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 […].
COMMISSION DECISION

of

on the measure SA.23600 - C 38/2008 (ex NN 53/2007) - Germany

Financing arrangements concerning Munich Airport Terminal 2

(Only the German version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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 provisions cited above\(^2\) and having regard to their comments,

Whereas:

1. PROCEEDING

1. By letter of 3 November 2005, Ryanair (hereinafter: "complainant" or "Ryanair") submitted a complaint concerning the financing of the construction of Terminal 2 at the Munich airport and the exclusive use arrangement between Deutsche Lufthansa AG (hereinafter: "LH") and Flughafen München GmbH (hereinafter: "FMG") with regard to that terminal. The complainant alleged amongst other points that the financing provided by the shareholders of FMG (public authorities) to construct Terminal 2 is not in line with the market economy investor principle and that the exclusive rights for LH and its Star alliance partners to use Terminal 2 have led to financial losses of over EUR 100 million for FMG in the past two years. On that basis, Ryanair claimed that those measures, by conferring economic advantages to LH, were illegal and incompatible State aid.

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\(^1\) 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. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

\(^2\) OJ C 5, 10 January 2009, p. 4.

3. By letter of 31 July 2007, the complainant submitted a formal notice under Article 265(2) of the TFEU, alleging failure to act on its complaint on the part of the Commission. On 15 November 2007, the complainant introduced an application for failure to act before the General Court.³

4. By letter dated 23 July 2008 the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the TFEU in respect to the loans n° 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 granted by KfW Bankengruppe, Bayerische Landesbank and LfA Förderbank Bayern (hereinafter "LfA") to FM Terminal 2 Immobilien-Verwaltungsgesellschaft mbH and Terminal 2 Betriebsgesellschaft mbH, and the rent paid by FM Terminal 2 Immobilien-Verwaltungsgesellschaft mbH to FMG for the use of the land parcel at the Munich airport (hereinafter: "opening decision").

5. By letter dated 31 July 2008 Germany requested an extension of the deadline for its reply, which was accepted by the Commission. At the request of Germany, a meeting took place on 12 September 2008. Germany transmitted its comments on 6 November 2008.

6. A corrigendum of the opening decision to initiate the procedure provided for in Article 108(2) of the TFEU was adopted on 12 November 2008.

7. The Commission decision to initiate the procedure was published in the Official Journal of the European Union⁴ on 10 January 2009. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.

8. The Commission received comments on the subject from Ryanair. It transmitted the comments to Germany by letter dated 17 February 2009. Germany was given the opportunity to respond to them within one month. On 1 April 2009 Germany requested an extension of the deadline for its reply which was accepted by the Commission. Germany transmitted its comments on 30 April 2009.

9. On 19 May 2011 the General Court issued a judgment on Ryanair's application for failure to act.⁵

10. By letter dated 30 April 2012 the Commission requested further information with regard to loans n° 17 and 20. Germany responded by letter dated 30 May 2012.

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³ That application was registered under as Case T-423/07 Ryanair v Commission, OJ C 8, 12 January 2008, p. 28.
⁴ See footnote 2.
⁵ Case T-423/07 Ryanair v Commission, [2011], not yet published in ECR.

2. DESCRIPTION OF THE FACTS AND GROUNDS FOR INITIATING THE PROCEDURE

2.1. Background to the investigation

As it became apparent within just a few years after commencing operations in 1992 that, due to growth in passenger traffic, the capacity of Munich Airport would reach its limits sooner than expected, it was decided to build a second terminal at Munich airport. On 15 July 1998, FMG and LH signed a Memorandum of Understanding regarding the construction and operation of Terminal 2 (the new terminal at the Munich airport).

As foreseen in the Memorandum of Understanding, FMG and LH created jointly-owned undertakings responsible for the construction and operation of the terminal (hereinafter: "T2 Companies"): (a) *FM Terminal 2 Immobilien-Verwaltungsgesellschaft mbH* (hereinafter: "Immo T2") is a property-holding company. The allocation of shares is fixed at a rate of FMG: 60/LH: 40. Immo T2 was responsible for the construction of Terminal 2 and rents out the premises of Terminal 2 on the basis of a long-term lease contract to Terminal 2 Betriebsgesellschaft mbH (hereinafter: "T2 Operating Company"); (b) *Terminal 2 Betriebsgesellschaft mbH* (hereinafter: "T2 Operating Company") is responsible for the operation and management of Terminal 2. The shares of T2 Operating Company are also fixed at the rate of FMG: 60/LH: 40.

Pursuant to the Memorandum of Understanding, the allocation of risks incurred by T2 Companies has been set according to the allocation of the shares between FMG and LH. FMG and LH have concluded profit-and-loss transfer agreements with the T2 Companies. They cover the losses in correspondence to their shares (60/40). According to German law, FMG and LH are therefore liable for all debt contracted by the T2 Companies during the time when the profit-and-loss transfer agreement was valid; that liability extends even beyond the date at which the profit-and-loss transfer agreement has ended, if the debt was contracted before that date.

The total investment cost for the construction of Terminal 2 at Munich Airport was approximately EUR [...]*. The T2 Companies have financed the project partially by own capital (capital contributions from FMG and LH) and partially by loans. Three

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6 FMG is the State-owned limited liability company that operates Munich airport. The shareholders of FMG are the Free State of Bavaria (holding 51 % of the shares), the Federal Republic of Germany (with 26 % of the shares) and the City of Munich (with 23 % of the shares).

7 LH is a globally operating air carrier that has been listed on the German Stock Exchange since 1966 and was fully privatised in 1997.

* Confidential Information.
German public banks (KfW Bankengruppe\textsuperscript{8}, Bayerische Landesbank\textsuperscript{9} and LfA\textsuperscript{10}) have provided long-term loans to the T2 Companies amounting to EUR [...] in total in order to finance the Terminal 2 project. Both T2 companies are parties to all loan agreements.

2.2. Scope of the formal investigation procedure and the measures under investigation

16. In its opening decision the Commission concluded that the capital investment of FMG and LH and the exclusive use of Terminal 2 by LH did not amount to State aid.

17. With regard to the loans provided by KfW, BayernLB and LfA to the T2 Companies for the construction of Terminal 2, the Commission considered that the loans n° 2, 3, 4, 11, 12, 13, 14, 15, 18, 19 and 22 do not constitute State aid in the meaning of Article 107(1) of the TFEU.

18. However, the opening decision raised the following questions:

(1) First, whether the loans n°1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 to the T2 Companies and the land use agreement for the land parcels n° 4935/3 and 4881 were imputable to the State;

(2) Second, whether the loans n° 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 to the T2 Companies were granted at market conditions, and thus did not involve State aid, and if not, whether such State aid could be considered compatible with the internal market.

(3) Third, whether the rent paid by ImmoT2 to FMG for the right to use the land parcels n° 4935/3 and 4881 covering the area of approximately 170 000 m\textsuperscript{2} and to construct Terminal 2 thereon is a market rent.

2.2.1. Loans granted to the T2 Companies

19. Only loans n° 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 granted by KfW and Bayern LB, as referred to in the opening decision, are relevant for the purposes of this decision.

20. The interest rates for all loans referred to in recital 19 have been established in the relevant loan agreements. The base rate was determined on the basis of a maturity-dependent interbank rate published in Reuters information system on page DGZF at 11:00 am (Munich/Frankfurt local time) on the day of the interest fixing (long-term

\textsuperscript{8} KfW Bankengruppe (hereinafter: "KfW") is a corporation established under public law ("Anstalt des öffentlichen Rechts"), to support development in different areas, e. g. promotion of small and medium-sized enterprises, environmental protection measures, infrastructure etc. It is owned by Germany (80 %) and the Länder (20 %). KfW refinances its lending business on international capital markets.

\textsuperscript{9} Bayerische Landesbank (hereinafter: "BayernLB") is a corporation established under public law ("Anstalt des öffentlichen Rechts"). At the time the individual loan agreements were concluded, it is indirectly jointly-owned through BayernLB Holding AG by the Free State of Bavaria and the Association of Bavarian Savings Banks ("Sparkassenverband Bayern"), each with a 50% stake. Currently, the Free State of Bavaria holds 94 % stake in BayernLB Holding, remaining 6 % stake is owned by der Sparkassenverband Bayern.

\textsuperscript{10} LfA Förderbank Bayern (hereinafter: "LfA") is a corporation established under public law ("Anstalt des öffentlichen Rechts") specialised in facilitating comprehensive business development in Bavaria (incl. the development of the local infrastructure). It is wholly-owned by the Free State of Bavaria.
public bonds yields of Deka Bank). The risk margins were agreed in the respective loan agreements.

21. Loans n° 5, 6 and 7 have been granted under the KfW infrastructure programme according to a loan agreement of […] in order to support the provision of the infrastructure from the regional and economic development point of view. The interest rates for loans n° 5, 6, and 7 were fixed for ten years. After the expiry of the interest fixing period for those loans in 2009 – 2011, the interest rates will be adjusted according to the published Commission reference rate. The risk margin agreed in the loan agreement will remain unchanged.

22. According to a loan agreement of 13 September 2000, loans n° 1, 9, 10, 16, 21 and 23 are subject to the following risk margins in basis points (hereinafter: "bps") fixed for the whole duration of the loan agreement:

(a) for BayernLB: […]
(b) for KfW: […]

23. In July 2003, BayernLB and KfW concluded a supplementary loan agreement to the loan agreement of 13 September 2000 to cover the additional financing needs of Terminal 2 due to the increase in construction costs. The base rate was determined on the basis of a maturity-dependent interbank rate published in Reuters information system on page DGZF at 11:00 am (Munich/Frankfurt local time) on the day of the interest fixing (long-term public bonds yields of Deka Bank). On the basis of that amendment, the interest risk margins for loans n° 17 and 20 were established at […] bps.11

24. The T2 Companies provided the following collateral for the loans and credit facilities:

(a) […];
(b) […];
(c) […];
(d) […].

25. In addition, the banks reserved for themselves the right to cancel the loan agreements if:

(a) the profit and loss agreements between the T2 Companies and their shareholders (FMG and LH) were abandoned or amended with a negative impact on the banks;

(b) the Free State of Bavaria, Germany and the City of Munich lost – separately or together - the absolute majority in the capital stock and/or voting rights of FMG; or

(c) the stake and/or voting rights of the Free State of Bavaria in FMG decreased to 25 % or less.

In view of the facts referred to in recitals 20 to 25, the Commission expressed doubts whether loans n° 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 provided by the public development banks KfW and LfA and the publicly-owned bank BayernLB to the T2 Companies were granted at conditions which could have been normally obtained on the market. That assessment was primarily based on the fact that the interest rates charged on those loans seemed to be below the reference rates established in application of the Commission notice on current State aid recovery interest rates and reference/discount rates for 15 Member States applicable as from 1 January 2005 and historic recovery interest rates and reference/discount rates applicable from 1 August 1997\(^\text{12}\) (hereinafter: “2005 Commission Notice”).

The 2005 Commission Notice was subsequently replaced by the Communication from the Commission on the revision of the method setting the reference and discount rates of 12 December 2007\(^\text{13}\) (hereinafter: “2008 Reference Rate Communication”). According to the 2008 Reference Rate Communication, the credit rating of undertakings and the collateral offered have to be taken into account for setting risk margins. The Commission considered that the ratings of the parent companies FMG and LH were relevant for the case at issue. In its preliminary assessment the Commission explained that according to an approximation of the rating for the two undertakings, rates for the loans appeared to be below the rates resulting from the application of the 2008 Reference Rate Communication.

The conditions of loans n° 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 therefore seemed to be more favourable than the proxy established by the Commission for the market rate in application of the 2008 Reference Rate Communication.

The Commission also expressed its doubts on the question of the imputability of the measures to the State. It seemed that for the loans granted by BayernLB and LfA the approval of the supervisory board was not required.

The land-use agreement between FMG and Immo T2

FMG and Immo T2 concluded a contract on 30 March 2000 by which FMG granted Immo T2 the right to use the land parcels n° 4935/3 and n° 4881 covering an area of approximately 170 000 m² and to construct Terminal 2 there.

In return, Immo T2 pays an annual rent of [...] plus VAT (approximately EUR [...] for the exclusive-use rights. That rent is paid in arrears quarterly from the beginning of the operation of Terminal 2. In order to take into account changes in property prices and interest, the amount of the annual rent will be reviewed and, if necessary, adjusted after a period of [...] years.

The duration of the contract is fixed for a period of [...] years. [...] With regard to the land-use arrangement, the Commission could not exclude that the price paid by Immo T2 to FMG for the renting of the land on which Terminal 2 is constructed is a market price.

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\(^{12}\) OJ C 88, 12 April 2005, p. 5.

\(^{13}\) OJ C 14, 19 January 2008, p. 6.
34. The Commission also expressed its doubts on the question of the imputability to the State. The Commission had no information whether the public owners of FMG were involved in the conclusion of the land-use agreement.

2.2.3. **Compatibility of possible State aid to the T2 Companies**

35. The Commission examined whether the rent mentioned in recital 31 and the loans mentioned in recital 19 would be compatible with the internal market if they constitute State aid. In particular loans n° 16, 17, 20, 21 and 23 seemed to involve operating aid that is unlikely to meet the requirements of the exemptions provided for in Article 107(2) and (3) of the TFEU.

3. **COMMENTS FROM GERMANY**

3.1. **Scope of the investigation procedure and the notion of economic activity of the T2 Companies**

36. Germany first submits observations on the notion of the economic activity of the T2 Companies and on the applicability of Article 107(1) of the TFEU to them as interpreted before the judgment of the General Court in *Aéroports de Paris*.

37. Germany points out that BayernLB, which subsequently took on the role of the lead bank for the loans in question, had already issued a binding loan commitment for the financing of the T2 Companies on 2 December 1998. Germany further explains that the conditions of all loans granted by KfW, LfA and BayernLB were based on that commitment, which definitively established the conditions of the loan agreements. Germany further states that the conditions of loans n° 5, 6, 7 were irrevocably agreed in the loan agreement dated 31 August 1999 and for loans n° 1, 9, 10, 16, 21 and 23 in the loan agreement dated 13 September 2000 respectively. Both loan agreements were irrevocably concluded prior the *Aéroports de Paris* judgment. Germany furthermore points out that the land use agreement was signed on 30 March 2000, that is, prior to the judgment of the General Court in *Aéroports de Paris*.

38. Consequently in view of Germany, the conformity of the risk margins with market conditions can be assessed only on the basis of the situation at that time. Furthermore, Germany argues that as at that time the operation and construction of the airport was not considered to be an economic activity, airports were not considered as subject to Article 107(1) of the TFEU.

3.2. **Aid nature of loans granted to the T2 Companies**

3.2.1. **Market conformity of bank loans**

39. With regard to the loans granted to the T2 Companies, Germany first comments on the suitable framework for the assessment of whether the loans were in line with market conditions. It rejects assessing the status of the loans in question on the 2005 Commission notice. Germany stresses it is not appropriate to compare the overall interest rates for each of the loans provided to the T2 companies with the Commission's reference rate. Rather, one should analyse the respective risk margins

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and compare the risk margins with a market benchmark. Germany clarifies that the base rate fluctuates from day to day and neither party is able to exert any control over it. Therefore, in the view of Germany, the Commission should instead use market comparators as a benchmark for the risk margins, because the risk margin referred to in the 2005 Commission notice is generally not taken into consideration by private creditors when entering into credit agreements. Moreover, Germany argues that the inadequacy of the 2005 Commission notice was also recognised by the 2008 Reference Rate Communication that takes into account the rating of the borrower and the collateral provided.

40. In the view of Germany it is also not necessary for the Commission to apply the 2008 Reference Rate Communication, because where it has been demonstrated that market comparators exist, the Commission should base its assessment on those market benchmarks. Otherwise, the competitiveness of public credit institutions would be seriously jeopardised, since specific conditions could ultimately only be determined on the basis of the Commission’s reference rates and no longer on the basis of actual market conditions.

41. Germany further argues that the conditions of the loans in question are explained by the very good rating and credit worthiness of FMG and LH. In that regard, Germany emphasises that the assessment of credit-worthiness has to be carried out at the level of FMG and LH, because where a profit-and-loss-transfer agreement exists between subsidiaries and their parent companies, it is standard practice for banks to take into account only the credit rating of the parent companies.

42. Germany points out that LH was accorded a rating BBB+\(^{15}\) from 2001-2003 by the rating agency Standard & Poor's. It also explains that FMG, on the other hand, does not have an external corporate credit rating, as it is a wholly publicly-owned company. However, Germany compares the financial situation of FMG to Schiphol airport which is also wholly publicly-owned and obtained ratings from the rating agency Standard & Poor's between A\(^{16}\) and AA\(^{17}\). Moreover, Germany explains that in 2006 FMG obtained a syndicated, uncollateralised loan of EUR [...] from an international consortium made up of a total of 21 public and private banks. In the memorandum for that loan FMG received a credit rating of [...]\(^{18}\).

43. Germany further observes that in contrast to the syndicated loan to FMG, the loans at stake were considerably collateralised. In addition to the collateral referred to in the opening decision, it is important to note that [...] in order to collateralise the loans. Germany argues that element demonstrates that an even lower margin would be appropriate for the loans at stake than the one used for the syndicated loan set between [...] bps to [...] bps.

44. Germany furthermore explains that there was no more collateral involved than that mentioned in recital 40 and in recital 45 of the opening decision. According to

\(^{15}\) This rating category means that the borrower has an adequate capacity to meet its financial commitments. However, adverse economic conditions or changing circumstances are likely to lead to a weakened capacity of the borrower to meet its financial commitments.

\(^{16}\) That rating category means that the borrower has a strong capacity to meet its financial commitments, but is somewhat more susceptible to the adverse effects of changes in circumstances and economic conditions than borrowers in higher-rated categories.

\(^{17}\) That rating category means that the borrower has a very strong capacity to meet its financial commitments.

\(^{18}\) [...]
Germany on 31 December 2002 the value [...] amounted to EUR [...] and the value of the corresponding debts amounted to EUR [...]. Germany explains further that the value of [...] increased to EUR [...] on 31 December 2003 and the value of the corresponding debts amounted to EUR [...]. Specifically, Germany confirms that there are no guarantees provided by FMG, LH or the shareholders of FMG.

45. As regards the comparability of the conditions of the loans at stake with the bond issues of Deutsche Telekom AG, Bayer AG, Volkswagen AG and Deutsche Börse AG, Germany is of the opinion that the credit ratings of Deutsche Telekom AG, Bayer AG, Volkswagen AG and Deutsche Börse AG show that the economic situation of those companies is entirely comparable with that of FMG and LH. The credit ratings provided by Germany for those companies are summarised in Table 1.

<table>
<thead>
<tr>
<th>Company</th>
<th>Credit rating (long-term) Standard &amp; Poor's</th>
<th>Credit rating (long-term) Moody's</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deutsche Telekom AG</td>
<td>BBB+</td>
<td>Baa 1</td>
</tr>
<tr>
<td>Bayer AG</td>
<td>A-</td>
<td>A3</td>
</tr>
<tr>
<td>Volkswagen AG</td>
<td>A-</td>
<td>A3</td>
</tr>
<tr>
<td>Deutsche Börse AG</td>
<td>AA</td>
<td>n.a.</td>
</tr>
</tbody>
</table>

46. Germany further draws attention to the average risk margins (in bps) for Euro-zone corporate bonds with a credit rating (according to the Standard & Poor's rating methodology) between AA and BBB as summarised in Table 2.

<table>
<thead>
<tr>
<th>Time period</th>
<th>AA</th>
<th>A</th>
<th>BBB</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997 – 2007</td>
<td>15.6</td>
<td>38.6</td>
<td>83.3</td>
</tr>
<tr>
<td>1997 – 03/2005</td>
<td>17.4</td>
<td>40.8</td>
<td>89.4</td>
</tr>
<tr>
<td>1997 – 2000</td>
<td>5.0</td>
<td>19.5</td>
<td>47.4</td>
</tr>
</tbody>
</table>

47. Germany argues that Table 2 shows that risk margins are very volatile over time and that it is accordingly not acceptable to use the risk margins that were applicable only in a particular month in order to justify whether the risk margins for the loans at stake were established under normal market conditions.

3.3. The conditions of the land-use agreement signed on 30 March 2000

48. As regards the conditions of the land-use agreement signed on 30 March 2000, Germany argues that a comparison with the land purchase price usually charged in the area of Munich airport shows that the rent paid by Immo T2 is certainly higher than the comparable market value.

49. Germany explains that the annual rent of DEM [...] (approximately EUR [...]) was established on the basis of the following parameters:

(a) size of the land parcel of 170 000 m²;

(b) an initial price per m² of DEM [...] (approximately EUR [...]); and
50. Germany is of the opinion that the price of DM […] (approximately EUR [...] per m²) is a market price for the following reasons.

51. First of all, in order to determine the market price of a land parcel, it is necessary to compare the prices of similar plots of land, in particular as regards the possibility for building development, their situation and the scale of the construction. In 2000, when the land-use agreement was signed, the plots in question were suitable for development, but there was no service infrastructure in place. Consequently, in order to determine the market price for land use of the land parcels in question, the service infrastructure costs further detailed in Table 3 must be factored in. Those costs were borne by Immo T2 itself, but would otherwise have had to be paid by the land owner.

Table 3: Overview infrastructure investment costs financed by Immo T2

<table>
<thead>
<tr>
<th>Measures/investments financed by Immo T2</th>
<th>Million EUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Streets and bridges</td>
<td>[…]</td>
</tr>
<tr>
<td>Public transport infrastructure access</td>
<td>[…]</td>
</tr>
<tr>
<td>Tunnel for utilities and media (electricity, water and waste water disposal, telecommunication, etc.)</td>
<td>[…]</td>
</tr>
<tr>
<td>Energy supply</td>
<td>[…]</td>
</tr>
<tr>
<td>Water and waste water supply</td>
<td>[…]</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>[…]</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>[…]</td>
</tr>
</tbody>
</table>

52. On the basis of the actual investment costs incurred and financed by Immo T2, the value of the plots of land increases by approximately EUR […] per m² to a total of approximately EUR […] per m². If the roads and bridges financed by Immo T2 were excluded, the value of the plots of land would still increase to approximately EUR […] per m².

53. Germany further explains that the purpose of that calculation is only the benchmarking of the value of the land parcels in question with other plots of land. However when calculating the rent, the value naturally remained at EUR […] per m², as all of the service infrastructure costs had been borne by Immo T2 and not by the land owner. Otherwise Immo T2 would have to bear those costs twice.

54. Moreover, Germany further points out that the plots of land are located in the municipality of Oberding, which is in the district of Erding. The value of plots of land situated in the industrial area with service infrastructure in place and located in the immediate vicinity of the airport in the Schwaig area of the municipality of Oberding, has remained unchanged in recent years at approximately EUR […] per m². That assertion was confirmed by the independent Expert Group on Land Valuations (der unabhängige Gutachterausschuss für Grundstückswerte) at the Erding District Office (Landratsamt).

55. Germany however is of the opinion that the figure of EUR […] per m² has to be further adjusted. First, the price of the comparison plot should therefore be increased by approximately […]% or EUR […] per m². On that basis the benchmarking price increases to EUR […] per m².
Second, the situation of a plot of land has a decisive influence on its value. Unlike the comparison plots of land in Schwaig, the Terminal 2 plots have a direct access to the airport, the motorway, the sub-urban railway (S-Bahn) and other local public transport infrastructure. In order to reflect those commercial advantages the price should be further increased by approximately […] % or EUR […] per m² as estimated by experts. It increases the benchmarking price from EUR […] per m² to EUR […] per m².

In view of the above, Germany points out that the value of the plots of land in question including the service infrastructure costs borne by Immo T2 amounts to at least EUR […] per m² (excluding the cost of bridges and road). Germany is therefore of the opinion that the value of the plots of land in questions is at least […] % higher than the benchmarking price. Consequently, Germany argues that the land-use agreement in question was concluded under normal market conditions and thus does not contain any aid element.

Finally, Germany further observes that all of those benchmarking values relate to the sale of land, i.e. they are prices at which a transfer of ownership takes place. However, the agreement in question merely concerns the use of the land in exchange for a rent for a limited period of time ([…] years) with no transfer of ownership. In fact, when the negotiations took place, LH sought to use that factor as justification for paying a lower rent. However, under the so-called 'double reversion clause' ('doppelte Heimfallregelung') included in the land-use agreement, Immo T2 will not be able to acquire ownership of the terminal building or the plots of land on which it has been built.

Consequently, Germany is of the opinion that the rent paid for the use of the two plots of land is actually higher than the normal market price for their purchase and does therefore not contain any elements of State aid within the meaning of Article 107(1) of the Treaty.

4. COMMENTS FROM THIRD PARTIES: RYANAIR

The Commission received comments on the opening decision from Ryanair only. According to Ryanair, the claim that the arrangements regarding Terminal 2 allow the use of the airport to be optimised is unsubstantiated. Ryanair argues further that the Commission should have also investigated the split in the ownership structure between Immo T2 and the T2 Operating Company.

With respect to the bank loans, Ryanair disputes that a risk premium of 75 bps is adequate. Ryanair argues further that the Commission itself acknowledged that the T2 Companies were newly-established special purpose companies without a credit rating history, that FMG is highly dependent on the business strategy of LH, that LH participates in the cyclical, price-competitive and capital-intensive airline industry with a relatively high cost-base and weak operating margins, and that security normally required by banks is apparently not provided. As a result of those factors, a higher risk premium should apply.

Ryanair also suspects that Germany has withheld information regarding guarantees offered by the State to the banks. Ryanair observes that the fact that the lending banks have reserved the right to terminate their loan agreements with the T2 Companies if certain State-related entities lose their control of FMG suggests that
those loans were granted in consideration for an implied or express guarantee offered by the State-related supporters of the T2 Companies. On that basis Ryanair is of the opinion that the interest rates offered by the banks are lower than those required under normal market conditions and that it has to be verified whether the T2 Companies have paid an adequate compensation for the guarantee.

63. As regards the rent for the land on which Terminal 2 is constructed, Ryanair submits that the terminal started operating in June 2003 whereas Immo T2 started enjoying the use of the land in March 2000. Against that background, Ryanair is of the opinion that Immo T2 had a right to use the land free of charge for three years and three months. Ryanair further argues that a gap in time of [...] years between two reviews of the amount of the rent is unusually long and favourable for the tenant.

64. Concerning equal access to the infrastructure, Ryanair contends that the Star Alliance partners of LH are also beneficiaries of the aid. In view of Ryanair, the preferential access for Star Alliance members is a special advantage granted by FMG without obtaining any special advantage in return. Ryanair disputes that there is no qualitative difference between Terminal 1 and 2, because for instance, the capacity, parking positions, floor area and terminal positions are greater in Terminal 2 compared to Terminal 1. Ryanair states also that it is foreseeable that Terminal 1 will be more quickly congested than Terminal 2 in the future. In the view of Ryanair LH does not appear to pay any extra charge in exchange for such preferential treatment by FMG. Finally, Ryanair stresses the aid's detrimental effect on competition in Southern Germany.

5. COMMENTS FROM GERMANY ON THIRD PARTY COMMENTS

65. In its reply to the observations of Ryanair on the opening decision, Germany comments first of all on the effect of a possible aid involved in this case on Ryanair's competitive situation. Germany argues that, even under the assumption that State aid exists in the present case, the aid would not substantially affect Ryanair's competitive position on the market. Immo T2 merely is a real-estate holding company renting the land parcels on which Terminal 2 is constructed and renting it out to T2 Operating Company. T2 Operating Company is an undertaking that rents the Terminal 2, runs it and sublets it to individual tenants. Thus, both potential beneficiaries of aid are active on entirely distinct markets than Ryanair. The fact that LH holds shares in the T2 Companies does not in itself create a competitive relationship between LH and Ryanair.

66. Germany furthermore explains that the arrangements for Terminal 2 allow the use of the airport to be optimised. Germany also rejects any criticism with regard to the ownership split in the T2 Companies. The split reflects the capital invested by FMG and Lufthansa, respectively, and the allocation of risks. That practice is accepted by the Commission and underlines that the arrangement is in line with market conditions. In addition, Germany explains that sanctions were not necessary in order to assure that LH honoured its commitments as regards the establishment of a hub at the airport, as LH has to share accordingly the business risks aligned to the operation of Terminal 2.

67. With regard to observations provided by Ryanair on the assessment of the loan financing, Germany observes that the 75 bps risk premium assumed by the
Commission in its opening decision according to the 2005 Commission Notice is only adequate if the undertaking is in difficulties or is not able to provide sufficient collaterals. In view of Germany, neither of the two situations is pertinent in the present case as there is no extraordinary credit risk involved.

68. As regards the observations of Ryanair on the conditions of the land-use agreement, Germany explains first why Immo T2 did not pay any rent during the three years and three months construction period of Terminal 2. Germany confirms that during the construction period no rent was paid by Immo T2 for the use of the land. However, in view of Germany the arrangements in question need to be assessed in their entirety taking into account the rent payments after the construction of Terminal 2 which offset the non-payment of the rent during the first three years and three months. In addition, it should also be taken into account that no option was given to the T2 Companies to acquire the land. Concerning Ryanair's doubts about the adequacy of the ten-year adjustment period Germany retorts that it has already proven that the rent is well above the market value, which is the decisive issue.

69. Furthermore, Germany emphasises again the qualitative equivalence of the two terminals. In the view of Germany, quantitative arguments brought forward by Ryanair are beside this point. Differences exist because Terminal 1 is designed for point-to-point traffic whereas Terminal 2 is constructed as a hub and is bigger. In terms of quality, however, Terminal 1 is not inferior. In fact, Ryanair's allegation that Terminal 1 will be more quickly congested is not correct: Only 66% of Terminal 1's capacity is currently used, while Terminal 2 operates at nearly full capacity (90%).

70. Finally, Germany argues that State aid control is not applicable to the case at issue. The Commission itself acknowledged that the operation of an international airport is regarded to be an economic activity only since the General Court's judgment in Aéroports de Paris. Consequently, measures introduced before that date constitute existing aid within the meaning of Article 1(b)(v) of Council Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty19. Germany also argues that the measures constitute individual aid within the meaning of Article 1(e) of Regulation 659/1999 and therefore the Commission has no controlling power over those measures.

71. Lastly, Germany points out that what is relevant is not the judgment of the General Court in 2000 but the final judgment of the Court of Justice of 24 October 2002. Only the latter ruling clarified the matter definitely and provided for legal certainty.

6. ASSESSMENT: EXISTENCE OF AID TO THE T2 COMPANIES

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

73. The criteria laid down in Article 107(1) of the TFEU are cumulative. Therefore, in order to determine whether the measures constitute State aid within the meaning of

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Article 107(1) of the TFEU, all of the following conditions need to be fulfilled. Namely, the financial support should

(a) be granted by the State or through State resources,
(b) favour certain undertakings or the production of certain goods,
(c) distort or threatens to distort competition, and
(d) affect trade between Member States.

6.1. **Loans granted to the T2 Companies**

6.1.1. *Applicability of State aid rules to financing of airport infrastructure*

74. Until recently, the development of airports was often determined by purely territorial considerations or, in some cases, military requirements. The operation of airports was organized as part of the administration rather than like a commercial undertaking. Competition between airports and airport operators was also limited and developed gradually. Taking into account those conditions, the financing of airports and airport infrastructure by the State had previously been considered by the Commission itself as a general measure of economic policy which could not be controlled under the Treaty rules for State aid.20

75. That situation has however changed in recent years. Although those land-use planning considerations and administrative structures may still persist in some cases, the majority of airports have been incorporated under commercial law in order to allow their operation on market terms in an increasing competitive environment. The process of transfer to the private sector has normally taken the form of privatisation or a progressive opening-up of capital. In recent years, private-equity firms and investment and pension funds have shown a great interest in acquiring airports.

76. In recent years the Union's airport industry has undergone fundamental organisational changes that reflect not only the active interest of private investors in the airport sector, but also a change of attitude on the part of the public authorities regarding the contribution of private investments to airport development. That development has led to a greater diversification and complexity of the functions undertaken by airports.

77. Those recent changes have led in turn to a change in the commercial relationships between airports. Whereas airports were previously mostly managed as infrastructures with a view to ensure accessibility and territorial development, in the recent years, more and more airports also have commercial objectives and are competing with each other in order to attract air traffic.

78. It is not easy to point out a date starting from which the operation of airport facilities should have been undoubtedly considered as an economic activity because of the gradual development of market forces in this sector. However, the case law of the General Court reflected the changing nature of airports operation. In the "Aéroports

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de Paris” judgment the Court stated that the operation of an airport, including the provision of airport services to airlines and to the various service providers within airports, is an economic activity because it consists "in the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by the manager, and when the latter is public, does not fall within the exercise of its official powers as a public authority and is separable from its activities in the exercise of such powers." Consequently, as of the adoption of the above judgment (December 2000) it has not been possible to consider that the operation and construction of airports as a task carried out within public policy remit by an administration, which is outside the ambit of State aid control.

79. In its "Leipzig/Halle airport" judgment the General Court confirmed that it is a priori not possible to exclude the application of State aid rules to airports as the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part. Once an airport operator engages in economic activities, 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 TFEU, and the Treaty rules on State aid therefore apply.

80. In the "Leipzig/Halle airport" judgment, the General Court also held that as of 2000 the application of State aid rules to the financing of airport infrastructure could no longer be excluded.

81. In the light of the recitals 74 to 80, the Commission considers that before the General Court judgment in Aéroports de Paris public authorities could legitimately consider that financing measures definitively adopted before the judgment in Aéroports de Paris did not constitute State aid and accordingly did not need to be notified to the Commission. It follows that the Commission cannot anymore put into question on the basis of State aid rules financing measures definitively adopted before the judgment in Aéroports de Paris.

82. Moreover, financing measures that were definitively adopted before any competition developed in the airport sector, did not constitute State aid when adopted, but should be now considered as existing aid pursuant to Article 1 (b) (v) of Regulation 659/99.

83. With regard to the present case and the loans granted to the T2 Companies to finance the construction of Terminal 2, the Commission considered in the opening decision that the interest rates were established at the time of the drawing of the loans, the date on which the money was disbursed to the T2 Companies.

84. However, Germany has explained during the formal investigation procedure that the conditions for loans n° 5, 6, 7 were irrevocably agreed in the loan agreement dated 31 August 1999 and for loans n° 1, 9, 10, 16, 21 and 23 in the loan agreement dated

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13 September 2000 respectively. In addition, Germany provided further evidence that the conditions of the loan agreements dated 31 August 1999 and 13 September 2000 were established on the basis of a binding loan commitment dated 2 December 1998. The conditions of those loans were not amended in the meantime.

85. The Commission observes that the conditions for loans n° 1, 5, 6, 7, 9, 10, 16, 21 and 23 were irrevocably decided prior to the Aéroports de Paris judgment (i.e., before 12 December 2000). As a result, the Commission concludes that it is not entitled to examine and put into question under State aid rules loans n° 1, 5, 6, 7, 9, 10, 16, 21 and 23.

86. In light of the legal situation referred to in recitals 74 to 82, the Commission will limit its assessment to loans n° 17 and 20 granted to T2 Operating Company under the supplementary loan agreement concluded in 2003.

87. In that regard the Commission notes that T2 Operating Company operates the Terminal 2 on a commercial basis, renting it out to airlines, restaurants and shop-owners against payment of fees. T2 Operating Company should therefore be considered as an undertaking engaged in an economic activity within the meaning of Article 107(1) of the TFEU for the purpose of the assessment of loans n° 17 and 20.

6.1.2. Selective economic advantage

88. In order to verify whether an undertaking has benefited from an economic advantage induced by granting of a loan at privileged terms, the Commission applies the criterion of the “market economy lender principle”. According to that principle, debt capital put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be qualified as State aid.25

89. In the present case, the Commission has to assess whether the conditions of loans n° 17 and 20 provided to T2 Operating Company confer an economic advantage to it, which the recipient undertaking would not have obtained under normal market conditions.

90. Germany is of the opinion that the “market economy lender principle” was fully respected as loans n° 17 and 20 were provided at market conditions. In order to justify the conditions of the loans at issue, Germany compares the financing of T2 Operating Company with the financing conditions available to Deutsche Telekom AG, Bayer AG, Volkswagen AG and Deutsche Börse AG as well with a syndicated loan granted to FMG in 2006.

91. According to its decisional practice, in order to determine whether the financing under assessment was granted at favourable conditions, the Commission may – in the absence of other proxies - compare the interest rate on the loan in question with the

Commission reference rate. The Commission reference rate is established pursuant to the methodology laid down in the 2008 Reference Rate Communication.

92. The 2008 Reference Rate Communication establishes a method for setting reference and discount rates that are applied as a proxy for the market rate. However, because the Commission reference rate is a proxy, where the Commission is in the possession of other indicators in a specific case of the interest rate that the borrower could obtain on the market, it may base its assessment on those indicators.

*The credit rating of T2 Operating Company*

93. In order to be able to compare the conditions of the loans at issue with the comparators provided by Germany, the Commission has to first assess the credit-worthiness of T2 Operating Company.

94. T2 Operating Company is not rated by a credit rating agency. Germany however argues that due to the profit-and-loss transfer agreements concluded between T2 Operating Company and LH and FMG in proportion to their shares, the rating of the mother companies should be taken into account.

95. The Commission observes that according to German law, LH and FMG remain liable for any loan contracted by the T2 Companies during the time at which the profit-and-loss transfer agreement existed, even if the agreement is subsequently revoked.

96. On that basis, the Commission takes the view that the rating of the T2 Operating Company should be considered to be at least the lower of the ratings of the parent companies, LH or FMG respectively.

97. LH has been rated by Standard & Poor's and by Moody's. At the time when loans n° 17 and 20 were granted (March 2005), the long-term credit rating assigned to LH by Standard & Poor's was BBB and the rating assigned by Moody's was Baa2, showing that both rating agencies put the company in the same credit rating category.

98. FMG has not been rated by a rating agency. The Commission notes that the 2008 Reference Rate Communication does not require that the ratings are obtained from a specific rating agency; ratings provided by banks in order to reflect default rates are equally acceptable. The syndicated loan agreement between FMG and 21 public and private banks signed in September 2006, i.e. shortly after loans 17 and 20 were granted, indicates that those banks assumed a rating of at least […] for FMG.

99. In view of the recitals 94 to 98 above the Commission considers that T2 Operating Company has at least the rating of LH, i.e. at least rating […].

*Benchmarking of the conditions of loans n° 17 and 20 with comparators provided by Germany:*

100. The Commission notes that the syndicated loan agreement of FMG concluded in 2006 cannot be used as comparator for the loans at stake, as the rating of T2 Operating Company may be lower than the rating of FMG. In addition, the conditions of loans n° 17 and 20 were agreed in 2003, a different point in time to that when the syndicated loan agreement was concluded.

101. With regard to the other comparators provided by Germany, namely Deutsche Telekom AG, Bayer AG, Volkswagen AG and Deutsche Börse AG, the Commission observes that they constitute only a narrow sample. Moreover, only Deutsche
Telekom AG has a rating similar to the rating of T2 Operating Company, namely a long-term Standard & Poor's rating BBB+ and a long-term Moody's rating Baa1. It should further be noted that the financing conditions of that latter comparator were established at a rather different point of time, namely October 2000, than that of the loans at stake.

102. In view of the recitals 100 to 101 above, the Commission considers that Germany has not performed an adequate market benchmarking to justify the conditions of loans n°17 and 20.

**Benchmarking of the conditions of loans n° 17 and 20 with market proxies based on Credit Default Swap (CDS) spreads:**

103. In order to assess whether loans n° 17 and 20 were in line with market conditions, the Commission has also performed a benchmarking with market proxies based on Credit Default Swap (CDS) spreads.

104. In line with the methodology underlying the 2008 Reference Rate Communication, the Commission is of the opinion that loan interest rates can be deemed in line with market conditions when the loans are priced at a rate equal or higher than a benchmark rate defined by the following formula:

\[
\text{Benchmark rate} = \text{base rate} + \text{risk margin} + \text{fee}
\]

105. The base rate represents the cost for banks of providing liquidity (funding cost). In the case of fixed-rate funding (i.e. the interest rate is fixed for the duration of the loan), it is appropriate to determine the base rate on the basis of swap rates\(^{26}\) with a maturity and currency corresponding to the maturity and the currency of the debt. The risk margin compensates the lender for the risks associated with the specific debt financing, in particular the credit risk. The risk margin can be derived from an appropriate sample of CDS spreads\(^ {27}\) relating to reference entities (e.g. company bonds) with a similar rating as the loans for T2 Operating Company. Finally, it appears appropriate to add 10-20 basis points as an approximation for the bank fees companies usually have to pay\(^ {28}\).

106. In order to establish the relevant maturity of the loans in question, the amortisation of the loans has to be taken into account. The Commission has calculated for that purpose the weighted average life (WAL) of the loans, which indicates the average number of years that each euro remains outstanding. The WAL of loan n° 17 has been calculated at […] years and the WAL of loan n° 20 at […] years.

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\(^{26}\) The swap rate is the longer maturity equivalent to the Inter-Bank Offered Rate (IBOR) rate. It is used in the financial markets as a benchmark rate for establishing the funding rate.

\(^{27}\) A credit default swap (CDS) is a (tradable) credit derivative contract between two counterparties, the protection buyer and the protection seller, transferring the credit risk on an underlying reference entity from the protection buyer to the protection seller. The protection buyer pays every period a premium to the protection seller until maturity of the CDS contract or until a pre-defined credit event occurs on the underlying reference entity (whichever occurs first). The periodic premium paid by the protection buyer (expressed as a percentage or in terms of basis points of the protected amount, the "notional") is called the CDS spread. CDS spreads can be used as a close proxy for the price of credit risk.

\(^{28}\) See e.g. Oxera, *Estimating the cost of capital for Dutch water companies*, 2011 (p.3), or Bloomberg data on underwriting fees for bond issuance. In the remainder of this Decision, a 20 bps fee will be used to arrive at a conservative estimate.
107. To determine the base rate of loan n° 17, as its WAL amounts to [...] years (for which swap rates are not available), the Commission has used the two-year EUR swap rate\(^{29}\) as a proxy. For loan n° 17, the five-year EUR swap rate\(^{30}\) is used as the closest approximation to its WAL of [...] years. Both swap rates have been obtained from Bloomberg, for the day when the loans were drawn (i.e. 23 March 2005). The values of the corresponding swap rates are as follows: 2.73% for loan n° 17 and 3.28% for loan n° 20\(^{31}\).

108. As regards the margin, the Commission notes that both loans in question are highly collateralized\(^{32}\). The level of collateralisation of the loans on 31 December 2003 amounted to [...] % (i.e. the value of the assets amounted to EUR [...] million on 31 December 2003 and the value of the corresponding debts amounted to EUR [...] million). Market practice in such cases is to increase the rating of the debt instrument (the "issue rating") in question by one notch compared to the issuer rating\(^{33}\). Accordingly, the rating of T2 Operating Company for the loans in question should be increased by one notch to a rating of (at least) [...].

109. Based on Bloomberg data, the Commission has established samples of reference entities with a rating of [...] from all industries excluding government and the financial sector. The sample for loan n° 17 (based on three-year CDS rates\(^{34}\)) contains 29 reference entities; the sample for loan n° 20 (based on five-year CDS rates) contains 38 companies. The median CDS spreads observed at the day when the loans were granted are 19 bps for a maturity of three years\(^{35}\) and 28 bps for a maturity of five years\(^{36}\).

110. That approach leads to a benchmark rate for loan n° 17 of 3.12\(^{37}\) and for loan n° 20 of 3.76 \(^{38}\). Loans n° 17 and n° 20 were granted at rates above those calculated benchmark rates (loan n° 17 at [...] and loan n° 20 at [...] ) and the Commission considers that fact to be an indication that the loans were indeed in line with market conditions.

111. As an additional check, the Commission has observed the levels of CDS spreads traded on LH itself, given the close relationship between LH and T2 Operating Company. The three-year\(^{39}\) CDS rate for LH on the day when loan n° 17 was drawn was [...] bps. The five-year CDS rate for LH was [...] bps. In order to account for the high collateralisation of loans n° 17 and n° 20, it is appropriate to adjust the obtained CDS rates downwards. Applying a multiplication factor of 2/3\(^{40}\), that

\(^{29}\) Bloomberg code EUSA2.

\(^{30}\) Bloomberg code EUSA5.

\(^{31}\) Source: Bloomberg.

\(^{32}\) See recitals 24, 25 and 44.

\(^{33}\) See, e.g. Moody’s, Updated Summary Guidance for Notching Bonds, Preferred Stocks and Hybrid Securities of Corporate Issuers (February 2007).

\(^{34}\) The CDS spread for loan number 17 should in principle match the WAL of the loan [...] years (approximated by two years). However, there are no CDS data available for a maturity of two years at the time when that loan was granted. For that reason CDS spreads with the maturity of the loan (three years) have been considered. That approach provides for an upper bound.

\(^{35}\) Source: Bloomberg. Interquartile range (i.e. the range between the first and third quartile): 16 - 29 bps.

\(^{36}\) Source: Bloomberg. Interquartile range: 23 - 37 bps.

\(^{37}\) 3.12 % = 2.73 % + 0.19 % + 0.20 %

\(^{38}\) 3.76 % = 3.28 % + 0.28 % + 0.20 %

\(^{39}\) At the time, there was no CDS trade on LH for a maturity of two years or less.

\(^{40}\) The level of collaterals can be measured as the Loss Given Default (LGD), which is the expected loss in percentage of the debtor’s exposure taking into account recoverable amounts from collateral and the
approach leads to a benchmark rate for loan n° 17 of […] % and for loan n° 20 of […] %. That approach also provides a further indication that the risk margins for the loan conditions were in line with market conditions.

112. In view of the recitals 103 to 111 above, the Commission notes that the loans n° 17 and 20 have been granted at rates above the calculated benchmark rates and can be deemed in line with market conditions.

Assessment of the conditions of loans n° 17 and in light of the 2008 Reference Rate Communication:

113. In the absence of a market benchmark provided by Germany, the Commission will also assess the conditions of loans n° 17 and 20 on the basis of the 2008 Reference Rate Communication. The 2008 Reference Rate Communication establishes a method for setting reference and discount rates that are applied as a proxy for the market rate.

114. The reference rates are based on a base rate (one-year inter-bank offered rate; IBOR) to which risk margins have to be added. The margins range from 60 to 1000 bps, depending on the creditworthiness of the company and the level of collateral offered. In normal circumstances, 100 bps are added to the base rate, assuming loans to undertakings with satisfactory rating and high collateral or loans to undertakings with good rating and normal collateral or strong rating and no collateral.

115. In the present case the base rate is defined as the three-month average of the 1-year EURIBOR\(^{41}\) rates for September to November of the preceding year (2004). For the loans in question the applicable base rate can be approximated at 2.34%.

116. The risk margin depends on the rating of the undertaking in question and the collaterals offered. As noted in recital 99, the credit rating of T2 Operating Company corresponds at least to […]\(^{42}\).

117. The Commission further observes that the loans at stake are highly collateralised (i. e. LGD smaller than 30 %), in particular with […]\(^{42}\). The LGD of smaller than 30 % is based on the level of pledged receivables and pledged assets. The Commission notes that in general the LGD for a loan secured by […] amounts to approximately 35 %.\(^{43}\) In addition, the loan in question is secured […] and the level of collateralisation of the loan amounts to […] %.

118. The 2008 Reference Rate Communication foresees for borrowers with a rating of at least […] and a high collateralisation of the loan a risk margin of at least […] bps. By adding the base rate of 2.34 % and the risk margin of […] bps an interest rate of […] % is reached.

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\(^{41}\) The Euro Interbank Offered Rate (hereinafter "EURIBOR") is a daily reference rate based on the averaged interest rates at which Eurozone banks offer to lend unsecured funds to other banks in the euro wholesale money market or interbank market.

119. The Commission notes that the interest rate of loan n° 17 is set at [...] and of loan n° 20 at [...]. Accordingly, the interest rates of both loans are set above the Commission's reference rate.

6.1.3. Conclusion

120. The Commission can conclude that loans n° 17 and 20 were granted in line with market conditions. The Commission notes that in absence of an economic advantage it is not necessary to clarify whether the measures are imputable to the State.

121. As the cumulative criteria pursuant to Article 107(1) of the TFEU are not fulfilled, the Commission considers that loans n° 17 and 20 do not contain any State aid within the meaning of Article 107(1) of the TFEU.

6.2. The land-use agreement between FMG and Immo T2

6.2.1. Notion of undertaking and economic activity

122. As pointed out in recitals 74 – 81, until December 2000 the legal classification for the purposes of State aid rules of the operation and construction of airport infrastructures was unclear. While competition developed gradually in the sector, the Commission and the Member States use to consider those activities as falling within the public policy remit, rather than being economic.

123. With regard to the land-use agreement between FMG and Immo T2 Germany clarified during the formal investigation procedure that the conditions of the use of land parcels no 4935/3 and 4881 were irrevocably agreed in the land-use agreement concluded on 30 March 2000.

124. The Commission notes that the conditions to use land parcels no 4935/3 and 4881 were irrevocably decided prior to the Aéroports de Paris judgment (i. e. before 12 December 2000). Consequently, even if that measure would imply an advantage, the Commission is not entitled to examine it and put it into question under State aid rules for the reasons explained above in section 6.1.1 of the present decision.

7. Conclusion

125. In view of the above, the Commission concludes that it is not entitled to examine and put into question under State aid rules loans n° 1, 5, 6, 7, 9, 10, 16, 21 and 23.

As regards loans n° 17 and 20 the Commission can conclude that those loans were granted at market conditions. As the cumulative criteria pursuant to Article 107(1) of the Treaty are not fulfilled, the Commission considers that loans n° 17 and 20 do not contain any State aid within the meaning of Article 107(1) of the TFEU.

126. As regards the conditions to use land parcels no 4935/3 and 4881, the Commission considers that it is not entitled to examine and put into question under State aid rules the land-use agreement,
HAS ADOPTED THIS DECISION:

Article 1
The loans n° 17 and 20, amounting to in total to EUR […], granted under the loan agreement dated July 2003 by KfW Bankengruppe, Bayerische Landesbank and LfA to FM Terminal 2 Immobilien-Verwaltungsgesellschaft mbH and Terminal 2 Betriebsgesellschaft mbH do not constitute aid within the meaning of Article 107(1) of the TFEU.

Article 2
This Decision is addressed to the Federal Republic of Germany.

Done at Brussels,

For the Commission

Joaquín ALMUNIA

Vice President of the Commission