



EUROPEAN COMMISSION

Brussels, 4.9.2017

C(2017) 6080 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: SA.48937 (2017/N) – Germany – Rescue Aid in favour of Air Berlin PLC & Co. Luftverkehrs KG

Sir,

1. Procedure

- (1) On 15 August 2017, Germany notified to the Commission its plans to grant rescue aid to the company Air Berlin PLC & Co. Luftverkehrs KG (hereinafter "Air Berlin").
- (2) The Commission held a meeting with the German authorities on 23 August 2017 and teleconferences on 16, 25 and 30 August 2017. The Commission also held a teleconference on 28 August 2017 with the creditor trustee (*Sachwalter*) appointed at the proposal of the main creditors to oversee the administration of Air Berlin (see recital (24)).

His Excellency Mr Sigmar GABRIEL
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

- (3) On 15 and 25 August 2017, the Commission received submissions from Ryanair, not based on the mandatory complaint form, contending that Air Berlin received unlawful State aid. On 25 August 2017, the Commission received a formal complaint from Germania. On 30 August 2017, the Commission received another formal complaint from a complainant who wishes to remain anonymous.
- (4) On 25, 28, 29 and 30 August, 1 and 2 September 2017, Germany provided further written information.
- (5) On 25 August 2017, Germany agreed that the present decision may be adopted and notified in English.
- (6) On 2 September 2017, Germany provided three commitments, by which it amended the notification.

2. **The beneficiary**

- (7) A legal predecessor of Air Berlin started to operate as an air transport company in 1978. The company has been restructured several times. In its current form, a holding company Air Berlin plc, registered in the United Kingdom and with headquarters in Germany, holds three airlines, namely Air Berlin, incorporated in Germany (indirectly, through two layers of other companies, 100% owned by the holding), Luftfahrtgesellschaft Walter, incorporated in Germany (direct 100% ownership by the holding), and Belair Airlines AG, incorporated in Switzerland (indirectly through one layer of companies, 49% owned by the holding, hereinafter "Belair", which has announced that operations will cease by October 2017). Air Berlin, in turn, holds, through two layers of companies, 49,8% of Niki Luftfahrt GmbH (hereinafter "Niki"). Furthermore, the Commission understands that as a result of contractual arrangements with the other shareholder in Niki, [...]*. In addition, as a result of those arrangements, [...]. In addition to the airlines, several other service, travel and leasing companies, which provide ancillary services, are part of the group.
- (8) Air Berlin plc was incorporated in 2005. Niki was founded in 2003, Luftfahrtgesellschaft Walter in 1980 and Belair in 1925 (and has been restructured several times).
- (9) Air Berlin plc's main shareholders are Etihad Airways PJSC¹, incorporated in the United Arab Emirates, with 29.21% and ESAS Holding A.S., a private equity fund incorporated in Turkey, with 12.02%, and which also owns Pegasus airlines, a Turkish airline, which has a code-share with Air Berlin. The rest of the shares are publicly floated, and no control agreements exist. Air Berlin plc is listed on the Frankfurt stock exchange.

* *Business secret*

¹ Etihad Airways was established by Royal (Emiri) Decree in July 2003 and is wholly owned by the Government of the UAE.

- (10) The Commission services have, in the past, had the occasion to verify the analysis conducted by the German authorities regarding the conditions of the operating licence, and in particular, whether Etihad Airways controlled Air Berlin plc, on the basis of Article 4(f) of Regulation 1008/2008². That analysis concluded that Etihad Airways did not effectively control Air Berlin plc, because, among others, the dispersed shareholders possessed 58% of the votes, and there was no indication that, for example due to a lack of their attendance at the General Assembly, there would be a situation where Etihad Airways could de facto exercise control. The German authorities have confirmed that that situation has not changed. This is not contradicted by the fact that when analysing the Etihad Airways – Alitalia merger, the Commission assessed overlaps between Alitalia and Air Berlin.³ This was due to the existence of the commercial cooperation agreement and the role of Etihad Airways as largest shareholder, but not based on the establishment of control of Etihad Airways over Air Berlin. The Commission did not further analyse in that merger context whether, as claimed by the notifying parties, Etihad Airways had control over Air Berlin. Indeed, Etihad Airways did not seek merger clearance for the acquisition of its stake in Air Berlin plc, and no competent competition authority has found otherwise.
- (11) Air Berlin is Germany's second-largest airline, after Lufthansa, and the Union's seventh-largest airline in terms of passengers carried. It operates hubs at Berlin Tegel Airport and Düsseldorf Airport with a network of routes serving several European countries, the Caribbean and the Americas. In 2016, Air Berlin plc group had around 8 400 employees and Air Berlin had 7200 employees in Germany. Air Berlin does not own any aircraft, but operates around 90 Airbus aircraft. 31 of those are operated in form of a wet lease for Eurowings, a subsidiary of Lufthansa, and five in the form of a wet lease for Austrian Airlines, another subsidiary of Lufthansa.
- (12) Air Berlin has been facing financial difficulties since 2008. Since 2008, the company has reported a profit only once, in 2012. In 2016, its earnings before interest and tax (EBIT) were negative, at minus EUR 667.1 million (compared with minus EUR 307.0 million in 2015). Air Berlin plc's earnings before interest and tax (EBIT) were minus EUR 781.9 million (2015: minus EUR 446.6 million).
- (13) In view of those problems, Air Berlin underwent a number of corporate restructuring programmes, which according to Germany did not involve any State aid.
- (14) The latest restructuring programme of 2016 was called “the new Air Berlin”. It foresaw that Air Berlin would reduce its network from around 140 destinations to 70, and focus on the hubs in Berlin and Düsseldorf, and two smaller bases in Stuttgart and Munich, with six bases being closed. Air Berlin would target business travellers and concentrate on flights to domestic German destinations, Italy, Scandinavia and Eastern Europe. It would also expand its long-haul business. It

² Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, (OJ L 293 of 31.10.2008, p. 3).

³ Case No COMP/M.7333 - ALITALIA/ ETIHAD, paragraph 36.

was envisaged that the restructuring would involve the loss of up to 1 200 jobs (FTE).

- (15) On 5 December 2016, Air Berlin announced plans to sell its entire 49-percent stake in Niki to Etihad Airways. However, the German authorities have confirmed that this transaction was never closed, and that Air Berlin still today owns the 49% stake.
- (16) In January 2017, Air Berlin announced a network reduction for the upcoming 2017 season, with most leisure routes either transferred to Niki or cancelled altogether; some domestic and European city routes are to be dropped with the remaining reduced network focusing on the Berlin-Tegel and Düsseldorf hubs.
- (17) In late April 2017, Air Berlin confirmed the creation of Air Berlin Aeronautics GmbH, a new subsidiary which will possess its own operational licence (AOC) to take over the wet lease operations currently handled by Air Berlin on behalf of Eurowings and Austrian Airlines.
- (18) In May 2017, Air Berlin announced that it would buy the remaining shares in Luftfahrtgesellschaft Walter, in which it had a controlling stake since 2009. That company operates a fleet of 20 Bombardier aircraft for Air Berlin.
- (19) According to Air Berlin plc's Annual Report for 2016⁴, the company's financial restructuring and operational focusing (carving out of the leisure business) in the context of "the new Air Berlin" were to be supported in part by shareholder loans to be provided by Etihad Airways.
- (20) On 28 April 2017, Etihad Airways provided a comfort letter to Air Berlin plc, confirming its intention to continue to provide the necessary support to Air Berlin plc group to enable it to meet its financial obligations for the following 18 months at least.
- (21) On 9 August 2017, Etihad Airways did not pay a due loan instalment to Air Berlin. On Friday evening, 11 August 2017, Etihad Airways unexpectedly announced publicly that it would no longer honour the comfort letter referred to in recital (20).
- (22) On 15 August 2017, Air Berlin filed for insolvency and requested authorisation to continue managing and disposing of its assets in self-administration (debtor-in-possession regime or *Eigenverwaltung* under German insolvency law). The same day, the *Amtsgericht Charlottenburg* (the competent German court) placed Air Berlin in insolvency proceedings and authorised self-administration under the supervision of a creditor trustee. At the same time, Air Berlin plc and Air Berlin Technik GmbH, a service subsidiary of Air Berlin, filed for the same type of insolvency proceedings. Finally, on the same day, the German government decided to grant Air Berlin the notified measure, subject to approval by the Commission.

⁴ Air Berlin Annual Report 2016, page 109.

- (23) When filing for insolvency, German law allows a company, under certain conditions, to continue to carry out its business. In that scenario, there are two possibilities, self-administration and assigning a judicial trustee appointed by the court who takes full control of the insolvent company, which then loses the right to manage and transfer its assets.
- (24) Self-administration is an option provided for under the German Insolvency Act (*Insolvenzordnung*). It aims at preserving the economic activity of the insolvent entity. The conditions to be fulfilled are that the debtor submits an application and there are no circumstances that would lead to the expectation that self-administration could negatively affect the creditors.⁵ If the preliminary creditors' committee does not object to the request, the insolvency court shall grant the request. In that case, instead of an external judicial trustee appointed by the competent court, there is a so-called creditor trustee proposed by the debtor and confirmed by the competent court. The creditor trustee's main role is to safeguard the interests of the creditors. The creditor trustee does not act towards third parties, but only internally, and ensures that the requirements and rules of the insolvency law are respected. The company must also appoint an insolvency expert (for the duration of the procedure) who will represent the company in the proceedings and guarantee the compliance of the self-administration with German insolvency law. Following the initiation of the insolvency procedure, the management has three months to present a restructuring plan for the company in insolvency.
- (25) In the case of Air Berlin, the preliminary creditor committee consists of three members, appointed each by Eurowings (which made important advance payments on its wet lease agreement with Air Berlin), the Federal Agency for Employment (*Bundesagentur für Arbeit*), which will pay a wage subsidy, so-called *Insolvenzgeld*,⁶ for the duration of the three months following the initiation of the procedure), and Commerzbank, representing other commercial creditors.
- (26) The management of Air Berlin had been in talks to sell parts of the airline already prior to the withdrawal of Etihad Airways. In March 2017, it started project QUAD, aiming to sell “the new Air Berlin” and Niki. 12 bidders signalled interest. Following a data room with 6 bidders and due diligence with 4 bidders, Lufthansa and Easyjet made indicative offers, covering the short and medium haul [...] and the short haul business [...].
- (27) Following the withdrawal of financing by Etihad Airways and the initiation of insolvency proceedings, a total of more than 20 additional bidders signalled interest for parts of Air Berlin plc, including Air Berlin or parts of it. In particular, two bids from large European airlines covering 10 to 50 and 20 to 80 aircraft (as yet with no indicative range) have been received.
- (28) According to a presentation made by Air Berlin to the German authorities, the management now has two parallel tracks. On the one hand, it aims at obtaining

⁵ Article 270(2)(1) of the Insolvency Act

⁶ The present decision is limited to the notified measure and is without prejudice to the assessment of *Insolvenzgeld* under Article 107 TFEU.

finalised offers from bidders that had signalled interest prior to the filing of insolvency. On the other hand, it starts negotiations with all new bidders.

- (29) The deadline for binding offers is 15 September 2017 for both tracks. The finalisation of contracts is foreseen until [...] 2017, with signing on the same day.
- (30) As of [...] 2017, the acquirer or acquirers have to take over the operating costs of Air Berlin. Once all necessary authorisations, in particular merger clearance, have been obtained, the deals should close.
- (31) According to the German authorities, insolvency in self-administration with continued economic operations would not have been possible absent the notified measure.
- (32) According to the German authorities, filing for insolvency puts the company at risk of having its operating licence withdrawn by the Federal Aviation Office, which in turn would mean that Air Berlin would have to immediately cease operations.
- (33) According to Article 3 of Regulation EC 1008/2008⁷ on the common operation of air services, no company established in the EU may carry flight passengers in commercial air transport without an operating licence. Pursuant to Article 9, paragraph 1, of the same Regulation, the licensing authority shall suspend or withdraw the license of an air carrier if it is no longer satisfied that it can meet its actual and potential obligations for a 12-month period. By virtue of paragraph 2 of that provision, the authority granting the license must assess the financial situation of a company within three months after the opening of insolvency proceedings. The competent authority can issue a temporary license only if there is a realistic prospect of a satisfactory financial reconstruction within that time period. According to the German authorities, in view of the company's over-indebtedness and lack of liquidity, this would be possible only if the notified measure is granted. If this is not the case, the license would have to be suspended or revoked, which would entail a grounding of all aircraft.
- (34) A possible revocation of the license would result in serious adverse effects for passengers and for the company's financial situation. The German authorities contend that there would be no way of ensuring the return journey of the some 80 000 passengers⁸ carried by Air Berlin per day during the holiday season. Germany claims that any possible disruption of Air Berlin's flight services would violate passenger rights as enshrined in Regulation (EC) No 261/2004 on air transport passenger rights.⁹

⁷ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, (OJ L 293 of 31.10.2008, p. 3).

⁸ This figure has been documented by Germany for August. Based on the booking numbers presented by Germany for September and October, the relevant number of passengers is 60 000 and 33 000, respectively.

⁹ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L

- (35) Germany provided an analysis demonstrating that the flight operations of Air Berlin over the summer could not be replaced or taken over by other companies on a short notice in view of the high rates of capacity utilisation of other airlines (high passenger load factors) and airports¹⁰. Especially, during the summer, the average capacity utilisation can exceed 90%.¹¹ Furthermore, the German authorities noted that the German air transport sector is continuously growing¹² and there are no overcapacities.
- (36) As an example, the German authorities presented an analysis of the route Berlin Tegel-Mallorca (as a preferred holiday destination¹³) on which Niki operates 6 direct flights per day and other airlines such as Ryanair, Easyjet, Eurowings, Azur Air operate (in total) 5 direct flights per day. The Oneworld alliance¹⁴ offers more than 30 connections to Berlin Tegel.¹⁵
- (37) The German authorities consider that neither the Oneworld alliance, nor other airlines would have the required capacity to transport the passengers of Air Berlin. The direct flights of other airlines such as Eurowings and Easyjet are for the most part fully booked (based on the online booking systems of these airlines). The passenger load factor on this route appears to exceed the European average of 86% for the month of August. The German authorities consider that all airlines operate at the limits of their capacity.
- (38) According to the information submitted by Germany, the number of bookings of Air Berlin for the month of September are [1.0-2.0] million (capacity utilisation of [70-80]%), for October [1.0-1.5] million (capacity utilisation of [50-60]%) and for November around [200 000-500 000] (capacity utilisation of [20-30]%). Overall, more than [2-4] million passengers have booked flights with Air Berlin for the period September to November 2017.
- (39) Moreover, the revocation of Air Berlin's license would lead to Air Berlin losing its slots, depriving the company of valuable assets. According to Regulation No

46/1 of 17.2.2004).

¹⁰ For example, the passengers at the Frankfurt airport increased from 4 million in February 2017 to more than 6.4 million in July 2017.

¹¹ According to Germany, for the month of August 2016, the passenger load factor for other airlines was 84,60 % for Lufthansa, 94.9 % and 96% for Easyjet and Ryanair. Other carriers such as Iberia, British Airways, Aer Lingus, and Vueling had a passenger load factor of 85,2%.

¹² The number of passengers increased from 140 million in 2001 to 223 million in 2016 and is expected to grow further.

¹³ The analysis is based on a busy return day at the height of the holiday season – Friday, 25 August 2017.

¹⁴ Oneworld is the world's third biggest airline alliance. Its members are Air Berlin, American Airlines, British Airways, Cathay Pacific, Finnair, Iberia, Japan Airlines, LAN, Malaysian Airlines, Qantas, Royal Jordanian and S7 Airlines. See <https://de.oneworld.com/news-information/oneworld-factsheets/oneworld-at-a-glance>.

¹⁵ Iberia (5 flights) and British Airways (1 flight) do not operate direct flights and passengers need to connect in Madrid and London, respectively. The remaining flight connections operated by Niki and Air Berlin are at German airports (Dusseldorf, Frankfurt, Cologne-Bonn) and at Zurich.

95/93¹⁶, series of slots are allocated from the slot pool to applicant carriers as permissions to use the airport infrastructure for the purpose of landing or take-off for the scheduling period for which they are requested, at the expiry of which they have to be returned to the slot pool.¹⁷ Air carriers need to demonstrate that the slots in question have been operated by the air carrier at least 80% of the time during the scheduling period for which they have been allocated. In such case that series of slots entitles the air carrier concerned to the same series of slots in the next equivalent scheduling period, if requested by that air carrier within the time-limit referred to in Article 7(1) of the same Regulation.

- (40) Maintaining the value of the slots is particularly important because they can be transferred to other airlines in accordance with Article 8a of Regulation No 95/93 "*in the case of a total or partial take-over when the slots are directly related to the air carrier taken over*".¹⁸

3. The notified measure

- (41) The notified measure consists of a loan of a maximum amount of EUR 150 million backed by a guarantee from the German State (hereinafter "the notified measure"). The loan will be provided by the German public credit institution "Kreditanstalt für Wiederaufbau" (Credit Institution for Reconstruction, "KfW"). KfW is a development bank, which is 100% owned by the Federal State. The national legal basis for granting the loan is the *Bundeshaushaltsordnung*. The guarantee will be provided by the German State on the basis of Article 3(1)(5) of the *Haushaltsgesetz 2017*.
- (42) On 15 August 2017, on the same day as the notification took place, the German ministers for economy and transport issued a joint press release, informing the public that the Federal Government had decided to grant a rescue loan of EUR 150 million to Air Berlin. According to the press release, this was necessary in order to avoid that several tens of thousands of travellers were stranded. Furthermore, Air Berlin plc was in negotiations with Lufthansa and one further airline to sell parts of the company.
- (43) The German authorities have confirmed, however, that until today, no loan contract has been signed by the German authorities. Hence, the aid has not yet been granted.

¹⁶ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1)

¹⁷ See Article 8 of Regulation 95/93.

¹⁸ When the assets of an air carrier are sold there are three possible scenarios: (1) the air carrier being sold becomes a subsidiary company of another air carrier. The slots can then be transferred between parent and subsidiary companies, and between subsidiaries of the same parent company as per Article 8a.1.(b)(i); (2) a transfer is also possible if 51 per cent of control over the capital of an air carrier is acquired as per Article 8a.1.(b)(ii) and (3) slots can also be transferred as part of a total or partial take-over of an air carrier. The slots have to be directly related to the part of the air carrier taken over as per Article 8a.1.(b)(iii). In the latter case, the transfers have to be notified to the national coordinator, who shall verify that all requirements are met. Slot transfers do not take effect until confirmed by the coordinator in accordance with Article 8a.2.

- (44) Pursuant to paragraphs 3 and 11.3(e) of the loan contract, the loan has the sole purpose of guaranteeing the continued operation of the airplanes of Air Berlin. [...]
- (45) On 2 September 2017, Germany gave commitment Nr. 1, pursuant to which no other company belonging to the group than the aid beneficiary (see recital (7)) would benefit from any aid (i.e. no other company would be able to draw payments from the loan).¹⁹ Germany has the power to honour this commitment, because any use for another company requires its prior consent. Through this commitment, Germany commits itself not to give any such agreement. Hence, the loan can only be used for payments to contractual partners under existing trade agreements, including contractual partners within the group (i.e. payments for market-conform deliveries/supplies and services within the group).
- (46) The objective of the loan is to enable Air Berlin to continue operations for maximum three months, with the aim of (i) maintaining orderly air transport during the holiday season²⁰ and (ii) achieving the sale of Air Berlin plc's assets in an orderly manner with the least negative consequences for staff.
- (47) According to the draft loan agreement provided by Germany, the loan can be drawn down for a duration of three months. Reimbursement is due at the end of the three months, with the possibility for Air Berlin to ask for a one-time extension of maximum six weeks. Hence, the loan has to be repaid in its entirety at the end of the loan duration at the end of November or, if an extension is granted, by mid-January at the very latest.
- (48) Based on the liquidity plan that is part of the notification, the loan will only be used to cover the operating costs of Air Berlin for the months September and October 2017. If the sales process proceeds as planned, the operational risk for the operations of Air Berlin will be transferred to the acquirer or acquirers as of [...] 2017 (see also above recital (30)).
- (49) The liquidity plan includes projections on the liquidity needs of Air Berlin, taking into account historical data (to the extent to which it is relevant) and the specific circumstances of the company that has been placed in insolvency. The liquidity plan includes information on the free liquidity of Air Berlin (before the loan is granted), the projected operating costs (e.g. airport charges, cargo transportation and handling, fuel, navigation fees, leasing costs etc.) and projected operating revenue (e.g. from operations, investment activities, financing activities). The liquidity plan takes into account the expected drop in the revenues due to possible reductions in bookings and cancellations. The expected proceeds from the sale of Air Berlin's assets have been taken into account in the liquidity plan.
- (50) Based on the liquidity plan, the liquidity needs for the months September and October that need to be covered were initially set at EUR [100-200] million.

¹⁹ Without the commitment it would have been possible, pursuant to paragraph 3(b) of the loan agreement and with the agreement of the German government, to pass on the loan to other companies.

²⁰ August, but also September and October are, according to data provided by Germany, among the busiest months for Air Berlin's business.

However, it was considered prudent to include a reserve in case new bookings for the months of September and October are below plan, which represents EUR [20-30] million. On that more conservative basis, Air Berlin plans to draw EUR [40-50] million in September and EUR [100-110] million in October. It also should be noted that the liquidity plan includes income from the sale of Niki for September of EUR [30-40] million and for October of EUR [10-20] million, and income from the sale of Leisure Cargo GmbH of EUR [10-20] million for October. Furthermore, it includes income from [...]. Finally, Germany has also explained that if all regulatory approvals had not been obtained by mid-January 2018, it may be envisaged that the sale price is put on a blocked account with KfW.²¹

- (51) The liquidity plan does not cover [...], because it is expected that the operational risk would be transferred to the acquirer at that point in time. However, Germany considered it prudent to allow for the possibility, if needed, to also draw on the loan in [...]. On 2 September 2017, Germany gave commitment Nr. 2, pursuant to which it will only allow Air Berlin to draw on the loan in November if it has submitted to the Commission prior to the drawing a liquidity plan for November.
- (52) The Commission notes that Air Berlin is subject to a recovery order, resulting from the Commission's decision in case SA.33983 (Aid to certain airlines in Sardinia)²², finding that Italy's Sardinia region had granted unlawful and incompatible State aid to selected airlines working at Cagliari and Olbia airports and had ordered Italy to recover the aid from the beneficiaries, including Air Berlin. In the liquidity plan, the German authorities have also noted the recovery order amounting to EUR [2-3 million] plus recovery interest to which Air Berlin is subject (furthermore, Niki has to pay back EUR [100 000-200 000]). However, the German authorities consider that it would violate German insolvency law if Air Berlin was to reimburse that aid to Italy. Germany gave, on 2 September 2017, commitment No. 3, which stipulates that:
- Niki will immediately pay the claim sent by the Italian authorities on 30 August 2017 of EUR [100 000-200 000],
 - The claim of the Italian authorities of 14 August 2017 against Air Berlin will be included into the list of creditors,
 - The insolvency proceedings will start the earliest on 1 October, and at the latest on 1 November 2017,
 - The claim of the Italian authorities will not be disputed,
 - The claim will have the rank provided for in paragraph 38 of the German Insolvency Act and participate in the final pro rata satisfaction of creditors.
- (53) The loan will be paid in instalments, according to duly justified liquidity needs. According to the loan agreement, loan tranches can be disbursed by KfW only if the following conditions are fulfilled: (i) the proceeds expected to be achieved from the insolvency mass cover the repayment of the loan including interest, fees

²¹ This is without prejudice to the assessment of such a solution on the basis of Article 107 TFEU.

²² Commission decision of 29 July 2016, SA.33983 – Italy – *Aid to certain airlines in Sardinia granted under the scheme established by Regional Law 10/2010*, not yet published.

and costs and there are no indications that the opening or continuation of the insolvency procedure could be refused for a lack of mass; (ii) Air Berlin shall present concrete proof of liquidity needs and use of all amounts drawn (on a weekly basis) and proof that it does not have other free liquidity at its disposal that exceeds EUR 1 million and other liquidity sources are fully exhausted; (iii) none of the circumstances that permit the lender to terminate the loan contract have arisen; (iv) the requested liquidity payments shall not exceed the maximum total amount of EUR 150 million, (v) the information in the liquidity plan is judged by the lender to be reliable, based on clear and plausible assumptions.

- (54) The interest rate is fixed at 1-year IBOR plus [750-950] basis points. The interest rate may be reduced, depending on the value of collateral offered by Air Berlin, but not below the Commission's reference rate for weak companies with normal collateral of 1-year IBOR plus 400 basis points.
- (55) The collateral granted at the time of signing the loan agreement comprises in particular the pledging as collateral (*Verpfändung*) of the shares of Air Berlin in Niki, Luftverkehrsgesellschaft Walter and Leisure Cargo, as well as all assets of Air Berlin [...]. The contract explicitly confers the right to decide (*Verwertungsrecht*) on the sale of all those assets to KfW [...].
- (56) The loan agreement does not include any direct or indirect conditions concerning the identity of the buyer of Air Berlin's assets. According to the information provided by Germany, the Federal Government has no influence on choosing the buyer of the assets. The sales negotiations are carried out by Air Berlin and the company's temporary insolvency representative under the monitoring of the creditor trustee and the preliminary committee of creditors. The Federal Government is not part of this process. However, Germany has one of three seats in the preliminary creditor committee and has the right (via KfW) to decide on the sale of all the assets.
- (57) The creditor trustee has approved the loan contract.

4. The Complaints

- (58) The Commission has received three complaints in relation to the proposed rescue aid: from Ryanair (not using the formal complaint form), Germania and a complainant who wishes to remain anonymous.
- (59) Ryanair alleges that the EUR 150 million loan to Air Berlin would artificially enable it to maintain its presence in the market. Instead, the natural course of events would require the company to exit the market (similarly to airlines such as Cyprus Airways, Malev and Spanair, where the spare capacity was filled by competitors).
- (60) According to Ryanair, Air Berlin had already received the public funding in violation of the standstill clause contained in Article 108(3) TFEU.
- (61) One of the complainants also alleges that the rescue loan and guarantee to Air Berlin constitutes unlawful and incompatible State aid. The complainant considers that the measure does not serve a well-defined objective of common interest as

preventing or delaying the exit of a company from the market deters other companies from stepping in, especially in the aviation sector that is limited by the availability of take-off and landing slots at some airports. Furthermore, the complainant alleges that Air Berlin's insolvency would not lead to any market failure or social hardship as competitors could provide the same services without substantial delay when the slots used by Air Berlin are distributed. The complainant also disputes the factual correctness of the claim that there is a risk of stranded travellers. In its view, the Air Berlin planes have been rather empty since the announcement of insolvency. In view of the duration of the measure, the complainant doubts whether the return of Air Berlin's passengers is the actual objective of the aid.

- (62) The complainant notes that the State aid to Air Berlin has an impact on the allocation of slots. Without the aid, Air Berlin would lose the slots that would then be distributed on the basis of a transparent and non-discriminatory procedure. Instead, due to the State aid, the companies acquiring Air Berlin or parts thereof will receive the slots in an ongoing non-competitive, discriminatory and not transparent sale of the assets of the company. The complainant further alleges that the aid granted to Air Berlin would indirectly benefit the future buyer of Air Berlin assets. The complaint further refers to possible misuse of aid that would allow Air Berlin to charge predatory prices to the detriment of its competitors.
- (63) The anonymous complainant reasoned that rescue aid must, by its nature, be urgent and temporary. However, Air Berlin's problems are long-lasting, continuous and ever-increasing. Also the complainant contends that a market solution was possible for Air Berlin and in this context refers to a press statement made by Etihad Airways on 15 August in which the airline declared that it "remained open to helping find a commercially viable solution." This complainant further alleged that the aid granted to Air Berlin would indirectly benefit the future buyer of Air Berlin assets, and mentions Lufthansa in that context.

5. ASSESSMENT

- (64) The Commission will assess whether the notified measure entails State aid to Air Berlin within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU"), and whether such aid, if present, is lawful and compatible with the internal market.

5.1. Existence of State aid

- (65) According to Article 107(1) TFEU, "*[s]ave as otherwise provided in the Treaties, 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*".
- (66) The qualification of a measure as aid within the meaning of this provision therefore presupposes that the following cumulative conditions are met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between

Member States.

- (67) The Commission notes that Germany notified the measure as rescue aid and therefore Germany considers that it involves State aid.
- (68) The decision to grant the notified measure was taken by the German Federal Government and the KfW, a publicly owned development bank, is the vehicle by which the benefit of the measure is extended to the beneficiary. The Commission therefore concludes that the notified measure involves State resources and is imputable to the State.
- (69) To be considered State aid, a measure must grant a selective advantage, in that it favours only certain undertakings and/or the production of certain goods. The notified measure, an ad hoc aid measure, will be granted specifically to the sole benefit of Air Berlin, and is hence selective.
- (70) The notified measure, by allowing Air Berlin to finance its liquidity gap at an interest rate of [750-950] basis points above IBOR, confers an advantage that Air Berlin would not have obtained under normal market conditions, since its largest single shareholder has unexpectedly discontinued financing the company and Air Berlin has not found any other source of financing.
- (71) If aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.²³
- (72) The aviation market is open to competition in the EU. Air Berlin operates routes within Germany and Europe and overseas (Americas, Caribbean countries). It is in direct competition with other Union providers (see recital (11) above). The measure is therefore liable to distort or threaten to distort competition and to affect trade between Member States.

Conclusion on the existence of aid

- (73) In light of the above, the Commission concludes that the notified measure involves State aid within the meaning of Article 107(1) TFEU.

5.2. Lawfulness of the aid

- (74) The Commission notes Germany's commitment that the notified measure will be granted to Air Berlin in observance of the standstill obligation laid down in Article 108(3) TFEU. Thus, the notified measure does not constitute unlawful State aid.

5.3. Compatibility of the aid

- (75) The Commission will authorise rescue aid as compatible with the internal market

²³ See, in particular, judgment of 17 September 1980, *Philip Morris Holland BV v Commission*, 730/79, EU:C:1980:209, paragraph 11; judgment of 22 November 2001, *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)*, C-53/00, EU:C:2001:627, paragraph 21; judgment of 15 December 2005, *Italy v Commission*, C-66/02, EU:C:2005:768, paragraph 44.

pursuant to Article 107(3)(c) TFEU if it complies with the compatibility criteria laid down in the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty²⁴ ("R&R Guidelines").

5.3.1. *Eligibility*

- (76) In order for an undertaking to be eligible for rescue aid, it must qualify as an undertaking in difficulty pursuant to section 2.2 of the R&R Guidelines. In particular, point 20 of the R&R Guidelines stipulates that an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term. This would be the case when at least one of the circumstances described in point 20 of the R&R Guidelines occurs.
- (77) It follows from the information provided by the German authorities that Air Berlin qualifies as a firm in difficulty according to the R&R Guidelines. More than half of its subscribed share capital has disappeared as a result of accumulated losses (point 20 (a) of the R&R Guidelines; see recital (12)) and Air Berlin is at present subject to collective insolvency proceedings (point 20 (c) of the R&R Guidelines; see recital (22)).
- (78) According to point 21 of the R&R Guidelines, a newly created undertaking is not eligible for rescue aid. An undertaking will in principle be considered as newly created during the first three years following the start of operations in the relevant field of activity. Only after that period it will become eligible for aid, provided notably that it does not form part of a larger business group.
- (79) Air Berlin is not a newly-created firm as its operations date back to 1978. Air Berlin is part of a larger group (Air Berlin plc), but the group has been loss-making for several years. According to Air Berlin's insolvency filing, on 30 June 2017, the company had a shortfall not covered by equity capital of EUR [500-1 500] million. Moreover, since Air Berlin plc's largest single shareholder, Etihad Airways, has withdrawn its financial support for the group and in particular did not grant a loan to finance liquidity needs over the next 18 months, the company has no realistic viability prospect. Therefore, it can be concluded that the firm's difficulties are not the result of an artificial intra-group cost allocation. Air Berlin is eligible to receive rescue aid pursuant to the R&R Guidelines.

5.3.2. *Other compatibility criteria*

- (80) Aid in favour of undertakings in difficulty can be found compatible with the internal market if the criteria set out under point 38, letters (a) to (g) of the R&R Guidelines are met. Point 38 (b) and 38 (d) do not apply to rescue aid.²⁵

²⁴ Communication from the Commission - Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C249, 31.7.2014, p.1.

²⁵ See points 53 and 59 of the R&R Guidelines.

5.3.2.1. Contribution to an objective of common interest

- (81) Point 38(a) of the R&R Guidelines provides that in order to assess whether the rescue aid can be declared compatible with the internal market, the Commission examines whether the State aid contributes to a well-defined objective of common interest in accordance with Article 107(3) TFEU. Point 38(a) further refers to Section 3.1 of the R&R Guidelines, at which it is noted that the Member State must provide clear evidence showing that the aid aims to prevent social hardship or address a market failure. According to point 44 (b) of the R&R Guidelines, this can be demonstrated in particular by showing that "*there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in*".
- (82) The notified rescue aid aims at preventing the disruption of the flight operations of Air Berlin, as explained in recitals (32) - (38). According to information submitted by Germany, over [2-4] million passengers have booked flights with Air Berlin for the period September to November 2017. If Air Berlin's planes had to be grounded because it loses its operating license as a consequence of its filing for insolvency, and given that other airlines practically cannot immediately fill the gap Air Berlin left in the market, disruption and serious disturbance of transport services are not only a risk but a likely scenario.
- (83) Moreover, the notified measure, by allowing Air Berlin to continue operations while its assets are sold, prevents a disorderly transition of the assets and prevents hardship for the over 7000 employees of Air Berlin. Also, absent the aid, Air Berlin would lose its license and its planes would be grounded.
- (84) The Commission therefore concludes that the conditions referred to in point 38(a), read in conjunction with 44 (b) and (g) of the R&R Guidelines are met and, accordingly the rescue aid contributes to a well-defined objective of common interest, which is to avoid that the failure of the beneficiary triggers a severe market failure and social hardship for employees within the meaning of point 44 of the R&R Guidelines.

5.3.2.2. Appropriateness

- (85) Under point 38(c) of the R&R Guidelines, the Commission will not consider an aid measure to be compatible with the internal market if other, less distortive measures allow the same objective to be achieved. In this respect, rescue aid must fulfil the conditions laid down in point 55 of the R&R Guidelines:
- (a) it must consist of temporary liquidity support in the form of loan guarantees or loans;
 - (b) the financial cost of the loan must be set at a rate not less than the reference rate set out in the Reference Rate Communication²⁶ for weak undertakings offering normal levels of collateralisation (currently 1-year IBOR plus 400 basis points);

²⁶ Communication from the Commission on the revision of the method for setting the reference and discount rates, OJ C 14, 19.1.2008, p. 6.

- (c) except as otherwise specified in point (d) below, any loan must be reimbursed and any guarantee must come to an end within a period of not more than six months after disbursement of the first instalment to the beneficiary;
 - (d) the Member State must undertake to communicate to the Commission, not later than six months after the rescue aid measure has been authorised (i) proof that the loan has been reimbursed in full and/or that the guarantee has been terminated; or (ii) a restructuring plan as set out in section 3.1.2 of the R&R Guidelines; or (iii) a liquidation plan setting out in a substantiated way the steps leading to the liquidation of the beneficiary within a reasonable time frame without further aid.
 - (e) Rescue aid may not be used to finance structural measures, such as acquisition of significant businesses or assets, unless they are required during the rescue period for the survival of the beneficiary.
- (86) In the case at hand, the planned rescue aid is a loan to Air Berlin of up to EUR 150 million and is to be used to cover liquidity needs for a period of maximum three months, as set out in the liquidity plan provided by the German authorities (see recitals (48) - (51)). The loan bears an interest rate of IBOR plus [750-950] basis points which is not less than the reference rate set out in the Reference Rate Communication for weak undertakings offering normal levels of collateralisation (currently 1-year IBOR plus 400 basis points).
- (87) As explained in recital (47), Germany undertakes to bring the loan to an end within a period of not more than six months after the disbursement of the first instalment to Air Berlin. The Commission notes that the period envisaged is shorter than the maximum period of six months set out in point 55(d) of the R&R Guidelines.
- (88) Germany also undertakes to communicate to the Commission not later than six months after the rescue aid measure has been authorised either proof that the loan has been reimbursed in full or a liquidation plan setting out in a substantiated way the steps leading to the liquidation of the beneficiary within a reasonable time frame without further aid.
- (89) Finally, the Commission notes that the loan will only be used to cover the operating costs specified in the liquidity plan (see recital (49)). Therefore Air Berlin will not use the rescue aid to finance structural measures or other activities than carrying out scheduled flights.
- (90) In view of the information provided by Germany, the Commission concludes that the conditions laid down in points 38(c) and 55 of the R&R Guidelines are met and therefore the instrument chosen allows the rescuing of Air Berlin in the least distortive way.

5.3.2.3. Proportionality of the aid / aid limited to the minimum

- (91) Under point 38(e) of the R&R Guidelines, aid must not exceed the minimum needed to achieve the objective of common interest. As specified in point 60 of the R&R Guidelines rescue aid must be restricted to the amount needed to keep the beneficiary in business for six months. In determining that amount, the

Commission takes into account the outcome of the formula set out in Annex I of the R&R Guidelines. The Commission will authorise any aid exceeding the result of that calculation only if it is duly justified by the provision of a liquidity plan setting out the beneficiary's liquidity needs for the coming six months.

- (92) The notified measure aims to allow the beneficiary to maintain operations for a period of three months. The application of the formula set out in the Annex to the R&R Guidelines must be adapted accordingly. In the present case, the amount in relation to which authorisation is sought is in excess of the outcome of the formula and must therefore be duly justified by the Member State. Germany provided a liquidity plan for Air Berlin which demonstrates that the amount of the rescue loan does not exceed the liquidity needs of the company for the next two months. The cash-flow estimate provided by Germany shows that Air Berlin needs EUR 150 million to cover its liquidity gap until end October 2017.
- (93) The Commission notes that the liquidity plan is based on plausible and credible assumptions and is realistic. In particular, it takes due account of the expected reduction in bookings, and bases the estimate of the sales price to be achieved for assets on existing indicative offers. It also reflects concessions negotiated with clients, and the impact of subsidies to be granted by the Federal Government in form of *Insolvenzgeld*. Furthermore, it explains in a succinct, but clear manner all assumptions on which it is based. Those assumptions are, taking into account the difficulty of predicting the main variables (that is, the development of passenger numbers, the speed of the sales process and the price ultimately agreed), realistic.
- (94) Moreover, as described in recital (53), the loan agreement provides that the loan will be paid out in instalments, subject to the demonstrated liquidity needs of Air Berlin and only when all available liquidity has been used up.
- (95) Should the full amount of the loan not be drawn by 31 October 2017, Germany committed to submit a liquidity plan justifying Air Berlin's liquidity needs for November (commitment Nr. 2), which the Commission will verify.
- (96) The Commission notes that in line with Germany's commitment Nr. 1 (see recital (45)) only Air Berlin, but neither the holding nor the subsidiaries nor any other related undertakings can draw on the rescue loan. Air Berlin in turn can only draw on the loan once it has clearly substantiated its liquidity needs.
- (97) The Commission therefore concludes that the rescue aid is indeed proportionate and restricted to a minimum amount, in line with point 60 of the R&R Guidelines.

5.3.2.4. Negative effects

- (98) Germany has declared that Air Berlin plc (at a group level) has not received any rescue aid, restructuring aid or temporary restructuring aid in the last ten years, including any such aid granted before the entry into force of the R&R Guidelines currently in place, and any non-notified aid. Consequently, the Commission concludes that the conditions laid down in points 38(f) in conjunction with points 70 and 71 of the R&R Guidelines ("one time, last time" principle) are met.
- (99) The Commission notes that Air Berlin is subject to a recovery order, resulting from the Commission's decision in case SA.33983 (Aid to certain airlines in Sardinia),

finding that Italy's Sardinia region had granted unlawful and incompatible State aid to selected airlines working at Cagliari and Olbia airports and had ordered Italy to recover the aid from the beneficiaries, including Air Berlin (see recital (52)).

- (100) According to point 94 of the R&R Guidelines, the assessment of any aid pursuant to those Guidelines to be granted to a company in difficulty that has not yet paid an outstanding recovery order, will take into account, first, the cumulative effect of the old aid and the new aid and, secondly, the fact that the old aid has not been repaid.
- (101) That provision is based on the so-called *Deggendorf* principle. In its Communication 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid'²⁷, the Commission stated that "*the [Deggendorf case law] enables the Commission, if certain conditions have been satisfied, to order Member States to suspend the payment of a new compatible aid to a company until that company has reimbursed old unlawful and incompatible aid that is subject to a recovery decision*".²⁸
- (102) In the present case, the recovery order amounts to EUR [2-3] million plus recovery interest (see recital (52)). The German authorities claim that after Air Berlin filed for insolvency, national insolvency law provides that any outstanding claims under public or civil law have to be registered in the insolvency proceedings, and can no longer be honoured. Otherwise, the responsible managers and the creditor trustee would face criminal prosecution.
- (103) The Commission does not share the legal analysis of the German authorities on this point. It considers, in line with the case law of the Court, that any provision of national law that constitutes an obstacle to effective enforcement of State aid recovery has to be disapplied.²⁹ Hence, the Commission takes the view that Air Berlin is obliged and legally able to repay immediately the entire aid amount, based on the principle of primacy, and that the Italian authorities, pursuant to Article 108(2) TFEU, can and should seek enforcement of their claim now and in its entirety in the competent German court.
- (104) However, the Commission recognises that the urgency of the present case and the serious consequences under national law (criminal sanctions for individuals) explain the content of commitment Nr. 3. In addition, the Commission acknowledges that the immediate repayment by Niki reduces any indirect benefit that Air Berlin could have obtained from unrecovered aid.
- (105) The Commission also recognises that the orders to pay were issued by Italy only recently, and that the decision itself has not yet been published in the Official Journal (or even on the website of DG COMP). Hence, if Air Berlin had wanted to seek interim protection against recovery before the national judge or the Union judge, it could not yet have done so, because it does not yet know the content of the Commission's decision and cannot defend itself against that decision.

²⁷ OJ C 272, 15.11.2007, p. 4.

²⁸ See, for example, Commission decision of 28 November 2012 – SA.23839 – France – *Restructuring aid to FagorBrandt*

²⁹ Judgment of 5 October 2006, *Commission v France*, C-232/05, EU:C:2006:651, paragraph 53.

(106) Therefore, the Commission considers that the principle of loyal cooperation and the principle of effective judicial protection justify a case-specific approach to the *Deggendorf* principle.

(107) The Commission has also assessed the cumulative effect of the old and the new aid. The Commission notes that the amount of State aid to be recovered is relatively small in proportion to the rescue aid needed by Air Berlin to keep its operations afloat in the very short-term. Any cumulative effect of the old and new aid will not distort competition to a greater extent than the new aid by itself. On the basis of the considerations set out above, and the conclusion that the substantive conditions for the compatibility of rescue aid are fulfilled, it may be concluded that the new aid does not distort competition to an extent contrary to the common interest.

5.3.2.5. Transparency

(108) According to point 38(g) of the R&R Guidelines, Member States, the Commission, economic operators and the public must have easy access to all relevant acts and pertinent information about the aid awarded. This means that the provisions on transparency laid down in point 96 of the R&R Guidelines must be respected. The Commission notes that Germany has undertaken to respect those obligations.

5.3.2.6. Conclusion on the compatibility of the aid

(109) In the light of the findings above, the Commission concludes that the aid meets the compatibility conditions of the R&R Guidelines.

(110) However, given the circumstances of the present case and according to the case law of the General Court, the Commission must, even where it has bound its discretion by adopting guidelines, assess whether the expected benefits of an aid outweigh the distortions of competition and the impact of the notified measure on trade between Member States.³⁰ The underlying rationale is that the Commission cannot, by adopting guidelines, waive the exercise of its discretion in relation to the concrete case at hand.

(111) **Positive effects:** The assessment of the Commission has established the following positive effects.

(112) First, by granting the aid, Germany avoids the stranding of significant numbers of travellers, which are currently on vacation or business travel, and to return home on a flight with Air Berlin. In the holiday period, such a situation would hit in particular families with children, for whom such stranding constitutes a particular hardship. It may also prevent stranded passengers from exercising their right to vote in the German Federal elections, which will take place on 24 September 2017.

(113) Second, it ensures that the more than [2-4] million passengers that have booked flights with Air Berlin for the period September through November 2017 can travel as planned. The importance of reliability of air transport is recognised, as Germany

³⁰ Judgment of 10 July 2012, *Smurfit Kappa v Commission*, T-304/08, EU:T:2012:351, paragraphs 82 to 98, and case law quoted there; see also, to that effect, judgment of 19 July 2016, *Kotnik*, C-526/14, EU:C:2016:570, paragraph 41.

has underlined, in the Union's air transport passenger rights regulation (see recital (34)).

- (114) With regard to both the first and the second point, it should be kept in mind that stranding of passengers and unreliability of air transport have knock-on effects on the economy at large. Stranded passengers are often absent from their workplaces for several days. Unreliable air transport may jeopardise business meetings. Furthermore, unreliable air transport may also affect the private life of citizens, for instance where it is not possible to visit family members for important events of life.
- (115) Third, the alternative to an orderly liquidation process with continued flight operations would be the immediate cessation of the flight activities of Air Berlin and the laying-off of all staff. Such an disorderly process would create important social and economic losses. Socially, crew teams and colleagues would find themselves dispersed over several airlines, often following a period of unemployment and uncertainty. As a result, motivation and well-being of the staff would be affected. Staff may also lose social benefits they have acquired on the basis of collective bargaining and loyal service to Air Berlin. Economically, as other airlines would not fill the void immediately, the use of the available airport capacities would for a certain period of time be inefficient, as not all slots would immediately be used by other operators. Also, aircraft may be grounded for a certain period of time, as new contracts would take some time to put in place.
- (116) **Negative effects.** As the competing airlines that have complained to the Commission have pointed out, the effect of an orderly wind-down of Air Berlin is that the outcome that would be achieved by free market forces is distorted. Absent the aid, all airlines could compete on an equal footing for the slots and the passengers of Air Berlin. The most efficient airlines would be most successful, and the slots and market share of Air Berlin could be distributed between several operators.
- (117) The orderly sales process is driven less by those market forces and more by a negotiation process in which other factors may come into play. First, the slots are not immediately handed back to the market, but remain reserved for the acquirer or acquirers. As a result, the strong market position of Air Berlin in the congested airports of Berlin Tegel and Dusseldorf is likely to remain in place. Second, the complainants argue that not all airlines are likely to have the same chances of being selected in the sales process, in particular because one of the airlines competing is represented on the preliminary creditor committee and has a prior business relationship with the Air Berlin management. Furthermore, they argue it will be necessary to have a certain size in order to acquire major parts of Air Berlin. Finally, they claim that those airlines that have already been in talks with Air Berlin prior to the insolvency are likely to have a better starting position in the bidding process. The Commission considers that it is not necessary to take a definitive view on those allegations. Even if they were true, they would not tilt the balance, as will be shown in the following section.
- (118) **Balancing.** When balancing positive and negative effects, it is important to note that the negative effects are reduced by the design of the aid and orderly liquidation process.
- (119) First, the aid is very limited and well-targeted. It is restricted to actual liquidity

needs for a period of three months (of which it is envisaged that only the first two months will be necessary, the third one serving as a buffer).

- (120) Second, the sales process is as open and competitive as is possible, given the circumstances. The fact that Germany is involved in the process both as a member of the preliminary creditor committee and because of the pledge of the assets to KfW offers an additional guarantee: in order to ensure that no State aid is granted to the buyer, Germany needs to verify in an objective manner that the economically most advantageous bid succeeds. Airlines from other Member States are taking part in the bidding process, and if the outcome is determined by the economically most advantageous offer, there is no scope for national preference.
- (121) Third, as a result of the sales process, one or more competitors will take over the slots and market shares of Air Berlin. Based on Union law provisions on the protection of workers in case of the transfer of undertakings, social rights of workers will be protected in the process to the largest extent possible.
- (122) The Commission, exercising its broad discretion under Article 107(3) TFEU, therefore considers that the positive effects of the aid clearly outweigh the negative effects.
- (123) The Commission reminds Germany to notify a liquidation plan for Air Berlin in the event that there are indications that the rescue aid cannot be reimbursed by Air Berlin within the set timeframe.

6. ASSESSMENT OF THE COMPLAINTS

- (124) Contrary to the allegations made by the three complainants that the aid to Air Berlin is unlawful, the Commission notes that Germany has confirmed, as recently as 31 August 2017, observance of the stand-still obligation laid down in Article 108(3) TFEU (see recital (74)). It has also informed the Commission that signing of the loan contract will take place on 4 September 2017, once the Commission has authorised the aid.
- (125) The complainants allege that the aid granted to Air Berlin would indirectly benefit potential future buyers of Air Berlin, in particular Lufthansa. The Commission notes, in that respect, that the sale process of Air Berlin's assets (as well as other assets of the Air Berlin plc group) is not relevant for assessing the compatibility of the rescue aid to Air Berlin. As set out above at recital (120), the Commission considers that Germany is obliged to ensure, through its representative on the preliminary creditor committee and the rights conferred upon KfW under the loan agreement, that Air Berlin and the other assets of the Air Berlin plc group are sold to the economically most advantageous bidder. Therefore, any aid to the buyer can normally be excluded. Should there be indications to the contrary, the complainants may file a complaint at that later stage.
- (126) As to the allegation made by the anonymous complainant that a market solution was still available for Air Berlin and that it hence was in no need of State aid to keep its business afloat over the next three months, the Commission notes that it was Air Berlin plc's largest single shareholder, Etihad Airways, that withdrew financial support. Contrary to the interpretation of the relevant press release by the anonymous complainant, Etihad Airways was not willing to take part in a market-

based solution. Given the financial difficulties Air Berlin has been facing no other potential investor was ready to provide funds for the airline. Also, as explained above at recital (10), nothing indicates that Etihad Airways controls Air Berlin. As a result, there is no obligation, under the R&R Guidelines, for Etihad Airways to support Air Berlin, even if Etihad Airways had the means to do so. Finally, any possible attempt to legally enforce the comfort letter – which may still follow or be pursued by the creditors – would come too late to rescue Air Berlin.

7. Conclusion

The Commission has accordingly decided not to raise objections to the notified measure to be granted to Air Berlin PLC & Co. Luftverkehrs KG, as amended by the three commitments described above at recitals ((45), (51) and (52)), on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

This decision is without prejudice to the outcome of any regulatory review processes that may be triggered at Union or national level by the forthcoming sale of Air Berlin's assets.

This decision is also without prejudice to an examination of possible State aid to the buyer(s) of Air Berlin plc group assets in the case of a sale not carried out under market conditions.

If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

<http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Registry
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

