(277) The Commission can furthermore not accept the argument advanced by Germany that the two airports are only complementing – rather than competing with – each other. First, despite the fact that the business models of the two Airports appear to differ to some degree, it is clear that Zweibrücken Airport's core business (vacation flights, in particular to Antalya / Palma de Mallorca) is also catered for by Saarbrücken. It is true that Saarbrücken otherwise concentrates on scheduled flights to major cities such as Luxemburg, Berlin, and Hamburg. This does not, however, change the fact that Zweibrücken appears to have only limited business that is not or could not be served from Saarbrücken.

(278) The Commission further finds that the differences in infrastructure that do exist between the two airports do not undermine its finding that Zweibrücken Airport duplicates airport infrastructure that already existed before in Saarbrücken. While it is again true that Zweibrücken has a longer runway, making it more suitable for long-distance flights and heavy freight planes, these differences are not sufficient to justify two airports in such close proximity. First, as explained in recitals (269) and (270), air freight demand is sufficiently served by Frankfurt-Hahn and Luxemburg Airports, where – according to the Commission's information – there is no relevant restriction with respect to the weight of planes. Secondly, Germany has not demonstrated that a significant number of the commercial passenger flights that depart from Zweibrücken could not start from Saarbrücken.

(279) Considering, finally, that Saarbrücken Airport was apparently able to accommodate the aviation service demands now partially taken over by Zweibrücken before the latter entered the market, the difference in infrastructure does not justify duplicating the infrastructure that already existed in Saarbrücken.

*Conclusion*

(280) In the light of the facts and considerations presented and discussed in recitals (255) - (279), the Commission finds that the investment aid in favour of FGAZ/FZG served to create or maintain infrastructure that merely duplicates the (unprofitable) airport in Saarbrücken. The investment aid therefore cannot be considered to contribute to an objective of common interest.

(281) As the compatibility conditions enumerated (in recital (254)) are cumulative, the Commission does not need to assess the remaining compatibility conditions. Accordingly, to the extent that it constitutes State aid, the investment aid should be found not to be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

(282) As Germany has not put forward and the Commission has not identified any alternative grounds of compatibility, it is therefore concluded that, to the extent that it amounts to State aid, the investment aid in favour of FGAZ/FZG is incompatible with the internal market.

7.1.3.4. Compatibility of operating aid under the SGEI rules

(283) Germany argues that public funding relating to operating aid in favour of FGAZ/FZG must be considered to be compatible with the internal market as compensation for the provision of a SGEI pursuant to Article 106 (2) of the Treaty.

(284) Article 106(2) of the Treaty states that *"undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."*

(285) That Article contains a (partial) derogation from the prohibition of State aid contained in Article 107(1) of the Treaty to the extent that the aid is necessary and proportional to ensure the performance of the SGEI under acceptable economic conditions.

(286) Prior to 31 January 2012, the 2005 SGEI Framework[70] and the 2005 SGEI Decision represented the Commission's policy in applying the derogation in Article 106(2) of the Treaty.

(287) The Commission notes that both those instruments require that the undertaking in question be entrusted with a genuine SGEI. The entrustment of the airport operator with public service missions must also be recorded in "*one or more official documents*" containing, *inter alia*, the "*precise nature of the public service obligation*".[71]

*Genuine SGEI*

(288) As regards, first, the question of whether the operation of Zweibrücken Airport constitutes a genuine SGEI, the Commission recalls that for an activity to constitute an SGEI, that activity should exhibit special characteristics as compared with ordinary economic activities, and that the objective of general interest which is pursued cannot simply be that of development of certain economic activities or

[70] OJ C 297, 29.11.2005.

[71] 2005 Aviation Guidelines, paragraph 66. See also Article 4 of the 2005 SGEI Decision.

economic areas as provided for in Article 107(3)(c) of the Treaty.[72] In this light, the Commission considers that this can only be the case if part of the area served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development.[73]

(289) The Commission further considers that there is a certain overlap between the proper definition of a SGEI and the question whether the public financing of an airport (both investment and operating costs) contributes to a well-defined objective of common interest. The Commission has recalled in recitals (257) *et seq.* that public funding that leads to the duplication of airport infrastructure in a given region cannot be considered as contributing to an objective of common interest (see also recitals (294) *et seq.*). The Commission also recalls that the overall management of an airport can only be considered to constitute an SGEI "*if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development*."[74] In this light, the Commission likewise considers that the operation of an airport that duplicates another airport in the same region cannot be considered to constitute a genuine SGEI.[75]

(290) The Commission has concluded that, to the extent that it amounts to State aid, the public funding of Zweibrücken Airport's infrastructure is incompatible with the internal market because it duplicates existing infrastructure. Likewise, the Commission finds that the operation of Zweibrücken Airport does not constitute a genuine service of general economic interest. To the extent that Germany considers that the operation of Zweibrücken Airport amounts to an SGEI, it has therefore made a manifest error in the definition of the SGEI.[76]

---

72 See Decision N 381/04 – France – Project for a high capacity telecommunications network in the Pyrénées-Atlantiques (DORSAL), OJ C 162, 2.07.2005, p. 5.

73 See 2014 Aviation Guidelines, point 72.

74 Point 72 of the 2014 Aviation Guidelines. See also point 34 of the 2005 Aviation Guidelines.

75 See also Case T-79/10 *Colt Télécommunications France v Commission* [2013] not yet reported, paragraphs 150-151, 154, 158, and 166.

76 Ibid, paragraphs 92, 119.

*Entrustment act*

(291) Secondly, the Commission finds that FGAZ/FZG were in any event not properly entrusted with the operation of Zweibrücken Airport as an SGEI. As relevant entrustment acts, Germany has only pointed to the general operating licence of the Airport and its "*obligation to operate*" pursuant to §45 LuftVZO. The Commission notes that according to Germany, the imposition of an obligation to operate was the result of an upgrade of Zweibrücken Airport from an "*airfield*" to an "*airport*" in the sense of §49 and §38 LuftVZO.[77] That upgrade, however, only occurred at the beginning of 2010, meaning that for the period under investigation in this case (2000 – 2009) no entrustment can be inferred from §45 LuftVZO.

(292) Germany furthermore submits that *"[a] general official entrustment of FZG with SGEI did not occur, apart from the operating licence and the inclusion in Rhineland-Palatinate's conversion project*". Considering that Germany has not explained how the operating licence, by itself, can constitute a proper entrustment act fulfilling the requirements mentioned in recital (287), or how inclusion in the conversion project constitutes a proper entrustment, the Commission finds that FGAZ/FZG have not been properly entrusted with a genuine SGEI.

(293) Accordingly, for the reasons outlined in recitals (288) *et seq.* it is concluded that the public funding granted to FGAZ/FZG amounting to operating aid cannot be considered as SGEI compensation compatible with the internal market.

7.1.3.5. Compatibility of operating aid pursuant to the 2014 Aviation Guidelines

(294) Section 5.1. of the 2014 Aviation Guidelines sets out the criteria that the Commission will apply in assessing the compatibility of operating aid with the internal market pursuant to Article 107(3)(c) of the Treaty. Pursuant to point 172 of the 2014 Aviation Guidelines, the Commission will apply those criteria to all cases concerning operating aid, including pending notifications and unlawful non-notified aid cases.

(295) Unlawful operating aid granted before the date of publication of the 2014 Aviation Guidelines may be declared compatible to the full extent of uncovered operating costs provided that the following conditions[78] are met:

a) *contribution to a well-defined objective of common interest*: this condition is fulfilled *inter alia* if the aid increases the mobility of citizens of the Union and connectivity of the regions or facilitates regional development[79];

[77] Submission Germany of 27 January 2011, p. 17: "*Aus der Aufstufung des Flughafens [vom Verkehrslandeplatz zum Verkehrsflughafen] folgt des Weiteren eine Betriebspflicht des Flughafens*".

[78] According to point 137 of the 2014 Aviation Guidelines, not all of the conditions set out in section 5.1 of the Guidelines apply to operating aid granted in the past.

[79] Point 137, 113 and 114 of the 2014 Aviation Guidelines.

(1)

b) *need for State intervention*: the aid must be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver[80];

c) *existence of incentive effect*: this condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced[81];

d) *proportionality of the aid amount (aid limited to the minimum necessary):* in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place[82];

e) *avoidance of undue negative effects on competition and trade*.[83]

*a) Contribution to a well-defined objective of common interest*

(296) Point 114 of the 2014 Aviation Guidelines outlines that "*the duplication of unprofitable airports does not contribute to an objective of common interest*". The Commission considers that the arguments presented in recitals (259) *et seq.* with respect to the compatibility of investment aid in favour of FGAZ/FZG under the 2005 Aviation Guidelines are equally applicable to the compatibility of operating aid pursuant to the 2014 Aviation Guidelines. For that reason, the Commission finds that the operating aid granted to FGAZ/FZG merely duplicates an unprofitable airport and therefore does not contribute to a well-defined objective of common interest. The operating aid to FGAZ/FZG, to the extent that it constitutes State aid, can therefore not be found to be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

*Conclusion*

(297) The Commission concludes that the operating aid granted to FGAZ/FZG is not compatible with the internal market, either pursuant to Article 106(2) of the Treaty or pursuant to Article 107(3)(c) of the Treaty. As Germany has not put forward and the Commission has not identified any alternative grounds of compatibility, it is therefore concluded that, to the extent that it amounts to State aid, the operating aid in favour of FGAZ/FZG is incompatible with the internal market.

80 Point 137 and 116 of the 2014 Aviation Guidelines.
81 Point 137 and 124 of the 2014 Aviation Guidelines.
82 Point 137 and 125 of the 2014 Aviation Guidelines.
83 Point 137 and 131 of the 2014 Aviation Guidelines.

## 7.2. Potential aid in connection with a bank loan and participation in the Land Rhineland-Palatinate's internal cash pool

*7.2.1. Existence of aid*

7.2.1.1. Economic activity and notion of undertaking

(298) For the reasons outlined in recital (173) *et seq*., FGAZ/FZG must be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty.

7.2.1.2. State resources and imputability to the State

(299) In order to constitute State aid, the measures in question must be financed from State resources and the decision to grant the measure must be imputable to the State.

(300) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it.[84] Resources of local authorities are, for the application of Article 107 of the Treaty, State resources.[85]

*100% State guarantee*

(301) Any public guarantee involves a potential loss of resources by the State. As the 100% State guarantee was issued directly by the *Land* Rhineland-Palatinate, it was granted from State resources and is also imputable to the State.

*Cash-pool of the Land*

(302) Germany submitted that the cash-pool of the *Land* Rhineland-Palatinate is not financed directly out of the public budget of the *Land*. It claims that that all funds in the cash-pool either stem from the participating undertakings or are obtained in the form of loans on the capital market.

(303) The Commission considers that in the case at hand, at all material times the State exercised direct or indirect control over the resources in the cash-pool, with the

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

85 Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais* [2011], not yet reported, paragraph 108.

consequence that they constituted State resources. First, only undertakings in majority ownership by *Land* Rhineland-Palatinate (at least 50% ownership) can participate in the cash-pool. Because of the majority public ownership, the participating undertakings are clearly public undertakings within the meaning of Article 2 (b) of Commission Directive 2006/111/EC.[86] Since all the participating undertakings are thus public undertakings, their resources constitute State resources. This fact alone signifies that the funds of the cash-pool, to the extent they are made up of the deposits made by the participating undertakings, constitute State resources.

(304) Secondly, in the event that the participating undertakings' deposits in the cash-pool are insufficient to satisfy the liquidity needs of a participant, *Land* Rhineland-Palatinate obtains short-term financing on the financial market in its own name and passes those funds on to the undertakings participating in the cash-pool. As the *Land* takes out the necessary loans in its own name, it must be considered that the funds thus obtained constitute State resources as well.

(305) Thus, the Commission considers that the funding provided by the cash-pool is financed by State resources, as both the deposits by participating undertakings and the loans taken out by the *Land* to overcome liquidity gaps in the cash-pool constitute State resources.

(306) It is furthermore clear that the *Land* had far-reaching control over the operation of the cash-pool, with the consequence that the financing provided to participating undertakings is imputable to the State. The Commission first notes that the Agreement for participation in the cash-pool is concluded between the *Land* and the undertakings involved. The decision to allow an undertaking to participate in the cash-pool is thus taken directly by the *Land*. The *Land* also decides on the maximum amount that a participating undertaking may withdraw from the cash-pool in the form of a credit line. In addition, *Land* Rhineland-Palatinate directly manages the day-to-day operations of the cash-pool through the "Landeshauptkasse", which is an institution of the Ministry of Finance of the *Land* Rhineland-Palatinate. The "Landeshauptkasse" also officially represents the *Land* when obtaining funds on the market to bridge liquidity gaps in the cash-pool.

(307) Based on these elements, it appears that the State is capable of directly controlling the activities of the cash-pool, most centrally the question of which undertaking may participate and the individual credit line granted to each participating undertaking. Hence, the decisions concerning the participation in the cash-pool and concerning the extent of that participation are imputable to the State.

*Loan granted by Sparkasse Südwestpfalz*

[86] Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings (OJ L 318, 17.11.2006, page 17).

(308) As regards the loan itself, the Commission accepts that the *Sparkasse Südwestpfalz* is an independent bank that takes decisions on granting loans under its own responsibility. There is no clear indication that the decision to grant the loan to FGAZ/FZG is imputable to the State. Thus, the Commission considers that the measure is not imputable to the State.

7.2.1.3. Economic advantage

*100% State guarantee*

(309) According to point 3.2 of the Guarantee Notice, an individual State guarantee is not aid when the following conditions are all met: *"(a) The borrower is not in financial difficulty […], (b) The extent of the guarantee can be properly measured when it is granted. […] (c) the guarantee does not cover more than 80 % of the outstanding loan or other financial obligation […], (d) A market-oriented price is paid for the guarantee […]".*

(310) In this case the *Land* Rhineland-Palatinate provided a 100% guarantee to collateralise a loan granted in favour of FGAZ/FZG, thus the guarantee exceeds the threshold of 80 % of the outstanding loan. Also, as explained below, the market price of the guarantee is not paid. Therefore the guarantee clearly involves an advantage.

(311) According to point 4.2 second subparagraph of the Guarantee Notice, the advantage can be calculated as the difference between the specific market interest rate FGAZ/FZG would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premium paid has been taken into account.

(312) With respect to the guarantee issued by the *Land*, the Commission recalls that FGAZ/FZG obtained this 100% guarantee free of charge and without providing collateral. It is clear that under normal market conditions, FGAZ/FZG would have had to pay a premium in order to obtain a guarantee on its loans from a third party.

(313) As FGAZ/FZG did not have to pay a premium, it obtained an economic advantage not otherwise available on the market. The amount of that advantage is equivalent to the premium that FGAZ/FZG would have had to pay under normal market conditions.

*Cash-pool of the Land*

(314) With respect to the participation of FGAZ/FZG in the cash-pool, Germany has explained that the cash-pool functions as follows: the FGAZ requests funds from the pool to ensure its liquidity, and the *Land* provides those funds from the cash-pool. The interest rates charged are market-based call money rates, at the level available to the *Land* itself. Where the deposits of participating undertakings are insufficient to

cover the request, the *Land* replenishes the cash-pool by taking up loans in its own name. Germany further explains that the *Land* essentially passes on the conditions it obtains on the capital market to the participants in the cash-pool, thereby allowing the participants – the *Land*'s subsidiary undertakings – to refinance themselves under the same conditions as the *Land* itself, without any considerations of their creditworthiness. Moreover, the Commission observes that this financing is available to the undertakings for an unlimited period of time.

(315) In the light of this mechanism, an advantage is granted to FGAZ where the conditions on which the *Land* grants loans from the cash-pool are more favourable than those otherwise available to FGAZ on the market. The conditions for taking up loans from the cash-pool are the same as those available to the *Land* to refinance itself. Considering that the *Land*, as a public authority, is able to take up loans at very favourable rates (as there is virtually no risk of default), the Commission considers that the rate at which FGAZ can obtain a loan from the cash-pool is more favourable than that otherwise available to it. In addition, FGAZ does not have to provide collateral for those loans and its financial situation / creditworthiness is not taken into account. Thus, by allowing the FGAZ to participate in the cash-pool, the *Land* granted the undertaking FGAZ/FZG an economic advantage.[87]

7.2.1.4. Selectivity

(316) As the 100% guarantee and the right to participate in the cash-pool was granted only to FGAZ/FZG (and, in the case of the cash-pool, other undertakings in which the *Land* holds a majority of shares), both measures have to be qualified as being selective in nature.

7.2.1.5. Distortion of competition and effect on trade

(317) For the same reasons as outlined in recitals (233) *et seq.*, the Commission considers that any selective economic advantage granted to FGAZ/FZG is liable to distort competition and affect trade between Member States.

[87] The effect of the cash-pool is rather similar to a 100% guarantee granted to FGAZ/FZG without charging a premium or requesting collateral. The *Land* bears the risk of FGAZ/FZG defaulting, without obtaining a compensatory payment in return.

7.2.1.6. Conclusion

(318) In conclusion, the Commission finds that by granting FGAZ/FZG a 100% guarantee on a bank loan free of charge and allowing FGAZ to participate in the *Land*'s cash-pool, the *Land* granted State aid to FGAZ/FZG.

(319) In addition, the Commission concludes that the loan by *Sparkasse Südwestpfalz* itself did not constitute State aid.

*7.2.2. Compatibility*

(320) The Commission considers that the compatibility considerations presented in recitals (248) *et seq.* and (283) *et seq.* with respect to State aid in the form of direct investment grants and annual capital injections are equally applicable to the State aid in the form of a guarantee and participation in the cash-pool. Accordingly, the Commission finds that the State aid granted by way of providing FGAZ/FZG a 100% guarantee free of charge and allowing it to participate in the *Land*'s cash-pool is incompatible with the internal market.

**7.3. Discounts on airport charges and marketing services agreement with Ryanair**

*7.3.1. Existence of aid*

7.3.1.1. Economic activity and notion of undertaking

(321) By providing air transportation services, airlines are performing an economic activity and therefore constitute undertakings for the purposes of Article 107(1) of the Treaty. It must accordingly be analysed whether the agreements between the airlines and the airport in question, if imputable to the State and effecting a transfer of State resources, granted the former an economic advantage.

7.3.1.2. State resources and imputability to the State

(322) The measure must be imputable to the State and be granted from State resources. The Court of Justice held in the *Stardust Marine*[88] judgment that the resources of an undertaking incorporated under private law, whose shares are in majority publicly owned, constitute State resources. In this respect, it is consistent Commission

[88] *Stardust Marine*, paragraphs 51 *et seq*.

practice to consider that irrespective of whether a public undertaking is loss-making or profit-making, all its resources are to be considered as State resources.[89]

(323) Concerning imputability, in its *Stardust Marine* judgment the Court of Justice furthermore held that the fact that the State or a State entity is the sole or majority shareholder of an undertaking is not sufficient to find that a transfer of resources by that undertaking is imputable to its public shareholders.[90] According to the Court of Justice, even if the State was 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 could not be automatically presumed, since a public undertaking may also act with more or less independence, according to the degree of autonomy left to it by the State.

(324) According to the Court of Justice, indicators from which imputability might be inferred, are:[91]

(a) the fact that the undertaking in question could not take the contested decision without taking account of the requirements of the public authorities;

(b) the fact that the undertaking had to take account of directives issued by public authorities;

(c) the integration of the public undertaking into the structures of the public administration;

(d) the nature of the public undertaking's activities and the exercise of those activities on the market in normal conditions of competition with private operators;

(e) the legal status of the undertaking;

(f) the intensity of the supervision exercised by the public authorities over the management of the undertaking;

(g) any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.

*State resources*

(325) The Commission notes that FGAZ/FZG are owned 100% by the State, namely 50% by the *Land* Rhineland-Palatinate and 50% by the ZEF. FGAZ/FZG must thus be considered to constitute public undertakings within the meaning of Article 2 (b) of Directive 2006/111/EC. The State, as the sole shareholder of FGAZ/FZG and by appointing the (identical) supervisory boards of FGAZ/FZG (which in turn appoint the management), can be presumed to have a dominant influence over FGAZ/FZG,

89 See for example Commission decision C 41/2005, Hungarian Stranded Costs, OJ C 324, 21.12.2005, p. 12, with further references.

90 *Stardust Marine*, paragraphs 51 *et seq*.

91 Ibid.

and can control its resources. Thus, any advantage granted from FGAZ/FZG's resources would signify a loss of State resources, thus constituting a transfer of State resources.

*Imputability*

(326) While Germany submitted that the conclusion of contracts between airlines and FZG is not imputable to the State, it acknowledged that the State – represented by the *Land* Rhineland-Palatinate and the ZEF – is indirectly involved, namely via its representatives on the supervisory board of FZG's mother company, FGAZ. According to the statutes of FGAZ and FZG, the supervisory boards of both entities are entirely constituted by representatives appointed by public authorities, namely the *Land* and the ZEF. A representative appointed by the *Land* is automatically the chairman of both supervisory boards. The supervisory boards appoint FGAZ's and FZG's management. For both entities the supervisory boards have to approve all transactions amounting to more than EUR […], which gives them broad control over the economic activities of FGAZ/FZG.

(327) Secondly, the minutes of the supervisory board of FGAZ demonstrate that the supervisory board was informed of and consulted on the negotiation and conclusion of contracts with airlines. What is more, the minutes also demonstrate that, in concluding the contracts, the FGAZ/FZG management had to take the requirements of the public authorities into account. For instance, the minutes of the board meeting of 13 July 2006 show that after the management reported on the successful conclusion of the contract with Germanwings, the chairman of the supervisory board indicated that the *Land* was very pleased with the development, noting that it could lead to the creation of jobs and help to economically justify the airport. Most notably, the chairman also suggested that these positive effects – the creation of jobs and economic justification of the airport – could lead to an extension of the P&L Agreement between FGAZ and FZG. Considering that FZG was vitally dependent on the P&L Agreement to cover its operating losses, and that the *Land* and ZEF had the power not to extend the profit and loss transfer agreement or to discontinue the capital injections that made its operation possible, it is clear that the FGAZ/FZG management had to take the requirements of the public authorities into account if it wanted to ensure its own economic survival.

(328) The supervisory board minutes of 13 July 2006 also indicate that a military exercise which had taken place at Zweibrücken Airport had led to complaints from the population about the noise. The management pointed out that the military exercise by the Dutch air force had created significant revenue. The chairman nevertheless suggested that the management should, in the future, carefully consider whether military exercises should be carried out and should inform the population in time. All of the above shows that the public authorities were involved in the day-to-day management decisions of FGAZ / FZG and agreed to them.

(329) The minutes of the supervisory board meeting of 26 June 2009 furthermore suggest that the State, represented by the *Land* Rhineland-Palatinate, was directly involved in negotiations with airlines. The minutes recount the management's report to the supervisory board, mentioning a meeting between the management, a representative

of Rhineland-Palatinate's Ministry of Economics, and Ryanair in London. During that meeting the relationship between Ryanair and Zweibrücken Airport was discussed. The active involvement of the Ministry may be deduced, apart from the mere presence of a representative in those commercial negotiations, from the Ministry's representative reminding Ryanair that serving Saarbrücken Airport would be considered an "unpleasant act" by Rhineland-Palatinate's government.

(330) The future of Ryanair's engagement in Zweibrücken was then discussed in the supervisory board, which considered that without a marked improvement in Ryanair's schedule and taking into account the monetary contribution demanded by Ryanair[92], it supported the management's proposal to terminate the relationship. Taking into account the monetary contribution demanded by Ryanair, which would have rendered the approval of a new contract by the supervisory board obligatory, and the early involvement of the public authorities in the negotiations, it is clear that the supervisory board had far-reaching control over the commercial decision of the management. This may be seen as a further indicator that the management had to take the requirements of the public authorities into account in taking decisions, and demonstrates the degree of control and influence exercised by the supervisory board over the commercial decisions of FGAZ/FZG.

(331) In the light of these considerations, the Commission considers that there are sufficient indicators to find that the conclusion of airport service contracts between FGAZ/FZG and the various airlines are imputable to the State.

7.3.1.3. Economic advantage

(332) In order to assess whether an agreement between a publically-owned airport and an airline confers an economic advantage on the latter, it is necessary to analyse whether that agreement complied with the MEO principle. In applying the MEO test to an agreement between an airport and an airline, it must be assessed whether, at the date when the agreement was concluded, a prudent market economy operator would have expected the agreement to lead to a higher profit than would have been achieved otherwise. That higher profit is to be measured by the difference between the incremental revenues expected to be generated by the agreement (that is, the difference between the revenues that would be achieved if the agreement were concluded and the revenues that would be achieved in the absence of the agreement) and the incremental costs expected to be incurred as a result of the contract (that is, the difference between the costs that would be incurred if the agreement were concluded and the costs that would be incurred in the absence of the agreement), the resulting cash flows being discounted with an appropriate discount rate.

92 In the course of that meeting, Ryanair offered to maintain the route between London and Zweibrücken open during the winter "for EUR[…]", and that it would be willing to start two new routes (Barcelona and Alicante) from Zweibrücken "for EUR […]".

(333) In this analysis, all the relevant incremental revenues and costs associated with the agreement must be taken into account. The various elements (discounts to airport charges, marketing grants, other financial incentives) must not be assessed separately. Indeed, as stated in the Charleroi judgment: *"It is (…) necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context […]*."[93]

(334) The expected incremental revenues must include in particular the revenues from airport charges, taking into account the discounts as well as the traffic expected to be generated by the agreement and the non-aeronautical revenues expected to be generated by the additional traffic. The expected incremental costs must include in particular all the incremental operating and investment costs that would not be incurred in the absence of the agreement as well as the costs of the marketing grants and other financial incentives.

(335) The Commission also notes in this context that price differentiation (including marketing support and other incentives) is a standard business practice. Such differentiated pricing policies should, however, be commercially justified.[94]

Application of the MEOP to the agreements in question, in particular with Ryanair

(336) In order to apply this principle, taking into account the facts of this case, the Commission considers that the first step should be to reply to the following questions:

(a) Should the marketing services agreement and the airport services agreement, which were signed within two weeks of each other, be analysed separately or together?

(b) What benefits could a hypothetical MEO acting in the stead of FGAZ / FZG the *Land* have expected to gain from marketing services agreements?

(c) What, for the purposes of applying the MEO principle, is the relevance of comparing the terms of the airport services agreements referred to in the formal investigation procedure with the airport charges billed at other airports?

(337) After replying to these questions, the next step for the Commission will be to apply the MEO principle to the various measures under discussion.

*a) Regarding an analysis of the marketing services agreement and the airport services agreement together*

93 Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, paragraph 59.

94 See Commission Decision C12/2008 – Slovakia – Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.02.2011, p. 24).

(338) The Commission considers that two types of measures covered by the formal investigation in this case, namely the airports service agreement and the marketing services agreements, must be evaluated together as one single measure. This approach concerns the airport services agreement concluded between Ryanair and FZG, on the one hand, and the marketing services agreements between FZG and Ryanair as well as AMS and *Land* Rhineland-Palatinate, on the other hand. Ryanair does not dispute that the marketing services agreement concluded directly between Ryanair and FZG is to be assessed together with the airport services agreement. In the Commission's view, the same applies for the marketing services agreement with AMS.

(339) There are several indications pointing towards the fact that those agreements should be evaluated as one single measure since they were entered into within the framework of a single transaction.

(340) First of all, the contracts were entered into by essentially the same parties at nearly the same point in time:

(a) AMS is the 100% subsidiary of Ryanair. The marketing services agreement was signed on behalf of AMS by Mr Edward Wilson, who at the time was a Director of AMS and concurrently a Director of Ryanair.[95] For the purpose of the application of State aid rules, AMS and Ryanair are considered to be a single undertaking, in the sense that AMS acts as an intermediary in the interest and under the control of Ryanair. For the agreements in this case, this can also be inferred from the fact that the marketing services agreement states in its preamble that "*AMS has* exclusive *license to offer marketing services on the travel website www.ryanair.com, the website of the Irish low fares airline Ryanair.*"

Furthermore, it was noted in recitals (326) *et seq.* that the decision of FGAZ/FZG to conclude airport services agreements with airlines such as Ryanair were imputable to the State. The controlling influence over FGAZ/FZG was, in this regard, exercised by the *Land* Rhineland-Palatinate and ZEF. Considering, however, that it was always the *Land* which appointed FGAZ/FZG's supervisory board chairman, and that the *Land* effectively financed between 95% and 80% of the losses of the FGAZ/FZG (thereby having significant influence on the ZEF and a larger financial interest in the undertaking), it can safely be considered that the *Land* had effective control over FGAZ/FZG. As regards the commercial relationship between Ryanair and FGAZ/FZG on the one hand, and the *Land* Rhineland-Palatinate on the other hand, the Commission finds that the interest of FGAZ/FZG and the *Land* in entering into the respective agreements converged to a very large degree: both were interested in increasing traffic at the Airport, and it made little difference to the *Land* whether the FGAZ/FZG concluded the contract (the costs of which it would later have to reimburse via the P&L Agreement) or whether it

[95] See http://corporate.ryanair.com/investors/biographies/ , accessed on 23 June 2014.

concluded the contract itself. In this light, the fact that one of the marketing services agreements was concluded with the *Land* directly while the airport services agreement was concluded with its dependent subsidiary cannot militate against assessing the agreements as one commercial transaction.

(b) The agreements were also concluded at nearly the same point in time, as the airports service agreement (22 September 2008) was concluded exactly two weeks before the marketing services agreement with AMS (6 October 2008).

(341) Second, the marketing services agreement with AMS states in its first section, entitled "Purpose of the Agreement", that the agreement is "*rooted in the Ryanair's commitment to operate on a route between Zweibrücken and London*". That formulation establishes an unambiguous direct link between the service agreement and the marketing services agreement in the sense that one would not have been concluded without the other. The marketing services agreement is based on the conclusion of the airport services agreement and the services provided by Ryanair. Indeed, the preamble to the marketing services agreement states that the *Land* Rhineland-Palatinate intends to target Ryanair passengers in order to promote tourism and business opportunities in the region, and in particular Zweibrücken Airport as a destination.

(342) Third, the marketing services agreement states in its preamble that Land Rhineland-Palatinate has decided to "*actively promote the Zweibrücken Airport as a holiday destination for international air travellers and also as an attractive business centre*." This is an indication that the conclusion of the marketing services agreement has as its primary and specific purpose to promote specifically Zweibrücken Airport (and the surrounding region).

(343) Fourth, the marketing services agreement provides specifically that two links are to be placed in the right hand bar on the Zweibrücken destination page and five paragraphs within the Top Five Things To Do section of the Zweibrücken destination page of Ryanair.com. It can be deduced from those provisions that the purpose of the agreement is to support Zweibrücken Airport specifically and not *Land* Rhineland-Palatinate as a whole.

(344) Fifth, the agreement can be terminated immediately by Rhineland-Palatinate in the event that Ryanair stops operating the route between Zweibrücken and London. This demonstrates yet again that the marketing services agreement and the airport services agreement are inseparably linked.

(345) In conclusion, the marketing services agreement concluded by Rhineland-Palatinate and AMS is thus indivisibly linked to the airport service agreement signed by Ryanair and FZG. The above considerations demonstrate that without the airport services agreement, the marketing services agreement would not have been concluded. Indeed, the marketing services agreement states explicitly that it is based on Ryanair's Zweibrücken-London service, and essentially envisages marketing services aimed at promoting that route. marketing services agreementAt the same time, it appears that the conclusion of the airport services agreement was also dependent on the marketing services agreement: although the airport services

agreement was concluded earlier in time, it did not oblige Ryanair to take up services from Zweibrücken. Rather, it explicitly stipulated that "if service is not commenced by 28th October 2008 this agreement will lapse without liability to either party". In fact, Ryanair only commenced its operations at Zweibrücken after the AMS contract had been concluded.

(346) For those reasons, the Commission considers it appropriate to analyse the airport services agreement of 22 September 2008 and the marketing services agreement of 6 October 2008 jointly, with a view to determining whether they constitute State aid or not.

*b) Regarding the benefits that an MEO could have expected to gain from marketing services agreements and the price that it would have been willing to pay for those services*

(347) In order to be able to apply the MEO principle to the case in point, the behaviour of FGAZ/FZG and the *Land* as signatories of airport services agreement with Rynair and the marketing services agreement with AMS must be compared to that of a hypothetical MEO in charge of operating Zweibrücken Airport.

(348) When analysing the transaction in question, it would be advisable to assess the benefits that this hypothetical MEO, motivated by the prospect of profits, could gain from purchasing marketing services. This analysis should not take into account the general impact of such services on tourism and the region's economic performance. Only the impact of these services on the airport's profitability should be taken into account, as this would be the only concern for a hypothetical MEO.

(349) Thus, marketing services should stimulate passenger traffic on the air routes covered by marketing services agreements and the corresponding airport services agreements, as the marketing services are designed to promote those air routes. Although that impact will mainly benefit the airline concerned, it may also be of benefit to the airport operator. An increase in passenger traffic may lead to an increase in revenues generated by certain airport charges for the airport operator, as well as an increase in non-aviation revenues, in particular from car parks, restaurants and other businesses.

(350) There can therefore be no doubt that an MEO operating Zweibrücken Airport in the stead of FGAZ/FZG and the *Land* would have taken this positive effect into account when considering entering into a marketing services agreement and the corresponding airport services agreement. The MEO would have taken into account the impact of the air route in question on future revenues and costs by, in this case, estimating the number of passengers using these routes, which would have reflected the positive effect of marketing services. Moreover, this effect would have been evaluated for the entire term of operation of the air routes in question, as set out in the airport services agreement and the marketing services agreement.

(351) When an airport operator enters into an agreement for the promotion of certain air routes, it is standard practice to estimate the load ratio (or the load factor)[96] for the air routes in question and to take this into account when assessing future revenues. The Commission agrees with Ryanair on this issue, that is to say, that marketing services agreements do not just generate costs for the airport operator, they also bring benefits with them.

(352) In addition, it would be advisable to determine whether other benefits could reasonably be expected and quantified for a hypothetical MEO operating Zweibrücken Airport in the stead of FGAZ/ FZG and the *Land*, that is to say, other than the benefits from the positive effect on passenger traffic on the air routes covered by the marketing services agreement during the term of operation of these routes, as set out in the marketing services agreement or the airport services agreement.

(353) Certain interested third parties support this argument, in particular Ryanair in its study of 17 January 2014. The study of 17 January 2014 is based on the theory that marketing services acquired by an airport operator, such as FGAZ/FZG and the *Land*, will help to improve the airport's brand image and, as a result, to sustainably increase the number of passengers using the airport and not just the numbers on the air routes covered by the marketing services agreement and the airport services agreement for the term of operation set out in those agreements. In particular, Ryanair found in its study that the marketing services will have sustainable positive effects on passenger traffic in the airport even after the marketing services agreement has expired.

(354) It should first be noted that there is nothing to suggest that, when the marketing services agreement was entered into, the airport operator or the *Land* ever considered, still less quantified, the marketing services agreement's possible beneficial effects on air routes additional to those covered by the agreement, or the possibility of such effects continuing after the agreement had expired. Moreover, Germany did not suggest any method for estimating the possible value that a hypothetical MEO operating Zweibrücken Airport in the stead of FGAZ/FZG and the *Land* could have placed on such effects when assessing whether or not to enter into the agreements in 2008.

(355) In addition, the sustainable nature of these effects cannot be assessed based on the information available. It is possible that advertising Zweibrücken and the region on Ryanair's Internet site may have encouraged people visiting that site to buy Ryanair tickets to Zweibrücken when the advertising was first posted or just thereafter. However, it is highly unlikely that the effect of the advertising on visitors lasted or had an influence on plane ticket purchases for more than a few weeks after it was posted on the Ryanair Internet site. An advertising campaign is more likely to have a sustainable effect when the promotional activities involve one or more

[96] The load ratio or load factor is defined as the proportion of places filled in the aircraft in operation on the air route in question.

advertising media to which consumers are regularly exposed over a given period. For example, an advertising campaign involving general TV and radio stations, popular Internet sites and/or various advertising posters displayed outside or inside public places could have a sustainable effect if consumers are regularly exposed to those media. However, promotional activities limited to just Ryanair's Internet site are highly unlikely to have an effect that lasts much past the end of the promotion.

(356) In fact, it is very likely that most people do not visit Ryanair's Internet site frequently enough for the advertising there alone to leave them with a clear recollection of the region concerned. This argument is well supported by two factors. Firstly, under the terms of the marketing services agreement, the promotion of the Zweibrücken region on the homepage of the Ryanair Internet site was limited to five paragraphs of 150 words under 'Top Five Things To Do' on the page for the destination of Zweibrücken, the presence for a very short period of time (16 days) of a simple link on the www.ryanair.com homepage leading to a site made available by the *Land*, and the presence of two simple links on the page for the destination of Zweibrücken leading again to a site made available by the *Land*. Both the type of promotional activities (a simple link with a limited marketing value) and their short lifespan would have severely reduced the effect of these activities after the end of the promotion, in particular as these activities were limited to the Ryanair Internet site and were not supported by any other media. Secondly, the preponderance of marketing activities set out in the agreement entered into with AMS was only in relation to the Internet page for the destination of Zweibrücken. It is very likely that most people do not visit that page often; if and when they do, it is probably only because they are already interested in that destination.

(357) Thus, even if the marketing services did increase passenger traffic on the air routes covered by the marketing services agreements for the period of their implementation, it is very likely that this effect was zero or negligible after that period and that the effect on other air routes was similarly insignificant.

(358) It also follows from the Ryanair studies of 17 and 31 January 2014 that the generation of benefits going beyond the air routes covered by marketing services agreements or lasting after the period of their implementation for these routes, as set out in the marketing services agreement and airport services agreement, was extremely uncertain and could not be quantified with a degree of reliability that would be considered sufficient by a prudent MEO.

(359) Thus, for example, according to the study of 17 January 2014, "future incremental profits beyond the scheduled expiry of the airport services agreement are inherently uncertain". Moreover, that study suggests two methods for evaluating *a priori* the positive effects of marketing service agreements: a "cash flow" approach and a "capitalisation" approach.

(360) The "cash flow" approach involves evaluating the benefits of marketing services agreements and airport services agreements by assessing the future revenues which may be generated by the airport operator through marketing services and the airport services agreement, minus corresponding costs. In the "capitalisation" approach, improvement of the brand image of the airport through marketing services is treated

as an intangible asset, acquired for the price laid down in the marketing services agreement.

(361) However, the study highlights the major difficulties presented by the "capitalisation" approach and shows that the results produced by this method may be unreliable; it suggests that the "cash flow" approach would be better. In particular, the study finds:

> *"The capitalisation approach should only take into account the proportion of marketing expenditure that is attributable to the intangible asset base of an airport. However, it may be difficult to identify the proportion of marketing expenditure that is targeted towards generating expected future revenues for the airport (i.e. an investment in the intangible asset base of the airport) as opposed to generating current revenues for the airport."*

It also stresses that:

> *"In order to implement the capitalisation-based approach, it is necessary to estimate the average length of time that an airport would be able to retain a customer due to the AMS marketing campaign. In practice, it would be very difficult to estimate the average period of customer retention following an AMS campaign due to insufficient data."*

(362) The study of 31 January 2014 proposes a practical application of the "cash flow" approach. Under this approach, the benefits of marketing services agreements and airport services agreements which last even after the marketing services agreement has expired are expressed as a "terminal value" that is calculated on the agreement's expiry date. This terminal value is calculated based on the incremental profits expected from the airport services agreement and marketing services agreement in the final year of application of the airport services agreement. Those profits are extended into the following period, the term of which is equal to the term of the airport services agreement, and are adjusted to take into account the growth rate for the air transport market in Europe and the probability factor designed to reflect the airport services agreement's and marketing services agreement's capacities to contribute to the airport's profits after they have expired. According to the study of 31 January 2014, the capacity for producing lasting benefits depends on various factors "including greater prominence and a stronger brand, alongside network externalities and repeat passengers", although no details are given about these factors. Moreover, this method takes into account a discount rate which reflects capital costs.

(363) The study suggests a probability factor of 30 %, which it considers prudent. However, this very theoretical study does not provide any serious evidence for this factor, either quantitatively or qualitatively. It does not base itself on any facts relating to Ryanair's activities, air transport markets or airport services to substantiate this rate of 30 %. It does not establish any link between this rate and the factors that it mentions in passing (prominence, strong brand, network externalities and repeat passengers) and that are supposed to extend the benefits of the airport services agreement and market service agreement after their expiry dates. Finally, it does not in any way base itself on the specific content of marketing services provided for in

the various contracts with AMS when analysing to what extent those services could influence those factors.

(364) Moreover, it does not prove that there is any likelihood that, on expiry of the airport services agreement and the marketing services agreement, the profits generated by these agreements for the airport operator in the final year of their application will continue in the future. Likewise, it provides no evidence that the growth rate of the air transport market in Europe is a useful indicator for measuring the impact of an airport services agreement and a marketing services agreement for a given airport.

(365) A "terminal value" calculated using the method suggested by Ryanair would therefore be highly unlikely to be taken into account by a prudent MEO when deciding whether or not to enter into an agreement.

(366) The study of 31 January 2014 therefore shows that a "cash flow" approach would only lead to very uncertain and unreliable results, as would the "capitalisation" method.

(367) Moreover, neither Germany nor any interested third party has provided any evidence that the method put forward by Ryanair in the study of 31 January 2014, or any other method aiming to quantify the profits after expiry of airport services agreements and marketing services agreements, has been successfully implemented by regional airport operators comparable to Zweibrücken's operator. Germany has not made any comments on the studies of 17 and 31 January 2014.

(368) Moreover, a terminal value calculated using the method put forward by Ryanair is only positive (and, therefore, only tends to increase the profitability of the airport services agreement and marketing services agreement) if the incremental profit expected from these agreements in the final year of application of the airport services agreement is positive. If it is negative, taking the terminal value into account will usually reduce the profitability of the agreements. It will be demonstrated below (see recitals (378) *et seq.*) that the 2008 agreements resulted in negative incremental cash flows.

(369) Moreover, as stated above (see recitals (341) *et seq.*), the marketing services clearly target persons likely to use the route covered by the marketing services agreement. If this route is not renewed on expiry of the airport services agreement, it is unlikely that marketing services will continue to have a positive effect on passenger traffic at the airport after the expiry date. It is very difficult for an airport operator to assess the likelihood of an airline continuing to run a route on expiry of the term to which it has committed itself in the airport services agreement. Low-cost airlines, in particular, have shown that, when it comes to opening and closing routes, they are very responsive to market conditions which, more often than not, change very quickly. Therefore, when entering into a transaction such as the one being examined in this case, a prudent MEO would not rely on an airline company extending the operation of the route in question on expiry of the agreement.

(370) To conclude, it is clear from the above that the only benefit that a prudent MEO would expect from a marketing services agreement, and which it would quantify when deciding on whether or not to enter into such an agreement, together with an

airport services agreement, would be that the marketing services would have a positive effect on the number of passengers using the routes covered by the agreements in question for the term of operation of those routes, as set out in the agreements. The Commission considers that any other possible benefits are too uncertain to be quantified and taken into account.

*c) The feasibility of comparing Zweibrücken airport to other European airports*

(371) Under the new guidelines for applying the MEO principle, the existence of aid to an airline using a particular airport can, in principle, be excluded if the price charged for the airport services corresponds to the market price, or if it can be demonstrated through an *ex ante* analysis – that is to say one founded on information available when the aid is granted and on developments foreseeable at the time – that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport[97]. However, as regards the first approach (a comparison with the "market price"), the Commission doubts that, at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. It therefore considers an *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines[98].

(372) It should be noted that, in general, the application of the MEO principle based on an average price on other, similar markets may prove helpful if such a price can be reasonably identified or deduced from other market indicators. However, this method is not as relevant in the case of airport services, as the structure of costs and revenues tends to differ greatly from one airport to another. This is because costs and revenues depend on how developed an airport is, the number of airlines which use the airport, its capacity in terms of passenger traffic, the state of the infrastructure and related investments, the regulatory framework which can vary from one Member State to another and any debts or obligations entered into by the airport in the past[99].

(373) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As can be seen in this case, commercial practices between airports and airlines are not always based exclusively on a published schedule of charges. Rather, these commercial relations are very varied. They include sharing risks with regard to passenger traffic and any related commercial and financial liability, standard incentive schemes and changing the spread of risks over the term of the agreements. Consequently, one transaction cannot really be compared with another based on a turnaround price or price per passenger.

---

97 See point 53 of the 2014 Aviation Guidelines.

98 See points 59 and 61 of the 2014 Aviation Guidelines.

99 Commission Decision C12/2008 – Slovakia – Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.02.2011, p. 24).

(374) Finally, assuming that it could be established, based on a valid comparative analysis, that the "prices" involved in the various transactions that are the subject of this assessment are equivalent to or higher than the "market prices" established through a comparative sample of transactions, the Commission would, for all that, not be able to conclude from this that these transactions comply with MEO test if it emerges that, when they were set, the airport operator had expected them to generate incremental costs higher than the incremental revenues. An MEO will thus have no incentive to offer goods or services at "market price" if doing so would result in an incremental loss.

(375) In such conditions, the Commission considers that, taking into account all the information available to it, there are no grounds for diverging from the approach recommended in the 2014 Aviation Guidelines for applying the MEO principle to relations between airports and airlines, that is to say, an *ex ante* analysis of incremental profitability.

*7.3.1.4.* Assessment of incremental costs and revenues

*Time frame*

(376) When deciding on whether or not to enter into an airport services agreement and/or a marketing services agreement, a MEO will choose a time frame for its assessment based on the term of the agreements in question or the term set in each individual agreement. In other words, it will assess the incremental costs and revenues for the term of application of the agreements.

(377) There does not seem to be any justification for choosing a longer period. On the date of signature of the agreements, a prudent MEO will not count on the agreements being renewed once they have expired, whether under the same or new terms. Moreover, a generally prudent operator would be aware that low-cost airlines such as Ryanair have always been and are known for being very responsive to market developments, both when starting up or shutting down routes and when increasing or decreasing the number of flights.

*Assessment*

(378) Germany asserts that FGAZ/FZG did not prepare *ex ante* business plans before concluding individual airport services agreements with the various airlines. It explained that since the majority of the costs of the airport could be considered to be fixed and that an expansion of the commercial activities would not lead to significant additional costs, no such *ex ante* business plans were necessary.

(379) Nevertheless, upon request by the Commission, Germany prepared an overview of the incremental costs and revenues that could have been expected at the time the relevant agreements were concluded. Germany prepared that data for each of the agreements concluded with airlines during the period under investigation, that is to say 2000 – 2009, as summarised in Table 8.

**Table 8: Incremental profitability of contracts with Germanwings, TUIFly and Ryanair**

| | **Germanwings (Contract 15 Sept.2006– 15 Sept.2009)** | **Germanwings (Contract 30 June2008 – 31 Dec.2011)[100]** | **TUIFly (Contract 1 Apr.2008– 31 Mar.2011)[101]** | **Ryanair (Contract 22 Sept.2008– 21 Sept.2009)[102]** |
|---|---|---|---|---|
| Expected Passengers | […] | […] | […] | […] |
| Expected Additional Aviation Revenue | […] | […] | […] | […] |
| Expected Additional Non-Aviation Revenue | […] | […] | […] | […] |
| Expected Additional Costs | […] | […] | […] | […] |
| Costs Marketing Support | […] | […] | […] | […] |
| Expected Nominal Result | […] | […] | […] | […] |
| Discount Rate | […] | […] | […] | […] |
| Expected Discounted Result | […] | […] | […] | […] |

(380) In preparing Table 8, Germany took the following considerations into account:

(a) The expected passenger numbers were deduced from the envisaged number of flights per week and extrapolated for the duration of the agreement.

(b) The expected aviation revenues (handling and landing charges, cleaning and de-icing, etc.) were calculated over the duration of the agreement on the basis of the conditions agreed on with each airline, taking into account the relevant rebates and incentives.

(c) The expected non-aviation revenues (parking charges, spending in the terminal, etc.) were also calculated over the duration of the agreement.

(d) The expected incremental costs were calculated over the duration of the agreement, taking into account depreciation of investments necessary for handling commercial aviation (the new terminal, new check-in counters, parking lots, etc.) as well as additional personnel and materials costs. Only the

100 […]
101 […]
102 […]

costs caused by each individual airline were taken into account. On that basis, Germany argued that the costs of the new terminal and if hiring new staff were originally caused by Germanwings taking up business from Zweibrücken, so that those costs were mostly allocated to the first Germanwings contract.

(e) At the Commission's request, marketing support payments made to Ryanair under the agreement between the *Land* and AMS were taken into account as incremental costs of the Ryanair contract.

(f) The discount rate was based on the discount rates of the German Bundesbank starting from 2008.

(381) The Commission finds that the approach taken by Germany in estimating the passenger numbers, and calculating on that basis the expected incremental aviation and non-aviation revenues, is sound. The same holds true with respect to the discount rates.

(382) The Commission further notes Germany's disagreement that in calculating the incremental revenue only over the duration of the agreement, long-term gains are not taken into account. In response, the Commission refers to its reasoning developed in recitals (376)-(377), that it is indeed appropriate to take only the incremental costs and revenues generated over the duration of the agreement into account.

(383) The Commission also takes note of Germany's submission that the marketing services agreement could not be regarded as only producing costs, but should be also viewed as generating income. Germany did not propose any methodology to evaluate the specific incremental revenue generated by the marketing services agreement beyond increasing traffic (and thus also non-aeronautical revenues) at the airport. In any event, the Commission has already determined in recitals (347) *et seq.* that a MEO would take only the incremental revenue of the airport into account in evaluating the positive effects of the marketing services agreement.

(384) As regards incremental operating costs in particular, the Commission must base itself on the data provided by Germany and FGAZ/FZG as long as these appear reasonable, as it is not itself in a position to independently estimate those costs. The same is, in principle, true for the incremental investment costs, as Germany and FGAZ/FZG are in a better position to estimate which investment can be directly traced back to a particular airport services agreement. Having analysed the information provided by Germany, the Commission accepts the general calculation of the incremental costs as reasonable.

(385) Furthermore, it appears reasonable that the hiring of additional staff to handle Germanwings and initial investments in renovating the terminal can be traced back to the first agreement with Germanwings, as that agreement was the trigger to forcefully develop commercial aviation at Zweibrücken.

*Conclusion*

(386) As the expected discounted result is negative for the first Germanwings agreement as well as for the TUIFly and Ryanair agreements, the Commission finds that FGAZ/FZG did not act like a MEO in concluding those agreements. The Airport could not have expected to cover at least the incremental costs brought about by any one of those agreements. As FGAZ/FZG thus did not behave like a MEO, its decision to conclude the agreements on those terms granted Germanwings, TUIFly and Ryanair an economic advantage.

(387) In contrast, the second Germanwings agreement could have been expected to lead to a positive discounted result. In concluding that agreement, FGAZ/FZG therefore did not grant an economic advantage to Germanwings.

7.3.1.5. Selectivity

(388) The economic advantage identified in recitals (376) *et seq.* was granted on a selective basis, as only airlines operating from Zweibrücken Airport benefited from it.

(389) In this context, the argument advanced by Germany that the discounts on airport charges granted to airlines flying from Zweibrücken were not selective must be rejected. Germany argued that the discounts were open to all airlines wishing to operate from Zweibrücken, which allegedly rendered them non-selective.

(390) In response, the Commission first observes that the individual agreements concluded with the airlines diverge from the schedule of charges and from each other (see recitals (67)-(72)), thus containing individually-negotiated conditions. The precise advantage granted would then appear to be selective as regards each individual airline.

(391) Secondly, however, the Commission observes that even if the schedule of charges had been applied in the same way to each airline wishing to operate from Zweibrücken, any advantage conferred thereunder would still have to be considered selective. As Advocate-General Mengozzi opined in the *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH* case, accepting Germany's argumentation would amount to "*radically denying the possibility of classifying as State aid the conditions on which a public undertaking offers its services where those conditions are applicable to all its contracting parties without distinction.*"[103] Advocate-General Mengozzi further remarked that

> *"in my opinion, the Commission correctly observed, such an exclusion would not appear to be in line with either the case-law of the Court according to which public interventions which affect all the traders of a particular economic sector without distinction can also be selective in nature, nor with the various precedents where selective benefits arising from the provision of goods or services by public (or private) undertakings at identical rates or on identical*

[103] Opinion Advocate-General, Case C-284/12 *Lufthansa v Flughafen Frankfurt-Hahn* [2013] not yet reported, paragraph 50.

*conditions for all operators carrying on a specific activity were regarded as selective."*[104]

7.3.1.6. Distortion of competition and effect on trade

(392) A measure granted by a State is considered to distort or to threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.[105] For all practical purposes, a distortion of competition is thus assumed as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. The case law of the European Courts has established that any grant of aid to an undertaking exercising its activities in the internal market can be liable to affect trade between Member States.[106]

(393) Since the entry into force of the third package on the liberalisation of air transport on 1 January 1993[107], air carriers can freely operate flights on intra-European connections. As the Court of Justice has observed,

*"where an undertaking operates in a sector in which ... producers from various Member States compete, any aid which it may receive from the public authorities is liable to affect trade between the Member States and impair competition, inasmuch as its continuing presence on the market prevents competitors from increasing their market share and reduces their chances of increasing exports*."[108]

(394) The Commission has found that FGAZ/FZG and the *Land* Rhineland-Palatinate granted a selective advantage to Germanwings, TUIFly and Ryanair. These airlines are active on a competitive, Union-wide market and the advantage they received was liable to improve their competitive position on that market. In this light, the Commission finds that the advantage granted to Germanwings, TUIFly and Ryanair is liable to distort competition and affect trade between Member States.

---

104 Ibid (internal footnotes omitted). See also ibid, paragraphs 51-52.

105 Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 267, paragraph 11 and joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and others v Commission of the European Communities* [2000] ECR II-2325, paragraph 80.

106 Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980], ECR 2671, paragraphs 11 and 12 and Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities [1998]* ECR II-717, paragraphs 48-50.

107 Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, all of these published in OJ L 240, 24.08.1992, p. 1-17.

108 Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 26.

7.3.1.7. Conclusion

(395) For the foregoing reasons, the Commission finds that Germanwings, TUIFly, and Ryanair have received State aid, amounting to approximately EUR 1 054 985, EUR 232 781, and EUR 464 879, respectively.

*7.3.2. Compatibility*

(396) The Commission notes that Germany has not advanced any arguments to show that the aid granted to TUIFly, Germanwings and Ryanair is compatible with the internal market.

(397) Following the caselaw of the Court of Justice[109], the Commission recalls that it is Germany's responsibility to indicate the legal basis on which a State aid measure could be found compatible with the internal market and to demonstrate that all required conditions are met. In the opening decision the Commission requested Germany to provide information on whether compatibility could be established pursuant to the 2005 Aviation Guidelines. Germany, however, did not make any submissions with a view to showing that the relevant conditions for compatible start-up aid under the 2005 Aviation Guidelines were met. Nor did the interested parties who submitted comments put forward any arguments demonstrating the compatibility of the State aid measure with the internal market.

(398) The Commission nevertheless finds it useful to briefly consider whether the State aid in question could be considered compatible start-up aid.

7.3.2.1. Applicable legal framework

(399) As regards start-up aid, the 2014 Aviation Guidelines state that:

> *"the Commission will apply the principles set out in these guidelines to all notified start-up aid measure in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014."*[110]

(400) The 2005 Aviation Guidelines, in turn, stipulate that:

> *"the Commission will assess the compatibility of ... start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the*

[109] See notably Case C-364/90 *Italy v Commission* [1993] ECR I-2097, paragraph 20.

[110] 2014 Aviation Guidelines, point 174.

*Treaty [now Article 108 (3) of the Treaty], on the basis of these guidelines if payment of the aid started after the guidelines were published in the Official Journal of the European Union."*

(401) As the agreements with Germanwings, TUIFly, and Ryanair were concluded after the publication of the 2005 Aviation Guidelines in the *Official Journal* on 9 December 2005, those guidelines constitute the applicable legal basis for the assessment of their compatibility with the internal market.

7.3.2.2. Compatibility assessment pursuant to 2005 Aviation Guidelines

(402) Given that the compatibility conditions for start-up aid enshrined in point 79 of the 2005 Aviation Guidelines are cumulative, the Commission considers that it is only necessary to demonstrate that one of those conditions is not fulfilled in order to find that the aid to the airlines is not compatible. The Commission starts its analysis with the condition set out in point 79(d) of the 2005 Aviation Guidelines.

(403) Point 79(d) of the 2005 Aviation Guidelines requires, *inter alia*, that the amount of aid granted in any one year does not exceed 50% of total eligible costs for that year and total aid does not exceed an average of 30% of eligible costs. Eligible costs are defined as the *"additional start-up costs incurred in launching the new route or frequency … which the air operator will not have to bear once it is up and running*"[111].

(404) In the opening decision the Commission observed that the agreements with Germanwings, TUIFly and Ryanair did not provide for any connection between the aid granted and the eligible costs. Germany was therefore asked to provide details on the relationship between the aid and the eligible costs. Neither Germany nor the third parties commenting on the opening decision provided any such information. In this light, and considering that the agreements with the airlines in question make no reference to the costs of the airlines, let alone the eligible costs, the Commission finds that the compatibility condition enshrined in point 79(d) of the 2005 Aviation Guidelines is not fulfilled.

(405) In conclusion, the aid to the airlines cannot be found to constitute compatible start-up aid, as at least one of the compatibility conditions is not fulfilled. The State aid granted to Germanwings, TUIFly and Ryanair therefore constitutes unlawful and incompatible State aid that has to be recovered.

## 8. RECOVERY

(406) In accordance with the Treaty and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or

[111] 2005 Aviation Guidelines, point 79(e).

alter aid[112] when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation.[113] In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.[114]

(407) Following that case-law, Article 14 of Council Regulation (EC) No 659/99[115] laid down that "*where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.*"

(408) Therefore, the State aid mentioned above (see recitals (282), (297), (318), (320), (395), and (405), taking into account recitals (198), (199), and (200)) must be reimbursed to Germany, insofar as it has been paid out.

(409) Table 9 indicates the approximate recovery amounts.

**Table 9: Information about the approximate amounts of aid received, to be recovered and already recovered**

| Identity of the beneficiary | Total approximate amount of aid received (in EUR) | Total approximate amount of aid to be recovered[116] (in EUR) (Principal) | Total amount already reimbursed (in EUR) | |
|---|---|---|---|---|
| | | | Principal | Recovery interest[117] |
| FGAZ / FZG: Direct Investment Grants | | | | |
| FGAZ / FZG: Capital Injections | | | | |
| FGAZ / FZG: 100% Guarantee | | | | |
| FGAZ / FZG: Cash-Pool Participation | | | | |

112 Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

113 Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

114 Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 64-65.

115 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

116 The amounts to be recovered from FGAZ / FZG have to be calculated on the basis of the formula set out in Article 3 and cannot at this stage be identified approximately.

117 Considering that the aid is put at the disposal of the airlines continuously during the time concerned, the Commission considers it acceptable to fix as the date from which onward the recovery interest has to be calculated the last day of the period for which the aid amount was calculated (for example, 31 December if that period is a calendar year, or 31 October if that period starts on 1 January and ends on 31 October). In that respect, by choosing the last day of the period at stake, the Commission adopts the approach which is the most favourable to the beneficiaries.

| | | | | |
|---|---|---|---|---|
| Germanwings | 1 115 971 | 1 115 971 | | |
| TUIFly | 233 002 | 233 002 | | |
| Ryanair / AMS | 469 132 | 469 132 | | |

(410) To take account of the actual advantage received by the airline and its subsidiaries under the agreements, the amounts indicated in Table 9 may be adjusted, according to the supporting evidence provided by Germany, based on (i) the difference between, on the one hand, actual payments as presented *ex post*, that were made by the airline with regard to the airport charges (including the landing fee, the passenger fee and ground handling services under the airport services agreement), and on the other hand the forecasted cash flows (*ex ante*) on these items of income and shown in Table 8, and (ii) the difference between, on the one hand, the actual marketing payments as presented *ex post* which were paid to the airline or its subsidiaries under marketing services agreements and, other the other hand, the marketing costs as foreseen *ex ante*, corresponding to the amounts indicated in Table 8,

HAS ADOPTED THIS DECISION:

**Article 1**

1. The State aid, unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty in favour of *Flugplatz GmbH Aeroville Zweibrücken* ("FGAZ") / *Flughafen Zweibrücken GmbH* ("FZG") between 2000 and 2009 by means of direct investment grants, annual capital injections, the grant of a 100% guarantee on a bank loan free of charge, and allowing FGAZ to participate in *Land* Rhineland-Pfalz's cash-pool, is incompatible with the internal market.
2. The State aid, unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty in favour of Germanwings, TUIFly and Ryanair / AMS by means of the airport services agreements and marketing services agreements concluded on 15 September 2006 (Germanwings), 1 April 2008 (TUIFly), and 22 September 2008 / 6 October 2008 (Ryanair / Airport Marketing Services ("AMS")) is incompatible with the internal market.

**Article 2**

1. The loan granted to FZG by *Sparkasse Südwestpfalz* does not constitute State aid.
2. The airport services agreement concluded by FZG with Germanwings on 30 June 2008 does not constitute State aid.

**Article 3**

1. Germany shall recover the incompatible aid referred to in Article 1 from the beneficiaries.
2. FGAZ and FZG shall be jointly liable to repay the State aid received by either of them.
3. Ryanair and AMS shall be jointly liable to repay the State aid received by either of them.
4. The sums to be recovered are as follows:
   (a) in respect of the direct investment grants granted by the *Land* Rhineland-Palatinate *and the ZEF* in favour of FZG: **EUR 20 564 170** granted between 12 December 2000 and 31 December 2009, minus the costs of fire brigade services and the costs for which the airport operator is entitled to reimbursement pursuant to §8(3) *Luftsicherheitsgesetz* to the extent that they were covered by the direct investment grants;
   (b) in respect of the annual capital injections granted by the *Land* Rhineland-Palatinate and the ZEF in favour of FGAZ: **EUR 26 629 000** granted between 2000 and 2009, minus the costs of fire brigade services and the costs for which the airport operator is entitled to reimbursement pursuant to §8(3)

*Luftsicherheitsgesetz* to the extent that they were covered by the annual capital injections, and minus those sums granted before 12 December 2000;

(c) in respect of the 100% guarantee on the loan granted by the *Land* Rhineland-Palatinate in favour of FZG: the cash-equivalent of the value of the guarantee, to be determined pursuant to the Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees;

(d) in respect of the participation of FGAZ in the cash-pool of *Land* Rhineland-Palatinate: the cash-equivalent of the advantageous loan conditions, to be determined pursuant to the Communication from the Commission on the revision of the method for setting the reference and discount rates of 12 December 2007, minus any advantage received on loans that were used to cover the costs of fire brigade services and the costs for which the airport operator is entitled to reimbursement pursuant to §8(3) *Luftsicherheitsgesetz*;

(e) in respect of the airport services agreement concluded between Germanwings and FZG on 15 September 2006: the amount of incompatible aid;

(f) in respect of the airport services agreement concluded between TUIFly and FZG on 1 April 2008: the amount of incompatible aid;

(g) in respect of the airport services agreement and marketing services agreements concluded between Ryanair and FZG on 22 September 2008 and between AMS and the *Land* Rhineland-Palatinate on 6 October 2008: the amount of incompatible aid.

5. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

6. Germany shall provide the exact dates on which the aid provided by the State was put at the disposal of the respective beneficiaries.

7. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004[118].

8. Germany shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.

**Article 4**

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Germany shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

[118] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p.1).

**Article 5**

1. Within two months following notification of this Decision, Germany shall submit the following information:

   (a) the total amount of aid received by the beneficiaries, and in particular:

   (i) the amount of direct investment grants, capital injections, and the cash-equivalent of advantageous loans that covered the costs of fire brigade services and costs for which the airport operator is entitled to reimbursement pursuant to §8(3) LuftSiG;

   (ii) information on the creditworthiness of FGAZ / FZG when the 100% guarantee was issued and when each loan from the cash-pool was provided, with a view to enabling the Commission to determine the cash-equivalent of the guarantee and the advantageous conditions of the cash-pool loans in line with the Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees and Communication from the Commission on the revision of the method for setting the reference and discount rates of 12 December 2007, respectively;

   (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

   (c) a detailed description of the measures already taken and planned to comply with this Decision;

   (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

**Article 6**

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 01.10.2014

For the Commission

Joaquin ALMUNIA
Vice-President

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision.

Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission,
Directorate-General Competition
State Aid Greffe
1049 Brussels
Fax: +32 2 296 12 42
Stateaidgreffe@ec.europa.eu