II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/1071

of 1 October 2014

on State aid SA 26190 (2012/C) (ex 2011/NN) implemented by Germany for Saarbrücken Airport and airlines using the airport

(notified under document C(2014) 5062)

(Only the English text 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) thereof ([1]),

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

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

Whereas:

1. PROCEDURE

(1) In a parliamentary question of 2008, MEP Hiltrud Breyer raised the issue of the public financing of Verkehrsholding Saarland ('vh Saar'), of Saarbrücken Airport and of the discounts granted to the airlines using the airport ([3]). The parliamentary question was answered by Commissioner Tajani on 5 September 2008. In addition, the question was registered as a complaint under CP 171/2008.

(2) The parliamentary question alleged that vh Saar had received EUR 11 million from *Saarland*'s State budget in the form of a capital increase. It was alleged that these funds were used to cover losses of the airport's operating company, which belonged to a subsidiary of vh Saar. The airport operator, its parent company and vh Saar were claimed to be connected via profit and loss transfer agreements ('P&L agreements'). This construction allegedly served the purpose of covertly and permanently subsidising the unprofitable airport.

(3) The Commission requested further information from Germany on 31 July 2008, 24 September 2010, 24 March 2011, and 8 August 2011. Germany responded to these requests and provided further information on 4 November 2008, 17 January 2011, 14 June 2011, and 7 October 2011.

(4) By letter dated 22 February 2012, the Commission informed Germany that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.

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

([2]) OJ C 213, 19.7.2012, p. 1.

([3]) E–3778/08, 8 July 2008.

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

(6) The Commission received comments from one interested party — Air Berlin — on 20 August 2012. It forwarded them to Germany on 1 October 2012, which was given the opportunity to react within one month; Germany's comments were received by letter dated 29 October 2012. Private individuals sent their comments within the framework of the procedure, stating that the public financing granted to the airport constituted State aid.

(7) Following the opening of the formal investigation procedure the Commission requested further information on 24 February 2012, 23 April 2012, 16 October 2012, 26 November 2013 and 14 March 2014. Germany responded to these requests and submitted further information on 17 April 2012, 4 May 2012, 14 December 2012, 14 January 2014 and 3 April 2014.

(8) On 24 February 2014 the Commission informed Germany that the 2014 Aviation Guidelines ([5]) were adopted on 20 February 2014 and invited Germany to submit comments within 20 working days as of the publication of the new Aviation Guidelines in the Official Journal. Germany replied on 6 May 2014.

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

(10) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within 20 working days of the publication date of this notice ([8]). Air Berlin submitted comments on 5 May 2014.

(11) On 17 June 2014, Germany informed the Commission that it exceptionally accepts that this decision is adopted in the English language.

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

2.1. *BACKGROUND OF THE INVESTIGATION*

2.1.1. HISTORY AND DEVELOPMENT OF SAARBRÜCKEN AIRPORT

(12) Saarbrücken Airport is the airport of the capital of the *Land Saarland*, Saarbrücken. According to publicly accessible information, the airport was inaugurated in 1928 and operated until 1939, when it was closed after the outbreak of the war. The airport resumed operations in 1966, when a modern runway suitable for medium range aeroplanes was constructed. In 1999 the construction of a new terminal commenced, requiring an investment of approximately EUR 11,8 million. The new terminal, which according to publicly available information was designed for up to 800 000 passengers per year ('pax') was opened in May 2005. However, due to limitations arising from the security infrastructure, Germany submits that the airport's actual capacity is only 700 000 pax.

(13) Tables 1 and 2 indicate the development of the airport in terms of passenger numbers and aircraft movements. Air freight is of no great significance at Saarbrücken Airport.

Table 1

Passenger numbers 1998–2012 ([1])

Year	Commercial Scheduled	Commercial Charter	Comm. Total	Non–Comm.	Total
1998	126 231	293 449	419 680	10 070	429 750

([4]) Cf. footnote 2.
([5]) Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
([6]) See footnote 5.
([7]) OJ C 113, 15.4.2014, p. 30.
([8]) See footnote 7.

Year	Commercial Scheduled	Commercial Charter	Comm. Total	Non–Comm.	Total
1999	134 228	308 634	442 862	3 810	446 672
2000	149 693	332 902	482 595	1 971	484 566
2001	141 676	338 354	480 030	831	480 861
2002	144 542	316 757	461 299	946	462 245
2003	135 100	323 083	458 183	1 502	459 685
2004	128 498	331 355	459 853	1 560	461 413
2005	136 178	350 052	486 230	1 256	487 486
2006	125 188	295 033	420 221	1 422	421 643
2007	176 690	173 263	349 953	639	350 592
2008	360 694	157 226	517 920	368	518 288
2009	335 684	134 249	469 933	214	470 147
2010	331 780	159 469	491 249	166	491 415
2011	368 314	84 000	452 314	1 338	453 652
2012	364 076	61 353	425 429	414	425 843

([1]) http://www.flughafen–saarbruecken.de/index.php?id=372

Table 2

Aircraft movements ([1])

Year	Commercial Scheduled	Commercial Charter	Comm. Total	Non–Comm.	Total
1998	7 240	6 021	13 261	7 558	20 819
1999	7 491	7 192	14 683	7 280	21 963
2000	7 970	8 171	16 141	4 972	21 113
2001	6 740	4 624	11 364	3 582	14 946
2002	7 979	3 957	11 936	3 228	15 164
2003	7 256	4 377	11 633	3 378	15 011
2004	6 531	4 032	10 563	3 201	13 764
2005	6 291	4 453	10 744	3 458	14 202
2006	6 469	4 539	10 980	4 047	15 055

Year	Commercial Scheduled	Commercial Charter	Comm. Total	Non–Comm.	Total
2007	7 046	4 011	11 057	3 464	14 521
2008	11 173	3 475	14 648	2 596	17 244
2009	9 686	2 912	12 598	3 093	15 691
2010	8 775	4 983	13 758	2 487	16 245
2011	7 307	4 641	11 948	2 535	14 483
2012	6 567	3 398	9 965	2 359	12 324

([1]) http://www.flughafen–saarbruecken.de/index.php?id=daten_fakten

(14) The most significant developments for the airport were the departure of Hapag Lloyd in 2006 on the one hand and the establishment of Air Berlin in 2007 on the other. The charter airline Hapag Lloyd (now 'TUIFly') had, until it decided to relocate its operations to the nearby located Zweibrücken Airport, contributed more than 190 000 passengers to Saarbrücken's total traffic. The establishment of Air Berlin, on the other hand, signalled a significant increase in the scheduled flights traffic at Saarbrücken. In consequence, while until 2006 charter traffic dominated operations at Saarbrücken Airport, scheduled flights traffic is since 2007 responsible for the majority of passengers at Saarbrücken.

(15) As regards the future, Germany submitted that according to the most recent air traffic projection (August 2010), passenger numbers can be expected to rise to […] (*) passengers in the year 2020.

2.1.2. GEOGRAPHICAL LOCATION AND CATCHMENT AREA

(16) Saarbrücken Airport is located approximately 10 km to the south–east of the City of Saarbrücken. The nearest other airports are ([9]):

— *Zweibrücken Airport* (approximately 39 km, or approximately 29 minutes by car),

— *Metz–Nancy–Lorraine Airport* (approximately 96 km, or approximately 61 minutes by car),

— *Luxembourg Airport* (approximately 121 km, or approximately 77 minutes by car),

— *Frankfurt–Hahn Airport* (approximately 128 km, or approximately 85 minutes by car),

— *Strasbourg Airport* (approximately 140 km, or approximately 91 minutes by car),

— *Frankfurt (Main) Airport* (approximately 163 km, or approximately 92 minutes by car),

— *Karlsruhe/Baden–Baden Airport* (approximately 161 km, or approximately 104 minutes by car).

(17) Germany submitted that the large majority of passengers are from the region. It is asserted that 71 % of passengers are from *Saarland*, 15 % from the western part of *Rhineland–Palatinate* (including the Zweibrücken region) and around 14 % stem from France, Luxembourg and the Trier region. The projected increase of the passenger numbers is also expected to result from an increase of demand from the *Saarland* region.

2.1.3. LEGAL AND ECONOMIC SET–UP OF SAARBRÜCKEN AIRPORT

(18) In 1997, the Flughafen Saarbrücken GmbH, previously owner and operator of the Airport, was split up into two separate companies: the Flughafen Saarbrücken Betriebsgesellschaft mbH ('FSBG') was charged with operating the airport, while the Flughafen Saarbrücken Besitzgesellschaft mbH ('FSBesitzG') owned the airport and was in charge of maintaining the infrastructure. In return for operating and commercially exploiting the airport, the FSBG had to pay a leasing payment to FSBesitzG.

(*) Business secret.
([9]) Source: fastest route according to Google Maps.

(19) Until 30 June 2007, the FSBG was 48 % owned by the FSBesitzG, 51 % by the Fraport AG (operator of Frankfurt (Main) Airport) and 1 % by the City of Saarbrücken. The FSBesitzG was, in turn, 99,9 % owned by vh Saar and 0,1 % by the *Land Saarland*. The vh Saar was at all times owned directly by the *Land Saarland*.

(20) On 30 June 2007, the Fraport AG sold its share in the FSBG to the FSBesitzG, who subsequently owned 99 % of the FSBG. At the beginning of 2008, the two companies were merged to re–establish the Flughafen Saarbrücken GmbH (hereafter: 'FSG'), thereby essentially recreating the situation as it existed before the partial privatisation to Fraport AG in 1997. Since 2008 and until now, FSG is 100 % owned by vh Saar.

(21) **vh Saar** was established by the *Saarland* Ministry for Economy and Finance in 1996. The company's purpose is 'the coordination of the activities incurred with the construction, extension and operation of public airports and ports in the *Saarland*'. The conclusion of a contract of domination with FSG was foreseen in the statutes of vh Saar. The board of directors and the supervisory board are nominated by the *Saarland* State Government as the sole shareholder. Apart from the FSG, vh Saar is also the owner of Hafenbetriebe Saarland GmbH (hereafter: 'HSG'), owner and operator of various ports in *Saarland*.

(22) **FSBesitzG** was established on 4 July 1997 as the legal successor of the original FSG. Its purpose was the 'construction, maintenance and lease of the Airport and the shareholding in the [FSBG]'. The supervisory board was appointed by the *Saarland* Government, and its chairman chosen by the Saarland Ministry responsible for the aviation sector. The company's management was bound to instructions received by the Ministry of Economy and Finance as regards the exercise of its voting rights in the shareholder assembly of FSBG.

(23) **FSBG** was established on 4 July 1997. Its purpose was the operation of Saarbrücken Airport. The management was appointed by a 75 % majority of the shareholder assembly. The supervisory board consisted of 10 members, five of which were appointed by Fraport AG and FSBesitzG, respectively. Since 2006, the board has consisted of six members, two of which were appointed by Fraport AG and four by FSBesitzG.

(24) **FSG** was established on 30 August 2008. Its purpose is the operation of Saarbrücken Airport for civil aviation and connected ancillary businesses. The members of the board of directors and the supervisory board are nominated by the *Saarland* State Government. The chairman of the supervisory board is appointed by the Ministry responsible for aviation.

2.2. *MEASURES UNDER INVESTIGATION AND REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE*

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

(26) The following measures were investigated as potentially constituting State aid to vh Saar, FSG, and FSBesitzG:

(a) the financing of vh Saar, FSG, and FSBesitzG by the *Saarland;*

(b) the transfer of various plots of land to FSBesitzG by the *Saarland;*

(c) guarantees on loans granted by the *Saarland* to the benefit of vh Saar and FSBesitzG.

(27) The leasing contract between FSBesitzG and FSBG was investigated as potentially constituting State aid to FSBG.

(28) The following measures were investigated as potentially constituting State aid to various airlines operating at Saarbrücken Airport:

(a) the discounts introduced in 2007 for airlines taking up operations at Saarbrücken for the first time, serving new routes, or increasing their passenger numbers;

(b) the contract on start–up aid between FSBesitzG and Cirrus Airlines;

(c) the marketing agreement between FSG and Air Berlin.

2.2.1. FINANCING OF VH SAAR, FSG, AND FSBESITZG

Detailed description of the measure

(29) The vh Saar is financially connected to its subsidiary — until 30 August 2008 the FSBesitzG and since then the FSG — via a P&L agreement, the consequence being that the vh Saar covered all losses incurred by these companies. At the same time, vh Saar received profits generated by its second subsidiary — HSG — and direct capital injections from its sole shareholder, the *Land Saarland*. These funds ensured that the vh Saar always had the means to cover the FSBesitzG/FSG losses. The P&L agreement was originally concluded between vh Saar and FSBesitzG's legal predecessor, the FSG, on 1 January 1997. After the re–establishment of the FSG, it succeeded the FSBesitzG in the contract.

(30) The FSBG, legally separate from the FSBesitzG until 2008, regularly earned a profit until 2006. The profits were either distributed to the shareholders (until 30 June 2007, FSBesitzG and Fraport AG), in which case they were administered as revenue in the shareholders' balance sheets in the following year, or reinvested. In 2007, after FSBesitzG had become the sole shareholder of FSBG, the significant annual loss was covered by a corresponding capital injection by FSBesitzG. FSBesitzG and FSBG merged at the beginning of 2008, with the result that the combined loss would now be covered by vh Saar.

(31) Since the year 2000, the losses of the FSBesitzG/FSG and corresponding capital injections by vh Saar, financed from capital injections received from the *Saarland* and other revenues, developed as follows:

Table 3

Annual losses FSBesitzG/FSG in EUR

Year	FSBesitzG	FSG
2000	– 2 168 916	
2001	– 2 785 473	
2002	– 4 164 538	
2003	– 3 099 253	
2004	– 2 770 680	
2005	– 3 917 320	
2006	– 8 400 703	
2007	– 8 171 099	
2008		– 4 548 264
2009		– 9 306 512
2010		– 8 805 707
2011		– 10 065 522
2012		– 18 449 926
Total (2000-2009)	**– 49 332 758**	
Total (2000-2012)	**– 86 653 913**	

(32) FSG's estimated loss for the year 2013 amounts to EUR 9 427 000.

(33) During 2000–2012, the EBITDA of FSBesitzG/FSG developed as follows:

Table 4

EBITDA development in EUR ([1])

Year	EBITDA
2000 (*)	937 000
2001 (*)	– 156 000
2002 (*)	– 832 000
2003 (*)	56 000
2004 (*)	704 000
2005 (*)	– 732 000
2006 (*)	– 5 307 000
2007 (*)	– 4 392 000
2008	– 1 840 000
2009	– 5 237 000
2010	– 5 237 000
2011	– 3 528 000
2012	– 4 937 700
Total	**– 30 501 700**

([1]) EBITDA including public funding and compensation for activities that fall within public policy remit or are considered as SGEI; see submission of information by Germany of 5 May 2012, Annex II.
(*) As the owner and the operator were separate companies in these years (FSBesitzG and FSBG), EBITDA listed is the sum of the EBITDA of both companies.

(34) For the year 2013, FSG's EBITDA is estimated to be negative again, amounting to EUR – 5 144 000.

(35) Germany submitted that over the period 2000–2009, the majority of the costs can be traced back to investment in and maintenance of infrastructure, interest payments on loans taken up in order to finance infrastructure investments, and expenditure for safety/security purposes. The total costs for these activities are asserted to amount to approximately […]. These costs are said to be unrelated to the provision of airport services, but stem exclusively from the creation and operation of infrastructure.

Table 5

Infrastructure and Safety/Security Costs 2000–2009

1	Other Infrastructure Investment	[…]

2	Other Infrastructure Maintenance	[…]
	Other Infrastructure Total (1 and 2)	[…]
3	Total Costs of Capital ([1])	[…]
4	Safety/Security Infrastructure Investment	[…]
5	Safety/Security Other	[…]
	Safety/Security Total (4 and 5)	[…]
	Total (1 to 5)	[…]

([1]) Germany submits that due to the accounting system used, the costs of capital cannot be individually allocated to safety/security or other infrastructure.

(36) Germany ([10]) specified that in the period 2000–2009 the following investment and maintenance activities were conducted:

(i) *Construction of a new terminal with auxiliary facilities in 2000 (net costs of around* […]*).*

(37) The annual capacity of the old terminal was 390 000 passengers per year ([11]). It was for the first time exceeded in 1996. In that year the annual passenger number at Saarbrücken Airport reached 395 000 passengers and continued growing until 2000 when it reached 484 566 passengers. According to Germany, the old terminal was frequently congested in particular during the main travel time months (summer period), which caused long waiting times, overcrowded passengers areas or passengers waiting outside the terminal. In addition the old terminal did not comply anymore with the security requirements. The new terminal is equipped with a new security system. The old terminal serves now as a waiting and gate area.

(ii) *Implementing of the runway and safety area in 2009–2010 (net costs incl. electro works around* […]*)*

(38) In 2009–2010 the runway and safety area was implemented, which comprised a number of construction and security measures which were taken to increase the security of the airport infrastructure and make them compliant with the applicable security requirements. In particular the location of the runway lights was adjusted to give better signals to the pilots, the runway guard lights were installed and the superstructure of the runway curve was adjusted to the needs of modern aircrafts.

(iii) *Maintenance of the runway in 2009 (net costs of around* […]*)*

(39) Also in 2009–2010 the runway was maintained to avoid damage to the aircraft operating at the airport.

Reasons for opening the formal investigation procedure

Existence of aid

(40) The opening decision first observed that the financing of vh Saar by the *Saarland* and of FSBesitzG/FSG by vh Saar involved a transfer of State resources, either directly or because vh Saar was fully controlled by the *Saarland* and its actions imputable thereto. The activities of FSBesitzG, FSGB, and FSG as well as possibly those of vh Saar itself also amounted to economic activities.

(41) The opening decision explained that on the basis of the available information, it appeared that vh Saar did not itself incur an advantage, as it apparently passed all funds received from the *Saarland* on to FSBesitzG/FSG. Germany was asked to provide further information on whether vh Saar retained any of the State funds received for another purpose or activity. As regards FSBesitzG/FSG, the opening decision observed that the funds received from vh Saar lowered the costs that the airport would have normally had to bear, thereby constituting an economic advantage.

([10]) Submission of information by Germany of 17 January 2011, attachment 6, and of 16 April 2012, p. 9.
([11]) Submission of Information by Germany of 16 April 2012, p. 9.

(42) The opening decision next assessed whether the financing could be characterised as compensation for a service of general economic interest (SGEI) following the *Altmark* jurisprudence. It was observed that on the basis of the available information, the fourth *Altmark* criterion did not seem to be fulfilled. More particularly, it was observed that the operation of the airport was never tendered out, nor was the financing based on an analysis of the costs that a typical undertaking, well–run and adequately provided with the necessary means, would have incurred. As the *Altmark* criteria are cumulative, this finding was sufficient for the preliminary conclusion that the financing could not be considered as an SGEI compensation pursuant to that jurisprudence.

(43) On the basis of the available information, it also did not appear that the financing could be justified as being in line with the behaviour of a rational market economy operator (MEO). In particular, it was observed that Germany had not presented a business plan or any other documentation showing that a profit could be expected. On the contrary, the increasing annual losses rather indicated that the airport would not be viable without financial support from the *Saarland* via vh Saar, which might indicate the airport was an undertaking in financial difficulties. The Commission therefore took the preliminary position that the financing of the airport by vh Saar did not comply with the MEO test and asked Germany to comment on the financial situation of the airport.

(44) It was finally noted that the financing was selective, that the measure distorted or threatened to distort competition, and that based on its close proximity to a number of airports in other Member States, there seemed to be an effect on intra–Union trade. The Commission therefore reached the preliminary conclusion that the financing indeed amounted to State aid pursuant to Article 107(1) of the Treaty.

Compatibility

(45) The opening decision first discussed whether the financing of the airport could be qualified as compatible aid under the 2005 SGEI Decision ([12]). It observed that no information was made available demonstrating that without the airport the region in which it is located would be so isolated that its social and economic development would be harmed. At it appears that the catchment area of Saarbrücken Airport could also be served by other airports in the region, the Commission reached the preliminary conclusion that defining the operation of Saarbrücken Airport as a SGEI under the 2005 SGEI Decision constituted a manifest error.

(46) The opening decision observed further that, in any event, the airport was not properly entrusted with the SGEI of providing airport services, that it was not clear that the financing was limited to the airport's core activities, and that the compensation parameters were not defined in advance. Accordingly, the Commission reached the preliminary conclusion that the financing did not fulfil the conditions of the 2005 SGEI Decision.

(47) It was also analysed whether the conditions laid down in Section 4.2 of the 2005 Aviation Guidelines were met. These conditions are similar to those contained in the 2005 SGEI Decision. The lack of a proper entrustment act and the lack of provisions limiting the financing to the airport's core activities, inter alia, led to the preliminary conclusion that the financing could not be found compatible pursuant to Section 4.2 of the 2005 Aviation Guidelines.

(48) The opening decision further analysed whether the financing could be compatible pursuant to Section 4.1 of the 2005 Aviation Guidelines. It observed that the P&L agreement did not specifically serve the purpose of financing infrastructure investments, but simply covered all losses stemming from the activities of the airport. It further noted that such an instrument could hardly have an incentive effect in terms of investments and observed that Germany predicted only a positive EBITDA for 2020, but not a positive overall result. Finally, it was considered that the operation of the airport appeared to negatively affect the operation of the nearby airport in Zweibrücken. The Commission therefore expressed its doubts as regards the compatibility of the financing pursuant to Section 4.1 of the 2005 Aviation Guidelines.

(49) The opening decision finally addressed on the possible compatibility of the financing pursuant to the Rescue & Restructuring Guidelines ([13]). Germany was asked to clarify whether the airport could be considered an undertaking in difficulties and, if so, whether measures in accordance with the Rescue & Restructuring Guidelines had been taken.

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

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

(50) In conclusion, the Commission adopted the preliminary position that the financing of vh Saar, FSBesitzG, and FSG by means of direct grants to vh Saar by the *Saarland* and capital injections by vh Saar into FSBesitzG/FSG constituted State aid. It also expressed its doubts, based on the information available, regarding the compatibility of this aid with the internal market.

2.2.2. THE TRANSFER OF VARIOUS PLOTS OF LAND TO FSBESITZG

Detailed description of the measure

(51) Since 1998, Germany transferred various plots of land to the airport, which according to the submission of Germany had a total value of EUR 240 000. Of the various plots of land, only three were transferred after the year 2000. According to Germany, these plots of land had a combined value of […]. In the years 2002 and 2003, two plots of lands were transferred […] and in the year 2004, the airport bought one plot for a price of […].

Reasons for opening the formal investigation procedure

Existence of aid

(52) The opening decision first observed that the transfer of State–owned land amounted to a transfer of State resources. Because the operation and construction of airport infrastructure must be considered as a task falling within the ambit of State aid control only from the date of the judgment in *Aéroports de Paris* (12 December 2000), only transfers that took place after that date were relevant for a State aid analysis, Germany was asked to clarify which plots of land were transferred after 2000 and how much they were worth. The Commission observed further that the transfer did not comply with the MEO test, was selective, and, for the same reasons mentioned as regards the general financing, distorted competition and affected intra–Union trade.

(53) Germany argued that the transferred land was at least partially needed for safety or security reasons (such as construction of security fences), with the consequence that these measures could not constitute State aid for the purposes of Article 107(1) of the Treaty. The Commission asked Germany to clarify exactly which measures were directly related to air traffic safety and the exercise of sovereign prerogatives, and expressed its doubts that the construction of security fences merely served the purpose of ensuring secure airport operations, thereby falling also within the remit of costs necessarily linked to the economic activity of operating an airport. Germany was further asked to explain whether the public financing of activities falling within the public policy remit is regulated in the same way with regard to all German airports, or whether some airports had to bear costs themselves that were covered by the State for other airports.

(54) Accordingly, the opening decision reached the preliminary conclusion that the transfer of land constituted State aid for the purposes of Article 107(1) of the Treaty.

Compatibility

(55) The opening decision recalled that it is the Member States' responsibility to invoke possible grounds of compatibility and to demonstrate that the relevant conditions are fulfilled. It was noted that since Germany did not believe that the transfer of land in question amounted to State aid, they had not presented any arguments regarding compatibility. The Commission asked Germany to explain whether the transfer of land could be compatible pursuant to the Rescue & Restructuring Guidelines. The Commission further stated that, based on the information available at the time of adopting the opening decision, it had doubts about the compatibility of the measure with the internal market.

2.2.3. GUARANTEES ON LOANS TO THE BENEFIT OF VH SAAR AND FSBESITZG

Detailed description of the measure

(56) The *Land Saarland* granted guarantees to FSBesitzG on three occasions (two guarantees in the year 1998, one in the year 1999), each time without receiving any remuneration. Additionally, the *Saarland* issued two letters of comfort as security for two loans taken up by vh Saar. vh Saar transferred these loans to FSBesitzG.

Table 6

Guarantees and Letters of Comfort

Year	Loan Amount (EUR)	Duration of Loan	Beneficiary
1998	[…]	30 Dec. 2017	FSBesitzG
	[…]	1 Oct. 2017	FSBesitzG
1999	11 453 000	—	FSBesitzG
2005	3 700 000	31 Jan. 2021	vh Saar
2006	10 000 000	31 Aug. 2039	vh Saar

Reasons for opening the formal investigation procedure

Existence of aid

(57) The opening decision noted that, for the same reasons as mentioned in recital 52, only guarantees granted after the year 2000 were relevant for the State aid assessment. Due to the information available at the time, the Commission assumed that the guarantee covering a loan amounting to EUR 11 453 000 had been granted after 2000. It explained that since the guarantee for this loan, as well as the comfort letter issued for the 2005 and 2006 loans taken out by vh Saar, covered 100 % of the loans and that since the *Saarland* had not received any remuneration for the guarantee/comfort letters, they appeared to constitute State aid pursuant to the Guarantee Notice ([14]). Regarding selectivity, distortion of competition and effect on trade, the same considerations applied as those which were outlined with respect to the FSBesitzG/FSG's general financing by vh Saar.

Compatibility

(58) The opening decision assumed that the guarantee for the loan amounting to EUR 11 453 000 was granted after 2000. Noting that the underlying loan served to finance the new terminal building, the opening decision assessed the compatibility of the guarantee pursuant to Section 4.1 of the 2005 Aviation Guidelines. It reached the preliminary conclusion that it was doubtful whether the new terminal served a clearly defined objective of public interest (since it was not clear that other nearby airports could not serve Saarbrücken Airport's catchment area as well), whether the terminal was necessary for the functioning of the airport, whether it had satisfactory medium–term prospects (since Germany had not submitted any data on when the airport would become profitable), whether all users had equal and non–discriminatory access to the infrastructure (since it was not clear that all received the same advantages as Cirrus and Air Berlin), and finally whether it affected the development of trade to an extent contrary to the Union interest.

(59) As regards the 2005 and 2006 letters of comfort, the opening decision observed that Germany had not explained what purpose the underlying loans served. For this reason, and as Germany had not submitted arguments on the compatibility of these measures, the Commission reached the preliminary conclusion that the State aid involved in these measures was incompatible with the internal market.

2.2.4. THE LEASE CONTRACT BETWEEN FSBESITZG AND FSBG

Detailed description of the measure

(60) After the original FSG was split into FSBesitzG and FSBG in 1997, the FSBG leased the airport infrastructure from FSBesitzG. Under the lease contract of 7 July 1997, FSBG had to pay a fixed annual amount of […] per year plus turnover tax. On 3 August 2006, FSBG and FSBesitzG signed a new lease contract, retroactively applicable as from 1 July 2006.

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

(61) Under the 2006 contract, the fixed annual lease payment was set at […] per year. In addition, the FSBG had to transfer a certain percentage of its annual profit […].

(62) Based on these contracts, FSBG paid the following amounts as rent for the airport infrastructure to FSBesitzG:

Table 7

Lease Payments made by FSBG

Year	Lease Payment
2000	[…]
2001	[…]
2002	[…]
2003	[…]
2004	[…]
2005	[…]
2006	[…]
2007	[…]

(63) As FSBG and FSBesitzG merged at the beginning of 2008, no further leasing payments were due after that date.

Reasons for opening the formal investigation procedure

Existence of aid

(64) The opening decision first observed that the modified lease contract was concluded between FSBesitzG and FSBG, thus without direct involvement of any public authorities. However, it noted that FSBesitzG was owned entirely by public authorities (0,1 % belonged to the *Saarland* directly, 99,9 % belonged to vh Saar, which itself belonged 100 % to the *Saarland*), making it a public undertaking. It further noted that due to the various control mechanisms, the *Saarland* had comprehensive control over the FSBesitzG and reached the preliminary conclusion that, if the lease contract would be found to have granted FSBG an advantage in the form of below–market–price leasing rates, this advantage involved a transfer of State resources and was imputable to the State.

(65) The opening decision then outlined that from 2000 onwards, FSBG had to be considered as engaging in economic activities and therefore constituting an undertaking. At the time of the opening decision, the Commission had not received any information on the lease contracts before 2000 and whether the lease contract that existed until 2006 had been amended after 2000. The contract that was in force until 2006 could therefore have constituted existing aid. Germany was asked to provide further information on this question.

(66) As regards the question of whether the lease contract granted FSBG an advantage, the opening decision outlined the Commission's doubts as to whether the lease payments made by FSBG were in line with market conditions. It accordingly asked Germany for comprehensive information on the financial relations between FSBesitzG and FSBG as well as on the determination of the terms of the lease contract and the economic rationale underpinning them.

(67) On the basis of these considerations, the opening decision reached the preliminary conclusion that the lease payments made by FSBG contained an element of State aid.

Compatibility

(68) The opening decision points out that it reached the preliminary conclusion that the lease payments contain State aid in the sense of operating aid, as the below–market–price payments reduced the operating costs the FSBG had to bear. The opening decision pointed out that such operating aid is, in principle, not compatible with the internal market and requested Germany to clarify whether this aid could fall under the Rescue & Restructuring Guidelines or to present other arguments on compatibility.

2.2.5. DISCOUNTS FOR AIRLINES

Detailed description of the measure

(69) Until 2007, the applicable schedule of airport charges in Saarbrücken did not envisage any discounts for airlines. On 1 April 2007, FSBG introduced a new schedule, which provided for a series of discounts available to airlines that fulfilled certain conditions. This schedule was also adopted by FSBesitzG/FSG after the merger of the two companies.

(70) The 2007 schedule introduced three types of discounts. The first two could not be cumulated, while the third could be additional to any other discounts received.

(a) Discounts for new airlines: for airlines operating from Saarbrücken for the first time, a reduction of aircraft movement, start/landing, and passenger charges by 50 % in the first year, 30 % in the second year, and 20 % in the third year, were offered.

(b) Discounts for new destinations: discounts of the same magnitude and on the same charges were offered for airlines serving new destinations, that is to say destinations that had not been served in at least the previous 12 months.

(c) Reimbursement for increase of passenger numbers: airlines that transported between 60 000-100 000 pax, or more than 100 000 pax during one calendar year, received a reimbursement of 5 % or 10 % respectively of the passenger charges they paid during that year.

Reasons for opening the formal investigation procedure

Existence of aid

(71) The opening decision assumed that the new schedule of 1 April 2007 was adopted by FSBesitzG. On this basis, the opening decision proceeded to recall that due to the comprehensive control that the public authorities enjoyed over FSBesitzG, the introduction of this new schedule was imputable to the State. To the extent that the schedule provided for below–market–price charges, the schedule therefore constituted a transfer of State resources that was imputable to the State.

(72) Germany submitted that the discounts were motivated by economic considerations and complied with the MEO test. The opening decision stressed, however, that Germany had so far not provided sufficient information to allow the Commission to fully assess this claim. Germany was therefore asked to provide comprehensive information on the costs and revenues of the airport, in particular those related to commercial passenger aviation. In addition, the Commission sought clarification on whether the schedule of charges was applied without discrimination between airlines.

(73) The opening decision concluded by expressing that it was doubtful whether discounts in the schedule of 1 April 2007 could be justified on the basis of the MEO test and that it could therefore not be excluded that the airlines in question received an advantage. As the discounts were also liable to distort competition and effect trade between Member States, the Commission reached the preliminary conclusion that the discounts constituted State aid.

Compatibility

(74) The opening decision assessed whether the discounts could qualify as compatible start–up aid pursuant to Section 5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed doubts as to whether the various conditions for the compatibility of start–up aid were fulfilled.

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

(a) It was doubtful whether the discount for an increase in passenger numbers fulfilled the condition of point (c) of point 79 of the 2005 Aviation Guidelines since it did not require a new route or frequency.

(b) It was doubtful whether the discount for an increase in passenger numbers fulfilled the condition of point (d) of point 79 of the 2005 Aviation Guidelines since it was not degressive and of limited duration.

(c) It was doubtful whether all the discounts fulfilled the condition of point (f) of point 79 of the 2005 Aviation Guidelines since there was no obligation on airlines to repay any of the discounts received if they operated from Saarbrücken for at least three years.

(d) It was doubtful whether the discounts for new routes and new airlines fulfilled the condition of point (g) of point 79 of the 2005 Aviation Guidelines since they were not dependent on passenger numbers.

(e) It was doubtful whether at least the discounts for an increase in passengers fulfilled the condition of point (i) of point 79 of the 2005 Aviation Guidelines since it did not include the requirement of a prior business plan.

(f) It was doubtful whether all the discounts fulfilled the condition of point (j) of point 79 of the 2005 Aviation Guidelines since none of the required information appeared to have been published.

(g) It was doubtful whether all the discounts fulfilled the condition of point 80 of the 2005 Aviation Guidelines since it was not clear whether they could be cumulated and since it appeared that at least the discount for increased passenger numbers could be combined with the two others.

(76) As the cumulative conditions for compatible start–up aid did not appear to be fulfilled and since no other compatibility grounds were apparent, the Commission reached the preliminary conclusion that the discounts constituted incompatible State aid.

2.2.6. START–UP AID TO CIRRUS AIRLINES

Detailed description of the measure

(77) On 27 January 2005, FSBesitzG signed a start–up contract with Cirrus Airlines Luftfahrtgesellschaft mbH ('Cirrus') with a duration of one year. The purpose of the contract was the increase of passenger numbers for the route to […]. The contract stated that an increase of passengers would only possible if ticket prices were reduced considerably so that Cirrus became attractive for passengers. It explained further that this project would incur high losses in the start–up phase. Therefore the airport was ready to support the project with a start–up financing.

(78) The start of flight operations was set for 29 March 2005. The contract was based on a business plan which contained the passenger numbers and average net yields. The contract determined also the type of aircraft to be used.

(79) The contract obliged Cirrus to provide scheduled flights between Saarbrücken and […] with a frequency of […] flights on […] days per week, […] flights […]. The contract stated explicitly that Cirrus […]. The contract was subsequently extended and modified various times and finally expired on 31 December 2006.

(80) The remuneration due pursuant to the contract was calculated in accordance with the following formula:

[…]

Over the course of the duration of the contract, the annual amount of remuneration paid out to Cirrus by FSBesitzG was as follows:

Table 8

Payments to Cirrus Airlines in EUR

Year	Net Remuneration	Gross Remuneration
2005	[…]	[…]
2006	[…]	[…]

Reasons for opening the formal investigation procedure

Existence of aid

(81) The opening decision first noted that the decision of FSBesitzG involved a transfer of State resources and was imputable to the State. Cirrus was also clearly an undertaking carrying out economic activities. The question was then whether the contract granted Cirrus an advantage that Cirrus could not have otherwise obtained on the market. As Germany had not provided any explanation as to why the contract was concluded, it was asked to clarify whether it believed that in concluding the contract FSBesitzG acted like a rational MEO and, if so, to provide documentation supporting this view.

(82) The opening decision pointed out that, at the time the decision was adopted, the Commission had not received any indication that Germany had compared expected costs and revenues arising from this contract. On this basis, it preliminarily concluded that the contract with Cirrus constituted State aid.

Compatibility

(83) The opening decisions assessed whether the contract with Cirrus could qualify as compatible start–up aid under Section 5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed doubts as to whether the various conditions for compatible start–up aid were fulfilled.

(84) In particular, the opening decision observed that the contract with Cirrus apparently failed to fulfil the following conditions:

(a) point (c) of point 79 of the 2005 Aviation Guidelines, since the Cirrus route between Saarbrücken and […] apparently already existed and no information was provided on new frequencies that could lead to a passenger increase;

(b) point (d) of point 79 of the 2005 Aviation Guidelines, since the contract did not appear to be either degressive or truly time–limited, given that it had been extended various times, and because it was not clear whether Cirrus had demonstrated the long–term profitability of the route;

(c) point (e) of point 79 of the 2005 Aviation Guidelines, since the contract did not limit the support to additional start–up costs;

(d) point (f), first subparagraph of point 79 of the 2005 Aviation Guidelines, since the contract had no fixed end date and did not limit the aid amount by reference to the costs;

(e) point (f), third subparagraph of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether the time for which the aid was granted to Cirrus was substantially less than the period during which Cirrus committed to operate from Saarbrücken;

(f) point (g) of point 79 of the 2005 Aviation Guidelines, since the aid appeared to be linked to the development of the number of passengers transported;

(g) point (h) of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether the contract had been published before its conclusion and made available to other airlines as well;

(h) point (i) of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether FSBetriebG had access to a business plan of Cirrus and whether the airport had investigated the effects of the aid on competing routes;

(i) point (j) of point 79 of the 2005 Aviation Guidelines, since the required list of subsidised routes had apparently not been published;

(j) point (k) of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether Germany had put in place the required appeal procedure;

(k) point 80 of the 2005 Aviation Guidelines, since it appeared that Cirrus had combined the aid pursuant to the contracts with that pursuant to the 2007 schedule of charges.

(85) As the cumulative conditions for compatible start–up aid did not appear to be fulfilled and since no other compatibility grounds were apparent, the Commission reached the preliminary conclusion that the contract with Cirrus constituted incompatible State aid.

2.2.7. MARKETING AGREEMENT WITH AIR BERLIN

Detailed description of the measure

(86) On 6 April 2011, FSG signed a Marketing Agreement with Air Berlin PLC & Co. Luftverkehrs KG ('Air Berlin'), with a duration until 2 May 2014. The Agreement obliged Air Berlin to deliver marketing and publicity services to FSG. The agreement stated: […] FSG expected that the increased frequencies would trigger higher revenues from aviation and non–aviation activities. Additionally, Air Berlin was obliged to promote the two connections from and to Saarbrücken (information of the frequencies increase in the press, by emails, briefings of travel agencies, magazines, print media, at the check–in, on board, on the radio, etc.). FSG remunerated Air Berlin for the marketing service with a total of [EUR 800 000–EUR 1 700 000].

Reasons for opening the formal investigation procedure

Existence of aid

(87) Similar to the Cirrus contract, the marketing agreement concluded with Air Berlin also raised the question whether that agreement was in line with market conditions. All other conditions, such as the imputable transfer of State resources and selectivity were assumed to be fulfilled.

(88) Germany had submitted that it had conducted a cost–benefit analysis which demonstrated that the contract was profitable for the airport in the long term. It had not, however, provided that analysis, which prevented the Commission from assessing how the airport calculated the expected costs and revenues arising from the contract. Noting further that the only advantage accruing to the airport from the contract appeared to be the expected increase in passengers, the contract itself seemed to be nothing more than an additional discount on the airport charges, which were even cumulated with the discounts already available under the 2007 schedule of charges.

(89) On the basis of these considerations, the opening decision reached the preliminary conclusion that the marketing agreement with Air Berlin granted the latter a selective advantage. As all the other elements of State aid were also preliminarily found to be present, the Commission reached the preliminary conclusion that this contract contained an element of State aid.

Compatibility

(90) The opening decision assessed whether the marketing agreement could qualify as compatible start–up aid pursuant to Section 5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed doubts as to whether the various conditions for compatible start–up aid were fulfilled.

(91) In particular, the opening decision observed that the agreement with Air Berlin apparently failed to fulfil the following conditions:

(a) point (d) of point 79 of the 2005 Aviation Guidelines, since it was unclear whether Air Berlin had demonstrated the long–term profitability of the route;

(b) point (e) of point 79 of the 2005 Aviation Guidelines, since the contract did not limit the support to additional start–up costs;

(c) point (f), first subparagraph of point 79 of the 2005 Aviation Guidelines, since the contract did not limit the aid amount by reference to the costs;

(d) point (f), third subparagraph of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether the time for which the aid was granted to Air Berlin was substantially less than the period during which Air Berlin committed to operate from Saarbrücken;

(e) point (g) of point 79 of the 2005 Aviation Guidelines, since the aid was unconnected to the actual development of passenger numbers;

(f) point (h) of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether the contract had been published before conclusion and made available to other airlines as well;

(g) point (i) of point 79 of the 2005 Aviation Guidelines, since it was unclear whether the cost–benefit analysis undertaken by the Airport, which had not been provided to the Commission, complied with the conditions;

(h) point (j) of point 79 of the 2005 Aviation Guidelines, since the required list of subsidised routes had apparently not been published;

(i) point (k) of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether Germany had put in place the required appeal procedure;

(j) point 80 of the 2005 Aviation Guidelines, since it appeared that Air Berlin had combined the aid pursuant to the contracts with that pursuant to the 2007 schedule of charges.

(92) As the cumulative conditions for compatible start–up aid appeared not to be fulfilled and other compatibility grounds were not apparent, the Commission reached the preliminary conclusion that the contract with Air Berlin constituted State aid incompatible with the internal market.

3. COMMENTS RECEIVED FROM GERMANY

3.1. *FINANCING OF VH SAAR, FSG, AND FSBESITZG*

3.1.1. EXISTENCE OF AID

Undertaking and economic activity

(93) Germany does not dispute that FSBesitzG and FSG carry out economic activities and must be qualified as undertakings for the purpose of Article 107(1) of the Treaty. In so far as FSBesitzG and FSG carry out activities forming part of the sovereign prerogatives of the State, they would not, however, constitute undertakings.

(94) In this context, Germany submitted a table with expenses (both operating and investment expenses) relating to the public policy remit which occurred in the time between 2000 and 2011:

Table 9

Costs relating to the public policy remit in EUR ([1])

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
§ 8 LuftSiG													
Feuerwehr													
Außenumzäunung/Bestreifungsweg													

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
Neues Zugangs–kontrollsystem													
Container Tor 1													
Rollwegbeschil-derung													
Unterbrechungs-freie Stromvers. (Notstrom)													
Abstellfläche Ost, Bombenbedrohte Flz.													
Erweiterung S/L–Bahnköpfe, RESA													
Flughafennaviga-tion													
Summe p.A.													

([1]) Submission of information by Germany of 5 May 2012, Annex II.

(95) Germany argues that any financing of airport security measures pursuant to § 8 *Luftsicherheitsgesetz*, of air traffic control and of air safety measures pursuant to § 27(c)(2) *Luftverkehrsgesetz* and of the fire brigade falls within the public policy remit. According to Germany, fences around the airport and control footpaths, a container gate, runway signs, emergency electricity, parking spaces for airplanes subject to bomb threats and extension of runway–end safety areas (RESAs) fall under § 8 *Luftsicherheitsgesetz* and fall therefore also in the public policy remit.

(96) With regard to air traffic control and air safety measures pursuant to § 27(c)(2) *Luftverkehrsgesetz*, Germany submits that the State does not cover the costs for these measures for all airports, but that the different treatment of different airports is justified and therefore does not involve an advantage. More concretely, § 27(c)(2) distinguishes between certain airports where the financing of these security measures at federal level is regarded as being necessary for reasons of safety and transport policy interests, and other airports where such measures are not regarded as strictly necessary from a federal perspective. The Federal Ministry of Transport has so far recognised the financing of several airports, among those Saarbrücken, as being necessary for reasons of safety and transport policies. This is why financing of regional airports, which would normally have to bear those costs themselves, is not discriminatory. The funding of air traffic control and air safety measures, whether financed directly by the State on the federal level or by the *Länder*, is part of the public policy remit in all cases.

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

(98) As regards vh Saar, Germany submits that the company cannot be considered an undertaking. First, it is asserted that vh Saar does not itself act on the market, but merely holds shares in other companies (namely the airport and HSG). By referring to a judgment of the Court of Justice ([15]), Germany recalls that merely holding shares in other companies, even if it is a controlling share, is not in itself an economic activity. It is further submitted that an exception from this principle, according to which a holding company does engage in an economic activity where it exercises influence over the companies it owns shares in, does not apply in the case of vh Saar.

Advantage

(99) Germany argues, with respect to vh Saar, that the company did not receive any advantage from State resources, as it passed all funds received from the *Saarland* on to FSBesitzG/FSG. In consequence, it denies that vh Saar could be considered a beneficiary.

(100) As regards the funds received by FSBesitzG/FSG from vh Saar via the P&L agreement, Germany asserts that no advantage was granted as all financing merely compensated the FSBesitzG/FSG for providing a service of general economic interest (SGEI) in accordance with the *Altmark* jurisprudence.

First Altmark criterion: entrustment with a SGEI

(101) Germany argues that the operation of the airport, including the construction and maintenance of the necessary infrastructure, constitutes a SGEI. The notion of SGEI is defined by Germany as services rendered on a market, in the reliable and stable provision of which the public has a general interest, which the market itself cannot provide, and which are provided by an entity which has been entrusted with a corresponding obligation.

(102) As regards the operation of Saarbrücken Airport, Germany maintains that it involves offering services on a market. It further argues that, having less than 500 000 passengers per year and being thereby below the threshold in the 2005 Aviation Guidelines from which an airport can be expected to be profitable, the airport offers services that the market would otherwise not provide.

(103) According to Germany, Saarbrücken Airport has been entrusted with the obligation to provide these services. That obligation, so Germany states, results from the operating licence and the provision of German aviation law. Germany refers specifically to § 45(1) of the Aviation Licencing Regulation (*Luftverkehrszulassungsordnung*), which provides that an airport undertaking has to 'maintain the airport in a safe–to–operate state and to properly operate it'. The obligation to operate involves the duty to make airport services available to aircraft without any discrimination during the regular operating hours, which are themselves laid down in the operating licence and cannot be changed unilaterally by the airport operator. Any violation of the obligation to operate the airport would result in fines of up to EUR 50 000 pursuant to § 108 *Luftverkehrszulassungsordnung* in connection with § 58(1)(10)(2) *Luftverkehrsgesetz*. Germany finally submits that, in addition, the *Land* ensures the proper operation by means of its comprehensive control over the operator.

(104) Commenting on the opening decision's observation that no formal entrustment act appeared to be in place, Germany asserts that the combination of the factors mentioned in recital 103, and in particular the comprehensive and strict control over the airport exercised by the *Saarland*, ensure that the purposes of entrustment are realised in at least the same way as it would be the case if a formal entrustment act were in place.

(105) In supporting its claim that the operation of the airport constitutes an SGEI, Germany asserts that the airport forms an essential part of the traffic infrastructure in the *Saarland*, which is necessary in particular to connect the region with the rest of the country and major aviation hubs. The particular importance of this connection is said to stem from the *Saarland*'s geographical position on the margin of Germany, far away from the country's major metropolitan centres.

([15]) Case C–222/04, *Ministero dell'Economia e delle Finanze/Cassa di Risparmio di Firenze SpA et al.*, point 111.

(106) The airport is, first, claimed to serve the region's population by catering to their touristic and private traffic needs. The *Saarland* is said to increasingly develop as a destination for tourism. Germany secondly asserts that it is vital for the connection of the *Saarland*'s scientific, cultural, and social institutions, which are predominantly located in the City of Saarbrücken. Thirdly, the significance of the airport for the local economy and regional development is emphasised, especially in light of the ongoing structural transition away from an economy based on coal–mining and towards an international and innovative economy. Germany points out that companies base their decision to move to the *Saarland* often on the fact that there is an airport. It further refers to a study of 2009 according to which the demand for the provision of air passenger transport is supposed to increase in the future.

(107) Germany underpins its foregoing submission by asserting that the steady increase of passengers at Saarbrücken over the last decades, the results of a study showing further growth potential, and the fact that other airports in the region cannot satisfy the local demand, all demonstrate the importance of the airport for the local population and economy. Germany invokes the 2005 Aviation Guidelines, which state that 'it is not impossible to consider the overall management of an airport, in exceptional cases, to be considered a service of general economic interest', for example where an airport is located in an 'isolated region', and assert that Saarbrücken is such an exceptional case because of its geographical position and the on–going structural changes of the local economy ([16]). It finally submits that the financing does not fund activities going beyond the 'basic activities' in point 53(iv) of the 2005 Aviation Guidelines.

(108) Germany next asserts that the existence of an SGEI cannot be undermined by the allegedly missing necessity of the airport. It argues that other airports in the region cannot satisfy the needs that Saarbrücken Airport caters to. In particular, it is submitted that the other airports in the region are either too distant from Saarbrücken Airport's core catchment area (such as the airports in Luxembourg, Netz–Nancy–Lorraine, and Frankfurt–Hahn) or not comparable to Saarbrücken because of their smaller size and limited services offered (Zweibrücken, above all).

Second Altmark criterion: compensation parameters

(109) Germany argues that the purpose of the second *Altmark* criterion is to avoid overcompensation and to ensure efficient utilisation of public funding. It asserts that based on the strict control exercised by the local authorities over the airport, ensuring responsible economic behaviour, and the fact that the latter's activities are limited to providing a SGEI, the purpose of the second criterion is fulfilled. It is finally asserted that, in any event, the financing modalities are designed in such a way as to exclude any possibility of abusive reliance on SGEI compensation.

Third Altmark criterion: avoidance of overcompensation

(110) Germany maintains that the public financing never went beyond the amount necessary to facilitate the provision of the SGEI, taking into account all the relevant revenues. The activities of the airport, it is stressed, are limited to providing the SGEI in question, with the consequence that no other costs that could have been cross–subsidised arose. It is further submitted that the infrastructure and the airport operations are necessary and appropriate to satisfy the air traffic needs in Saarbrücken Airport's catchment area. FSBesitzG and FSG did not and do not generate profits, and FSBG only achieved marginal profits. Germany asserts that the local authorities closely monitored the utilisation of public funds and would have intervened if inefficiencies had existed.

Fourth Altmark criterion: public tender or benchmarking

(111) As the airport has been in existence for a long time well before the provision of airport services came to be considered as an economic activity, Germany submits that it chose not to tender the SGEI, but rather to continue relying on the existing airport. It is nevertheless submitted that the fourth criterion is fulfilled, as Germany considers that the local authorities have closely monitored the activities of the airport, thereby ensuring that only efficient costs were reimbursed. While the *Saarland* does not have precise data on other regional airports, it assumes that Saarbrücken Airport's efficiency is average, and that the local authorities would have recognised and eliminated any inefficiency. Germany finally submits that due to the various differences existing between regional airports in Germany, a simple comparison is not meaningful. In this situation, the Commission should be content with the fact that there is no indication that Saarbrücken is inefficient.

([16]) 2005 Aviation Guidelines, point 34.

Intermediary conclusion on Altmark/SGEI

(112) As Germany is of the opinion that all four *Altmark* criteria are fulfilled, it submits that the financing of the airport from State resources does not constitute an advantage, but merely a compensation for the provision of a SGEI.

Market economy operator principle

(113) Germany explains that because of Saarbrücken Airport's great structural and economic significance for the region, the *Saarland* considers the operation as an SGEI, not as a for–profit business activity. Accordingly, a closure of the airport is no option and no analyses of the costs and benefits of a closure exist.

Distortion of competition and effect on trade

(114) Arguing that the financing of the airport does not distort competition or affect trade between Member States, Germany submits that it does not constitute State aid. In this context, Germany recalls that the 2005 Aviation Guidelines state that funding a small regional airport with less than 1 million pax 'is unlikely to distort competition or affect trade to an extent contrary to the common interest' ([17]). Saarbrücken Airport falls within this category of cases, and according to Germany there are no reasons to depart from the general presumption: Saarbrücken Airport is a typical regional airport catering to the needs of the population in the region and the majority of passengers are in fact from the region.

(115) With a view to other airports in the region, especially those located in other Member States, it is argued that the catchment area of Saarbrücken Airport covers Saarbrücken and the surrounding areas, but hardly extends to other Member States. Indeed, it is said that only [less than 14 %] of passengers stem from either France […] or Luxembourg […]. Germany considers that the only foreign airports in potential competition with Saarbrücken are Metz–Nancy–Lorraine Airport and Luxembourg Airport. These two airports are, however, over an hour's drive away from Saarbrücken, so that — assuming an airport's catchment area covers all locations from which that airport can be reached within 60 minutes — their catchment areas only marginally overlap. What is more, the locations in which they do overlap are sparsely populated and said to generate few passengers, while Saarbrücken Airport's core catchment area does not fall within the catchment area of the mentioned foreign airports.

(116) In addition, it is argued that the profiles of the two mentioned foreign airports and of Saarbrücken Airport are very different: Luxembourg is significantly larger (approximately 1,5 million passengers per annum) and offers more diverse routes, while Metz–Nancy–Lorraine is significantly smaller and offers exclusively scheduled flights within France and charter flights to North Africa Germany maintains that, as regards Luxembourg Airport in particular, no competition exists as the two airports complement rather than substitute each other.

(117) As regards the neighbouring airports in Germany, Germany submits that Saarbrücken Airport is not in competition with either Frankfurt–Hahn or Zweibrücken. As far as the former is concerned, it is asserted that the catchment areas overlap only insignificantly due to the distance between the two airports, that Frankfurt–Hahn is much larger (approximately 3,5 million passengers per annum), and offers almost exclusively international routes by low–cost carriers, while these carriers do not serve Saarbrücken. Additionally, air freight is important in Frankfurt–Hahn, but plays no role in Saarbrücken.

(118) With respect to Zweibrücken, Germany emphasises that while Zweibrücken Airport is, due to its close proximity with Saarbrücken, most likely to be in competition with that airport, the relationship between the two airports is in fact complementary and not competitive. While Zweibrücken does not offer any scheduled flights, but is exclusively used for charter flights, Saarbrücken specialises in scheduled flights for business travellers. These different profiles are reflected in the respective infrastructure, with Saarbrücken's higher–quality facilities being typical for airports focusing on scheduled flights. In addition, air freight plays a role in Zweibrücken, while the same is not true in Saarbrücken due to the latter's short runway and ban on night flights.

([17]) 2005 Aviation Guidelines, point 39(2).

(119) Building on the perceived complementarity between Zweibrücken and Saarbrücken airports, Germany declares that a closer cooperation between the two airports is envisaged. The respective regional governments have already decided to cooperate more closely in the future, envisaging the creation of a joint airport ('Saar–Palatinate–Airport') with two locations (Saarbrücken and Zweibrücken). The cooperation should lead to synergies and safe funds. Finally, Germany emphasises the demand for aviation services in the region (both airports taken together already have 750 000 pax), maintaining that only Saarbrücken and Zweibrücken together can properly satisfy this demand, in particular because the other neighbouring airports cannot serve as substitutes.

(120) Germany stresses that even if the airports in Saarbrücken, Zweibrücken, and Frankfurt–Hahn were found to be in competition with each other, any public support measures would not affect trade between Member States. All three airports are located in Germany, the operating companies are German and the shareholders are German territorial entities.

(121) Finally, it is asserted that any distortion of competition or effect on trade would be so marginal that a '*de minimis* rationale' should be applied in the case at hand, leading to the conclusion that any such effect is not appreciable.

3.1.2. EXISTING AID AND COMPATIBILITY

(122) In the alternative and if the Commission should not follow the argument of Germany that the financing measures do not constitute State aid, Germany submits that the measures constitute existing aid, are in any event compatible as well as exempted from notification under the 2005 SGEI Decision, comply with the compatibility criteria set out in Sections 4.1 and 4.2 of the 2005 Aviation Guidelines, and can be justified as compatible pursuant to Article 107(3)(c) of the Treaty.

Existing aid

(123) Germany points out that if the P&L agreement between vh Saar and FSBesitzG/FSG were to be found to constitute State aid, it would qualify as existing aid. The relevant agreement, legal basis of the annual deficit cover, was concluded on 7 May 1996 and has, according to Germany, not been changed since. If the Commission were to find that the P&L agreement constitutes incompatible State aid, this finding would only have an effect for the future.

2005 SGEI Decision

(124) Germany argues that the financing falls under the 2005 SGEI Decision, as the applicability criteria for aid to airports (less than 1 million pax or less than EUR 100 million turnover in the two years prior to entrustment; less than EUR 30 million in compensation per year) are fulfilled. It further asserts that the conditions enshrined in Articles 4 and 5 of the 2005 SGEI Decision (entrustment with an SGEI, no overcompensation) are complied with, for the same reasons as those mentioned with respect to compliance with the *Altmark* criteria.

(125) Germany also repeats that there is a significant demand for aviation services in the region that cannot be satisfied by neighbouring airports, thereby rejecting the suggestion in the opening decision that the Airport was not necessary to satisfy the local demand for air traffic services. It stresses that relevant studies demonstrate that there are further growth potentials due to a predicted increase in passenger demand which neighbouring airports will not be able to satisfy (Germany refers to their explanations as to the lack of substitutability between the airports of the region and the corresponding lack of competition between them).

(126) As regards, finally, the suggestions in the opening decision that a formal entrustment act, a limitation to the basic activities of an airport, and a transparent fixing of the compensation parameters were missing, Germany refers back to its submissions regarding the compliance with the *Altmark* criteria, claiming that the reasoning presented there is equally applicable in the present context.

2012 SGEI Decision

(127) Germany mentions that the 2012 SGEI Decision, which will be applicable to the measures under discussion in this Decision only after the expiration of the transitional period in 2014, will be relevant only for the future, and then especially for the envisaged cooperation between Saarbrücken and Zweibrücken Airports.

2005 Aviation Guidelines

(128) Germany first asserts that the general financing measures are compatible with the internal market pursuant to Article 106(2) of the Treaty in connection with Section 4.2 of the 2005 Aviation Guidelines (aid for operation of airport infrastructure). In support of this submission it merely refers back to the arguments presented with respect to the compliance with the *Altmark* criteria and the 2005 SGEI Decision.

(129) With respect to compatibility pursuant to Section 4.1 of the 2005 Aviation Guidelines (financing of airport infrastructure), Germany submits that all conditions set out therein are fulfilled.

Construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.)

(130) Germany refers to their submissions regarding the existence of an SGEI for the purpose of demonstrating that Saarbrücken Airport meets an objective of general interest. It repeats that the airport satisfies the aviation needs of the local population, that the accessibility of the region cannot be ensured by the neighbouring airports, and that the airport is crucial for the economic development of the region.

The infrastructure is necessary and proportionate to the objective

(131) According to Germany, the infrastructure, especially the terminal building that has been in use since 2000 and the modernised runway are strictly necessary to achieve the objective and are not disproportionately large or elaborate. The investments into the infrastructure were necessary to maintain or replace the worn–out infrastructure and to adapt to increasing passenger numbers, heightened demands in terms of comfort, as well as stricter safety and security requirements. Without the investments, the Airport would not be operational. Germany also recalls that the existing infrastructure was regularly congested before the construction of a new terminal (starting in 1999) […]. It finally submits that the necessary investments could not have been financed from the operating company's own capital.

The infrastructure has satisfactory medium–term prospects for use

(132) Based on the already existing utilisation and the expected further increase in passenger numbers, Germany maintains that the infrastructure has more than satisfactory prospects for use. It refers to a prognosis of the development of aviation in the region, demonstrating that demand will grow.

(133) Germany submits that, when the construction of the new terminal building started in 1999, it was not foreseeable that the events of 11 September 2001 in the United States, the ash–cloud following a volcano eruption on Iceland in 2010, and the global economic crisis between 2008 and 2011 would negatively affect passenger numbers in Saarbrücken. These events are said to have affected the entire European aviation sector, delaying the otherwise positive development. Nevertheless, the positive trend that was already visible in 1999 is, according to Germany, still detectable, leading to the expectation that Saarbrücken Airport's capacity will be fully utilised in the medium term (taking account also of the envisaged cooperation with Zweibrücken Airport).

(134) With respect to the financial prospects, Germany stresses that a positive EBITDA is expected for 2020, and that this is sufficient to satisfy the requirement of satisfactory medium–term prospects for use. It recalls that the Commission itself has acknowledged that regional airports do not generally generate profits which could be reinvested into the infrastructure, a fact which cannot preclude compatibility of support measures pursuant to the 2005 Aviation Guidelines.

All potential users of the infrastructure have access to it in an equal and non–discriminatory manner

(135) As all airlines have access to the airport on a non–discriminatory basis and fall under the generally applicable schedule of charges, including discounts contained therein, Germany is of the opinion that this criterion is fulfilled. It stresses that especially the discounts are not designed in such a way that they would create a *de facto* selective advantage for some airlines. Finally, it asserts that the individual contracts concluded with Cirrus and Air Berlin are not relevant in this context, and that in any event all airlines had the possibility of concluding such contracts.

The development of trade is not affected to an extent contrary to Union interest

(136) It is not clear to Germany how the 'moderate' extension of the infrastructure at Saarbrücken Airport could have or have had effects on trade. It recalls that the Commission has accepted that support to small regional airports usually does not have such an effect. As regards a possible effect on Zweibrücken Airport, Germany repeats that the two airports are not in competition with each other, but must be seen as complementary. It also argues that the infrastructure measures did not have an effect on Metz–Nancy–Lorraine and Luxembourg airports that would be contrary to the Community interest.

Article 107(3)(c) of the Treaty

(137) Germany asserts that at least for the period between 2000 and 2005, the financial support for the airport can be found to be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty. For the purpose of demonstrating the importance of Saarbrücken Airport for the regional economic development and accessibility of the region, Germany refers to its submissions regarding the existence of an SGEI. The financial support has almost exclusively benefited infrastructure projects, which were in line with regional development goals. By way of example, Germany submits extensive explanations as to the necessity of the three biggest single infrastructure investments.

(138) As regards the incentive effect, Germany explains that the airport is an important incentive for extra–regional companies to invest in the *Saarland*. Similarly, companies already present are incentivised to expand and invest further. It is submitted that if an incentive effect were missing, the *Saarland* would, taking into account its difficult budgetary situation, reconsider its support for the airport. Finally, Germany stresses again that the operation of Zweibrücken Airport is not affected.

3.2. *THE TRANSFER OF VARIOUS PLOTS OF LAND TO FSBESITZG*

3.2.1. EXISTENCE OF AID

(139) Germany is of the opinion that the land transfer served security purposes and came within the public policy remit, thereby falling outside of the scope of application of Article 107(1) of the Treaty. More precisely, it is argued that after the runway had been changed, the transferred land was necessary to surround the runway ends with extended security and safety areas and to adapt the existing security fence. Securing the airport territory is, according to Germany, in the public interest and constitutes a sovereign task, not an economic activity. The background to these security measures were legislative changes taking place after the events of 11 September 2001 in the United States.

(140) In addition, Germany submits that the post–2000 transfer of land with a total value of […] did not, in any event, distort competition or affect trade for the same reasons as were mentioned with respect to the general financing measures. Based on the low value, the land transfer would fall under the *de minimis* regulation.

3.3. *GUARANTEES ON LOANS TO THE BENEFIT OF VH SAAR AND FSBESITZG*

3.3.1. EXISTENCE OF AID

(141) The opening decision had assumed that of three known guarantees for FSBesitzG, only one had been granted after 2000. However, Germany explains that the guarantee in question was, in fact, granted in the course of 1999, that is to say before the crucial *Aéroports de Paris* judgment. It is therefore submitted that none of the three guarantees could constitute State aid measures. In the event that the Commission should nevertheless find that these guarantees constituted State aid, Germany submits that they would need to be assessed as existing aid, with the consequence that any Commission decision would only have effects *ex nunc*.

(142) With respect to the letters of comfort, Germany refers to its reasoning regarding the general financing measure for the benefit of the airport (recitals 93–121), claiming it to be equally applicable here.

3.3.2. COMPATIBILITY

(143) Germany argues that if the measures should be qualified as State aid, they would be compatible with the internal market pursuant to the conditions laid down in the 2005 Aviation Guidelines. In this respect, it refers to the arguments presented as regards the general financing measure, claiming that they are equally applicable here.

3.4. *THE LEASE CONTRACT BETWEEN FSBESITZG AND FSBG*

3.4.1. EXISTENCE OF AID

(144) Germany distinguishes between the lease contract concluded in 1997, which was in force until 1 July 2006, and the lease contract which was valid from 1 July 2006 until the merger of FSBesitzG and FSBG.

(145) As regards the 1997 lease contract, it is asserted that if found to constitute State aid, it would qualify as existing aid. If the Commission found this contract to constitute incompatible State aid, such a decision would only have effect for the future, not the past.

(146) With respect to the 2006 lease contract, Germany submits that this contract merely amounted to a modification of the existing aid, and did not qualify was new aid. It emphasises that notably the law on the basis of which such a lease contract could be concluded, had not changed. It alleges that a change of the legislative basis would be necessary for the qualification as new aid.

(147) In addition, Germany asserts that the 2006 lease contract was in line with market conditions at the time. It argues that a variable leasing payment was not uncommon, and that there is no indication that the actual amount charged was uncommonly low. In addition, it is submitted that the variable leasing payment also entailed the possibility of obtaining significantly higher leasing payments than under the previous contract. It is submitted that the 2006 lease contract improved FSBG's ability to act. Finally, Germany argues that it was in FSBesitzG's interest to keep Fraport as a shareholder, since that company's involvement allowed for access to know–how and created synergies.

(148) In any event, Germany maintains that, despite the fact that no documents demonstrating how the leasing payments were calculated are available, the actual amount of the leasing payment was not important, as the close connection between FSBesitzG and FSBG meant that the overall economic impact was neutral. A higher leasing payment would have led FSBesitzG to receive less money from vh Saar, whereas a lower payment would have been compensated through higher transfers from vh Saar.

(149) As regards the distortion of competition and effect on trade, Germany refers to the arguments made in this respect in the context of the general financing measures, holding that these arguments are equally applicable here.

3.5. *DISCOUNTS FOR AIRLINES*

3.5.1. EXISTENCE OF AID

(150) Germany argues the discounts on airport charges introduced in 2007 were economically sensible, did not grant a selective advantage, and did not distort competition/had no effect on trade.

Market economy operator test

(151) Following the departure of Hapag Lloyd/TUIFly in 2006, the passenger numbers at Saarbrücken Airport dropped by 30 %. In this situation, according to Germany, actions were necessary to ensure that the existing capacity was appropriately used in the medium to long term and to maintain the airport's competitiveness and attractiveness. The previous schedule of charges had proved to be a disadvantage in competition, as the airport had the highest charges of all airports in Germany. Germany submits that the discounts did indeed lead to a continuous increase in passenger numbers after 2006. Germany illustrates the positive effect of the discounts by referring to the decision of Air Berlin to start serving Saarbrücken Airport, a decision that was made only after the discounts were in place.

(152) Germany underpins its argument that the discounts made economic sense, with the argument that discounts were only granted to new airlines or new routes. In consequence, so it is asserted, it could be expected that the discounts would have no immediate effect on the status quo, but would lead to an increase of passengers in the future. The economic sense is said to be further underlined by the limitation that the discount could not go beyond 50 % of the investment costs of the new airline or the new route.

(153) While maintaining that the discounts made economic sense, Germany argues that because the discounts were offered to all airlines, it was impossible to make precise *ex ante* calculations of the costs and benefits of the discounts. The costs of a closure of the airport, on the other hand, were not assessed, as closure was never an option.

Selectivity

(154) Relying on the fact that the discounts introduced in 2007 were available to all airlines, Germany maintains that the measure was non–selective. The published schedule of charges, of which the discounts were a part, was general and abstract in character, the discounts were automatically applied to all airlines operating from Saarbrücken that supplied the relevant data, and the airport had no discretion in applying the discounts.

(155) Germany asserts that the purpose of the discounts was to increase the attractiveness of Saarbrücken Airport, not to favour a particular airline. A *de facto* selectivity would also be excluded by the fact that the same charges were applied to all airplanes exceeding 5 700 kg of *Maximum Take–Off Weight* (MTOW), thereby treating all commercial traffic airplanes in an equal manner, and by not discriminating between domestic and international flights. Finally, the discounts did also not discriminate on the basis of the number of landings.

Distortion of competition and effect on trade

(156) As regards the distortion of competition and effect on trade, Germany refers to the arguments brought forward in this respect for the general financing measures, holding that those arguments are equally applicable here.

3.6. *START–UP AID TO CIRRUS AIRLINES*

3.6.1. EXISTENCE OF AID

(157) Germany argues that in concluding the contract with Cirrus, FSBesitzG acted like a private investor could have done, with the consequence that the payments made to Cirrus did not constitute State aid. Additionally, it is submitted that the measure did not distort competition and had no effect on trade.

Market economy operator test

(158) According to Germany, the purpose of the contract with Cirrus was to achieve an increase in passenger numbers. The increase was supposed to result from a higher frequency on the flights to […], as well as from the use of modern aircraft. Both the higher frequency and the obligation to use modern aircraft were particularly intended to increase comfort and flexibility for business travellers.

(159) Germany submits that the frequent amendments to the contract demonstrate that FSBesitzG closely monitored the economic development and was able to react quickly to economic necessity. The short notice period for cancelling the contract (30 days) appears to be a further indication of FSBesitzG's focus on the economic sustainability of the contract, allowing it to cancel the agreement in case that the goals could not be achieved. The long–term profitability was finally supposed to be strengthened by establishing Cirrus as the *home carrier* in Saarbrücken. According to Germany, precise data on expected costs and benefits is, however, not available.

Distortion of competition and effect on trade

(160) As regards the distortion of competition and the effect on trade, Germany refers to the arguments made for the discounts on airport charges introduced in 2007, holding that these arguments are equally applicable here.

3.6.2. COMPATIBILITY

(161) Germany argues that even if they were considered to constitute State aid, the payments to Cirrus can be justified as compatible start–up aid pursuant to the conditions laid out in the 2005 Aviation Guidelines as well as in Article 107 (3)(c) of the Treaty.

(162) Recalling that the contract with Cirrus increased the frequency of that airline's service on the […] route, that FSBesitzG concluded that contract with a view to it being profitable, and that the effect of the increased frequency on other routes could not be investigated because no other airline served […] from Saarbrücken, Germany maintains that the relevant conditions are fulfilled. It further explains that there were no other high–speed connections linking Saarbrücken and […] and that the payments under the contract were not cumulated with discounts on the airport charges (the schedule of charges including the discounts only entered into force after the Cirrus contract had expired). Finally, Germany explains that because it did not see the contract as containing elements of State aid, the existence of the contract was not made public (on a list or otherwise), and no specific appeal mechanism was provided for.

3.7. *MARKETING AGREEMENT WITH AIR BERLIN*

3.7.1. EXISTENCE OF AID

(163) Germany submits that the marketing agreement with Air Berlin was concluded in compliance with the MEO test and does not grant Air Berlin an advantage for the purposes of Article 107(1) of the Treaty. Additionally, it is submitted that the measure did not distort competition and had no effect on trade.

Market economy operator test

(164) Before concluding the contract with Air Berlin, FSG evaluated the costs and expected revenues, concluding that the contract was profitable for the airport. Germany explains that, while the original expectations were not entirely met, an extrapolation of the available real data shows that the contract is still clearly profitable.

(165) In this context, Germany contests the suggestion made in the opening decision that the marketing agreement had no genuine value for the airport apart from increasing the number of passengers on Air Berlin flights. It submits that the marketing activities agreed upon in the contract raise the Airport's profile and draw attention to the region as a travel destination, which in turn entails the possibility to generate further (non–aviation) revenue. Germany argues that when an airline markets a destination, consumers do not only take notice of the fact that this airline serves this destination, but also become aware of the region as a travel destination in general.

(166) Germany also challenges the preliminary finding contained in the opening decision that the marketing agreement effectively introduced additional special discounts for Air Berlin. Germany states that rather, the marketing agreement has genuine economic value for the airport, in such a way that a private investor would also have concluded such a contract, expected to be profitable already after three years.

Distortion of competition and effect on trade

(167) As regards the distortion of competition and effect on trade, Germany refers to the arguments it made concerning the discounts on airport charges introduced in 2007, holding that those arguments are equally applicable here.

4. **COMMENTS RECEIVED FROM AIR BERLIN**

(168) Before arguing that the two measures that directly affect Air Berlin — the general discount scheme on airport charges and the market contract concluded between FSG and Air Berlin — are in compliance with State aid rules, the airline first makes the general remark that it considers a genuine demand for aviation service to exist in the region of Saarbrücken. It stresses that Air Berlin's flights to […] and […] reach a 'Seat Load Factor' comparable to that reached on Air Berlin's flights to the same destinations from […]. Additionally, Air Berlin is of the opinion that none of the other existing airports in the region would be a viable alternative to Saarbrücken, which in turn precludes an effect on trade. In particular, Air Berlin stresses that it has never considered the neighbouring airports […] as an alternative base, given that on those airports the demand for flights to […], a holiday destination mainly fancied by German tourists, is not comparable to the demand for such destinations at Saarbrücken Airport.

4.1. *DISCOUNTS FOR AIRLINES*

(169) With respect to the discounts enshrined in the 2007 schedule of airport charges, Air Berlin, like Germany, argues that due to its abstract and general character, the discounts could not be considered to be selective. Wherever an airline fulfilled the listed conditions, the discounts would be granted without any discretion on the part of the airport.

(170) Additionally, Air Berlin contests the fact that there is competition between airlines from different Member States. Putting forward that only one airline from another Member States operates from Saarbrücken, it submits that the assumption that the measures has an effect on trade is not sustainable.

(171) Air Berlin also claims that the discount system fulfils all the conditions set out in the *Charleroi* judgment of the Court, namely that the discounts are time–limited, degressive, and not available for more than 50 % of the actual start–up and marketing costs.

(172) Finally, Air Berlin asserts that the airport charges at Saarbrücken Airport are, in comparison with other German airports, not particularly low. It is argued that the passenger charges are between […] and […] lower in […].

4.2. *MARKETING AGREEMENT WITH AIR BERLIN*

(173) Air Berlin explains that the development of passenger numbers since the conclusion of the contract confirms the expectations held at the time. On this basis, it could be assumed that the increase in aviation and non–aviation revenue that FSG expected to gain from this contract would materialise.

(174) Further, Air Berlin lists the various connections available via […], as well as the various marketing activities it has undertaken to promote Saarbrücken Airport. It submits that the combination of the increased frequency, the attractive connections, and the promotion of Saarbrücken Airport as a vacation and business destination have significant value for the airport and the region as a whole. As a consequence, according to Air Berlin, the contract makes economic sense for the airport, and therefore a private investor could also have concluded it.

5. **ASSESSMENT**

5.1. *FINANCING OF VH SAAR, FSG, AND FSBESITZG (CAPITAL INJECTIONS INTO VH SAAR, CAPITAL INJECTIONS INTO FSBESITZG/FSG TO COVER LOSSES)*

(175) The financing of vh Saar, FSG and FSBesitzG under assessment consisted of the following measures: vh Saar injected capital into FSBesitzG/FSG in order to cover their losses. vh Saar financed this with capital injections it received from the Saarland and other revenues.

5.1.1. EXISTENCE OF AID

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

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

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

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

(c) distort or threaten to distort competition; and

(d) affect trade between Member States.

Economic activity and notion of undertaking

(178) According to settled case–law, the Commission must first establish whether the vh Saar, FSG, and FSBesitzG are undertakings within the meaning of Article 107(1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ([18]). Any activity consisting in offering goods or services on a given market is an economic activity ([19]).

(179) In its '*Leipzig–Halle Airport'* judgment the Court of Justice confirmed that the operation of an airport for commercial purposes and the construction of the airport infrastructure constitute an economic activity ([20]). Once an airport operator engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) of the Treaty, and the Treaty rules on State aid are therefore capable of applying to advantages granted by the State or through State resources to that airport operator ([21]).

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

(181) In this regard the Commission notes that the infrastructure which is subject to the present Decision was operated by the airport operator FSBG since 1997, while FSBesitzG owned and maintained the airport infrastructure.

(182) Since 2008, FSG is both the owner and the operator of Saarbrücken airport. The airport operator — until 2008 FSBG and since then FSG — charges users for the use of its services and infrastructure, while the infrastructure owner — FSBesitzG until 2008 — leased the infrastructure to the airport operator against a lease payment. In effect, both the infrastructure owner and the infrastructure operator thereby commercially exploit the airport infrastructure in Saarbrücken. It follows that the entities exploiting this infrastructure — FSBesitzG, FSBG, and FSG — constitute undertakings for the purposes of Article 107(1) of the Treaty from the 12 December 2000, the date of the *Aéroports de Paris* judgment, onwards.

(183) As regards vh Saar, Germany submitted that, as a holding company, vh Saar could not be regarded as an undertaking for the purposes of Article 107(1) of the Treaty. The Commission recalls that according to the Court of Justice, 'the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset' ([22]). At the same time, the Court of Justice observed that 'on the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking'.

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

([19]) Case 118/85 *Commission* v *Italy* [1987] ECR 2599; Case 35/96 *Commission* v *Italy* [1998] ECR I–3851.

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

([21]) Cases C–159/91 and C–160/91, *Poucet* v *AGV and Pistre* v *Cancave* [1993] ECR I–637.

([22]) Case C–222/04 *Ministero dell'Economia e delle Finanze/Casse di Risparmio di Firenze SpA et al* [2006] I–289, paragraph 111.

(184) The Commission recalls that the statutory function of vh Saar is to coordinate the 'activities related to the construction, extension, and operation of public ports and airports in Saarland'. That coordination would typically go beyond the mere exercise of rights attached to the status of shareholder. At the same time, there is no evidence of vh Saar actually exercising control or involving itself directly in the management of FSBesitzG or FSG. Against this background, it is not entirely clear whether vh Saar can be characterised as an undertaking. The Commission finds, however, that it can leave this question open in light of the considerations in recital 203 below, namely that vh Saar has not received an advantage.

Public policy remit

(185) While FSBesitzG, FSG and FSBG must therefore be considered to constitute undertakings for the purposes of Article 107(1) of the Treaty, it must be recalled that not all the activities of an airport owner and operator are necessarily of an economic nature ([23]).

(186) The Court of Justice ([24]) has held that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities include for example security, air traffic control, police and customs. The financing has to be strictly limited to the compensation of the costs to which these activities give rise and may not be used instead to fund other economic activities ([25]).

(187) Therefore, the financing of activities falling within the public policy remit, or of infrastructure directly related to those activities in general, does not constitute State aid ([26]). At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform these activities are generally considered to be of a non–economic nature ([27]).

(188) However, public financing of non–economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities ([28]). Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves as non–economic. Therefore, an analysis of the legal framework applicable to the airport operator is necessary in order to assess whether under that legal framework airport managers or airlines are required to bear the cost of the provision of some activities that might be non–economic in themselves but are inherent to the deployment of their economic activities.

(189) Germany explains that the following activities are to be considered as falling within the public policy remit, with the consequence that their exercise would not constitute an economic activity: airport security measures pursuant to § 8 *Luftsicherheitsgesetz* (Air Security Law) ([29]) (fences around the airport and control footpaths, a container gate, runway signs, emergency electricity, parking spaces for airplanes subject to bomb threats and extension of runway end safety areas (RESA) which all fall under § 8 *Luftsicherheitsgesetz*); the fire brigade; and air traffic control and air safety measures pursuant to § 27(c)(2) *Luftverkehrsgesetz* (Air Traffic Law).

([23]) Case C–364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I–43.
([24]) Commission Decision N309/2002 of 19 March 2003 on Aviation security — compensation for costs incurred following the attacks of 11 September 2001.
([25]) Case C–343/95 *Cali & Figli* v *Servizi ecologici porto di Genova* [1997] ECR I–1547; Commission Decision N309/02 of 19 March 2003; Commission Decision N438/2002 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector.
([26]) Commission Decision N309/02 of 19 March 2003.
([27]) See, in particular, Case C–364/92 *SAT/Eurocontrol* [1994] ECR I–43, paragraph 30 and Case C–113/07 P *Selex Sistemi Integrati* v *Commission* [2009] ECR I–2207, paragraph 71.
([28]) See i.a. Case C–172/03 *Wolfgang Heiser* v *Finanzamt Innsbruck* [2005] ECR I–01627, paragraph 36, and case–law cited.
([29]) Measures pursuant to § 8 Luftsicherheitsgesetz include, inter alia, construction of airport infrastructure that enables sufficient security controls; certain measures related to luggage and freight; securing restricted areas; controlling personnel and goods accessing restricted areas; training security personnel; removing and unloading airplanes that constitute security threats.

(190) The Commission is of the view that measures pursuant to § 8 *Luftsicherheitsgesetz*, measures pursuant to § 27(c)(2) *Luftverkehrsgesetz* and the fire brigade can, in principle, be considered to constitute activities falling within the public policy remit.

(191) With respect to measures relating purely to operational safety, however, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport ([30]). Subject to a more detailed review with respect to individual activities and costs (see recitals 196 and 197), the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling within the public policy remit. Any undertaking wishing to operate an airport has to ensure the safety of the installations, such as of the runway and aprons.

(192) As regards the legal framework, Germany has submitted that with regard to the fire brigade there are no legal rules strictly imposing these costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for the fire brigade is subject to regional responsibilities and these costs are usually remunerated by the relevant regional authorities. The remuneration of these costs is limited to the extent necessary to cover these costs.

(193) As regards air traffic control and air safety measures, § 27(d) *Luftverkehrsgesetz* provides that the costs related to the measures in § 27(c) *Luftverkehrsgesetz* are covered by the State for a number of specific airports. Airports are eligible for cost coverage as 'recognised airports' pursuant to § 27(d) *Luftverkehrsgesetz* if the Federal Ministry of Transport has recognised a necessity of the air traffic control and air safety measures for security reasons and transport policy related interests ([31]). German airports which have not been recognised are not eligible for cost coverage pursuant to § 27(d) *Luftverkehrsgesetz* and have therefore in principle to bear the costs related to the measures foreseen in § 27(c) *Luftverkehrsgesetz* themselves. These costs are inherent to the operation of the airports. Since some airports have to bear these costs themselves whereas other airports do not, the latter might be granted an advantage, even if control and air safety measures can be considered to be non–economic. The Commission notes that Saarbrücken Airport has been recognised to be an airport eligible for cost coverage pursuant to § 27(d) *Luftverkehrsgesetz*. Other airports have to bear these costs themselves. Therefore, the coverage of the costs of Saarbrücken Airport related to air traffic control and safety measures pursuant to § 27(d) *Luftverkehrsgesetz* gives an advantage to Saarbrücken Airport, even if control and air safety measures can be considered to be of a non–economic nature.

(194) With respect to measures pursuant to § 8 *Luftsicherheitsgesetz*, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the public authorities. The Commission notes, however, that pursuant to § 8(3) *Luftsicherheitsgesetz* only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities listed in § 5 *Luftsicherheitsgesetz* may be reimbursed. All other costs must be borne by the airport operator. To the extent that public financing granted to FSBesitzG or FSG relieved those undertakings of costs they had to bear pursuant to § 8(3) *Luftsicherheitsgesetz*, that public financing is not exempted from scrutiny under Union State aid rules.

Conclusion on public policy remit

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

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

([31]) § 27(d)(1) *Luftverkehrsgesetz:* 'Flugsicherungsdienste und die dazu erforderlichen flugsicherungstechnischen Einrichtungen werden an den Flugplätzen vorgehalten, bei denen das Bundesministerium für Verkehr, Bau und Stadtentwicklung einen Bedarf aus Gründen der Sicherheit und aus verkehrspolitischen Interessen anerkennt'.

(196) As regards operating expenses, the Commission accepts that operating expenses linked to the fire brigade qualify as public policy remit expenses, in so far as the remuneration of these costs is strictly limited to what is necessary to pursue these activities. As regards operating costs linked to measures taken pursuant to § 8 *Luftsicherheitsgesetz*, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to § 8(3) *Luftsicherheitsgesetz* qualify as public policy remit costs. With respect to air traffic control and air safety measures pursuant to § 27c(2) *Luftverkehrsgesetz*, noting that Saarbrücken is one of the airports eligible for cost coverage, whereas other airports are not, the Commission finds that the coverage of operating costs linked to air traffic control and air safety measures pursuant to § 27(d) *Luftverkehrsgesetz* gives an advantage to Saarbrücken Airport, even if air traffic control and air safety measures can be considered to be non–economic. Equally, operating costs related to ensuring the operational safety of the airport do not qualify as public policy remit costs.

(197) As regards investments made between 2000 and 2012, the Commission accepts that investments directly related to the fire brigade qualify as public policy remit expenses in so far as the remuneration of those costs is strictly limited to what is necessary to pursue these activities. As regards investments linked to measures taken pursuant to § 8 *Luftsicherheitsgesetz*, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to § 8(3) *Luftsicherheitsgesetz* qualify as public policy remit costs. With respect to investments linked to air traffic control and air safety measures pursuant to § 27(c)(2) *Luftverkehrsgesetz*, noting that Saarbrücken is one of the airports eligible for cost coverage, the Commission finds that those investments related to air traffic control and safety measures pursuant to § 27(d) *Luftverkehrsgesetz* give an advantage to Saarbrücken Airport, even if control and air safety measures can be considered to be non–economic. Equally, investments related to ensuring the operational safety of the airport do not qualify as public policy remit costs. In particular, this means that the investments into fences around the airport, runway signs, and the extension of runway end safety areas cannot be qualified as falling within the public policy remit.

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

State resources and imputability to the State

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

(200) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it ([32]). Resources of local authorities are for the application of Article 107 of the Treaty State resources ([33]).

(201) The capital injections provided to vh Saar stem directly from the *Land Saarland*'s budget and therefore constitute State resources.

(202) As regards the financing of FSBesitzG/FSG by vh Saar, it must be noted that vh Saar is entirely owned by the *Land Saarland*, and therefore constitutes a public undertaking. The funding provided by vh Saar to FSBesitzG/FSG thus constitutes a loss of State resources. As regards imputability of the P&L agreement and the transfers made thereunder, the Commission notes that the statutes, by means of which vh Saar was established by the *Land Saarland*'s Ministry of Economics, are dated 7 May 1996. On that very same day, the P&L agreement between vh Saar and FSBesitzG/FSG

([32]) Case C–482/99 *France* v *Commission* (*'Stardust Marine'*) [2002] ECR I–4397.
([33]) Judgment of 12 May 2011 in Joined Cases T–267/08 and T–279/08, *Nord–Pas–de–Calais*, not yet published, paragraph 108.

was established. According to Germany, vh Saar acts under the 'comprehensive legal and factual control of the *Land Saarland*' as the sole shareholder of the company. In this regard, the Commission first notes that, according to the annual reports of vh Saar, the company can be considered as controlling FSBesitzG/FSG ([34]). According to the statutes, the *Saarland*'s government appoints vh Saar's supervisory board and the chairman of the supervisory board is a representative of the Ministry of the Land responsible for aviation. The statutes also foresee that the board of directors is appointed by the general assembly, which consists of representatives of the owner, i.e. the *Saarland*. Finally, the statutes provide that vh Saar was to conclude a control agreement ([35]) with FSG. Based on this information, the Commission considers that the P&L agreement between vh Saar and FSBesitzG/FSG and the transfers made thereunder are imputable to the State.

Economic advantage

(203) Germany has confirmed that all public funds provided to vh Saar are used by the entity to fulfil its obligations under the P&L agreement with FSBesitzG/FSG, that is to say that all funds are passed on by vh Saar to FSBesitzG/FSG. As vh Saar is therefore merely an intermediary via which funding is passed on from the State to FSBesitzG/FSG, vh Saar cannot be considered to receive an economic advantage itself.

FSBesitzG/FSG: MEO

(204) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention ([36]). Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention ([37]). Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.

(205) The Commission further recalls that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid' ([38]). In this case, in order to determine whether the public financing of Saarbrücken Airport grants FSBesitzG/FSG an advantage that they would not have received under normal market conditions, the Commission has to compare the conduct of the public shareholders providing the financing to that of a MEO that is guided by prospects of profitability in the long term ([39]).

(206) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEO principle is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional–policy and sectoral considerations, would have subscribed the capital in question' ([40]).

(207) In Stardust Marine the Court stated that, '[…] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation' ([41]).

(208) Furthermore, the Court declared in the EDF case that, '[…] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen' ([42]).

([34]) vh Saar and FSBesitzG/FSG can be considered as connected companies in the meaning of § 290 HGB.
([35]) Contract by which one company submits the direction of the company to another enterprise.
([36]) Case C–39/94 *Syndicat français de l'Express international (SFEI) and others* v *La Poste and others* [1996] ECR I–3547, paragraph 60 and Case C–342/96 *Kingdom of Spain* v *Commission of the European Communities* [1999] ECR I–2459, paragraph 41.
([37]) Case 173/73 *Italian Republic* v *Commission of the European Communities* [1974] ECR 709, paragraph 13.
([38]) Case C–482/99 *France* v *Commission* ('*Stardust Marine*') [2002] ECR I–4397, point 69.
([39]) Case C–305/89 Italy v Commission ('*ALFA Romeo*') [1991] ECR I–1603; Case T–296/97 *Alitalia* v *Commission* [2000] ECR II–3871.
([40]) Case 40/85 *Belgium* v *Commission* [1986] ECR I–2321.
([41]) Case C–482/99 *France* v *Commission* [2002] ECR I–04397.
([42]) Case C–124/10P *European Commission* v *Électricité de France (EDF)* [2012], not yet published in ECR, ('EDF Judgment'), paragraph 85.

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

(210) The Commission takes note of Germany's submission that the *Land Saarland*, which owns and finances Saarbrücken Airport, is not concerned with a return on investment, but rather views the financing as related to the provision of essential infrastructure. It is also for this reason that according to Germany no analysis of the costs of a potential closure of the airport exists. The Commission further observes that the airport has incurred increasing losses since 2000 and that a positive EBIDTA, but not a positive overall result, is only expected for 2020. In the light of these considerations, the public financing of FSBesitzG/FSG cannot be qualified as complying with the MEO principle.

FSBesitzG/FSG: SGEI Compensation

(211) Germany has submitted that in this case public funding constitutes compensation for a service of general economic interest that does not confer an economic advantage. According to the Court of Justice's *Altmark* ([43]) jurisprudence, compensation for the provision of a service of general economic interest does not grant an economic advantage where four cumulative conditions are fulfilled:

(a) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined ('*Altmark* criterion 1').

(b) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner ('*Altmark* criterion 2').

(c) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit ('*Altmark* criterion 3').

(d) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well–run and adequately provided with the means for carrying out the service so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations ('*Altmark* criterion 4').

(212) Pursuant to *Altmark* criterion 4, the amount of compensation must either be determined following a public procurement procedure or, instead, on the basis of an analysis of the costs which a typical, well run undertaking would have incurred. In the case of Saarbrücken Airport, the operation of the airport was not tendered out, but rather entrusted to the State–owned FSBesitzG/FSG. The amount of compensation was also not determined on the basis of an analysis of the costs that a typical, well run undertaking would have incurred. The financing modalities were and are such that any loss generated by FSBesitzG/FSG is covered from State resources, regardless of whether such losses correspond to costs that a typical, well run undertaking would have occurred.

(213) In order to fulfil the *Altmark* criterion 4 it is not sufficient that the authorities of the *Land Saarland*, who as sole shareholder has comprehensive supervisory and control powers, claim to have ensured the efficient use of resources. While Germany submits that only costs incurred as a consequence of efficient operations entered into the deficit cover, the P&L agreement does not provide for such a limitation, but rather provides for the cover of any losses that may have been generated.

(214) It is also not sufficient to compare the costs of Saarbrücken Airport with those of other State–owned undertakings active in other sectors, as no conclusions can be drawn therefrom as to the efficiency of the airport operator. A comparison with other airport operators was, according to Germany, not attempted, as it was considered that regional airports differed too greatly with respect to their costs and revenues to allow for a meaningful comparison.

([43]) Case C–280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I–7747, paragraphs 87–93.

(215) In its final analysis, Germany therefore mainly relies on its appreciation that there is no indication that the airport operator in Saarbrücken was inefficient. It has submitted that the Commission has, in the past, accepted the absence of an indication of inefficiency as sufficient for compliance with the *Altmark* criterion 4. The Commission notes, however, that the decision referred to by Germany is by no means solely based on the absence of any indication of inefficiency. In that case, the Commission referred to a variety of reasons for finding that *Altmark* criterion 4 was fulfilled, and stressed that its reasoning was based on the 'specific factual and legal constraints prevailing in this case' ([44]).

(216) The Commission finds therefore that the *Altmark* criterion 4 is not fulfilled in the present case. As the four *Altmark* criteria are strictly cumulative, it is therefore not necessary to assess compliance with the other criteria.

Selectivity

(217) Article 107(1) of the Treaty requires that a measure, in order to be defined as State aid, favours 'certain undertakings or the production of certain goods'. In the case at hand, the Commission notes that the public financing only benefits FSBesitzG/FSG. It is thus clearly selective within the meaning of Article 107(1) of the Treaty.

Distortion of competition and effect on trade

(218) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as affected by that aid ([45]). The economic advantage granted by the measure in this case to the airport operator strengthens its economic position, as the airport operator will be able to set up its business without bearing the inherent investment and operating costs.

(219) As assessed in recitals 178 et seq., the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, in particular with respect to low–cost carriers and charter operators also airports that are not located in the same catchment areas and even in different Member States can also be in competition with each other to attract those airlines.

(220) As mentioned in point 40 of the 2005 Aviation Guidelines and reaffirmed in point 45 of the 2014 Aviation Guidelines, it is not possible to exclude even small airports from the scope of application of Article 107(1) of the Treaty.

(221) Saarbrücken Airport currently serves approximately 425 000 passengers per year, and has served as many as approximately 520 000 per year in the past. The forecasts provided by Germany establish that passenger numbers are expected to rise to as much as […] passengers per year in 2020. As observed in recital 16 above, it is located in the immediate vicinity of Zweibrücken Airport (39 kilometers) and within two hours' drive from six other airports. According to the data provided by Germany, approximately [less than 14 %] of passengers using Saarbrücken Airport originate from other Member States. In light of these facts, the Commission considers that public funding to FSBesitzG/FSG distorts or threatens to distort competition and has at least a potential effect on trade between Member States.

(222) Apart from these general considerations, the Commission also considers that Saarbrücken Airport is or at least has been in direct competition with Zweibrücken Airport. First, it must be noted that TUIFly, formerly Saarbrücken Airport's biggest client, left that airport and moved to Zweibrücken in 2007. Secondly, for a substantial period of time (approximately four years) flights to Berlin were offered from both Zweibrücken (Germanwings) and Saarbrücken (Air Berlin and Luxair) in parallel, demonstrating competition both between the airports and the airlines ([46]).

([44]) See OJ L 219, 24.8.2007, p. 9, recitals 111 et seq.
([45]) Case T–214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II–717.
([46]) See Commission decision of 1 October 2014 in State aid case SA.27339 — Germany — Zweibrücken airport, not yet published in OJ.

(223) In addition to these indicators for competition between Saarbrücken and Zweibrücken Airports, there is also evidence that — despite the official submission by Germany that the two airports never considered themselves as being in direct competition — officials of the *Land* Rhineland–Palatinate have clearly perceived the existence of competition. In two internal notes of the Rhineland–Palatinate government written in 2003, the position defended by the authors is that cooperation between Zweibrücken and Saarbrücken Airports was not possible/advisable at that time. Rather, one note explained that at least as long as Fraport AG was involved with Saarbrücken Airport ([47]), the relationship between the two airports would be one of competition ([48]). The notes further express that 'from the perspective of Rhineland–Palatinate, it can be expected that Zweibrücken Airport will prevail in this competition in the long term' ([49]). These statements indicate that at the very least in 2003, the perceived relationship between the two airports was indeed one of competition.

(224) Germany takes the position that pursuant to point 39 of the 2005 Aviation Guidelines, public funding provided to small regional airports is 'unlikely to distort competition or affect trade to an extent contrary to the common interest'. It also submits that competition with other airports is limited by a number of factors, such as business model, size, and distance. Any distortion of competition or effect on trade would, in any event, be minimal.

(225) However, the Commission considers that the indicators described in recitals 221 to 223 demonstrate the existence of at least a potential distortion of competition and effect on trade. The Commission emphasises that the definition of State aid does not require that the distortion of competition or effect on trade be significant or material, even though it considers that, given the close proximity of Saarbrücken and Zweibrücken airports and their direct competitive relationship as indicated above, this was indeed the case.

(226) There are international flights from Saarbrücken airport to destinations such as Mallorca or Ankara, or other holiday destinations. The runway at Saarbrücken is of a sufficient length (2 000 m) and allows airlines to serve medium–haul international destinations.

(227) Against this background, the public financing granted to FSBesitzG/FSG must be considered as being liable to distort competition and have an effect on trade.

5.1.2. EXISTING AID AND NEW AID

(228) The Commission recalls that an aid measure constitutes existing aid pursuant to Article 1(b)(v) of Council Regulation (EC) No 659/1999 ([50]) where it can be established that at the time the aid measure was put into effect, it did not constitute State aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Germany submits that the P&L agreement between FSBesitzG/FSG and vh Saar, which constitutes the basis for the annual deficit coverage that was considered to constitute State aid, was put into place when the public funding of airports was not yet considered to constitute State aid and has not been altered since.

(229) The Commission recalls that the gradual development of market forces in the airport sector does not allow for a precise date to be determined from which the operation of an airport should have undoubtedly been considered as an economic activity. As stated in recital 180, from the date of the judgment in '*Aéroports de Paris*' (12 December 2000), the operation and construction of airport infrastructure must be considered as a task falling within the ambit of State aid control.

(230) Conversely, due to the uncertainty that existed prior to the judgment in '*Aéroports de Paris*', public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid. It follows that the Commission cannot now call into question, on the basis of State aid rules, financing measures granted before the '*Aéroport de Paris*' judgment.

(231) In consequence, State aid measures that were granted to airport operators before the date of the '*Aéroports de Paris*' judgment did not constitute State aid at the time when they were put into place, and became existing aid by 12 December 2000.

([47]) Fraport AG held a 51 % share in FSBG until 30 June 2007.
([48]) *Vorlage für den Ministerrat, Gemeinsame Kabinettssitzung der Regierung des Saarlandes und der Landesregierung von Rheinland–Pfalz am 27. Mai 2003*, Ministerium für Wirtschaft, Verkehr, Landwirtschaft und Weinbau, 15 May 2003.
([49]) *Einschätzung der rheinland–pfälzischen Innenministeriums*, 15 May 2003.
([50]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

(232) In the present case, the P&L agreement between FSBesitzG/FSG and vh Saar (under which individual capital injections were made) was put into place in 1996 and has, according to Germany, not been changed since. It can therefore be considered that, from 2000 onwards, the annual public financing granted pursuant to this agreement constituted existing aid.

(233) The Commission further considers, however, that the existing aid became new aid by 1 June 2007. In point 83 of the 2005 Aviation Guidelines, and pursuant to what is now Article 108(1) of the Treaty, the Commission proposed appropriate measures to the Member States, asking them to bring all their existing schemes relating to State aid covered by those Guidelines in conformity with those Guidelines by 1 June 2007 at the latest. Member States were asked to confirm their acceptance in writing. Should a Member State fail to act according to its commitment, the existing aid becomes unlawful aid after the date set in the appropriate measures and is subject to recovery.

(234) Germany accepted the appropriate measures by letter of 30 May 2006. Considering that the P&L agreement established an aid scheme which provided the basis for repeated payments of aid over time, Germany had to ensure that the aid scheme conformed to the 2005 Aviation Guidelines at 1 June 2007 the latest. From that date onwards, the public financing of FSBesitzG/FSG no longer constituted existing aid.

5.1.3. CONCLUSION

(235) In view of the arguments presented in recitals 176 to 225, the Commission considers that the public funding granted in the form of annual loss coverage to FSBesitzG/FSG between 2000 and 2012 (see financial data detailed in Tables 3 and 4) constitutes State aid within the meaning of Article 107(1) of the Treaty in so far as it was related to activities outside the public policy remit, and therefore constituted new aid from 1 June 2007 onwards.

(236) The Commission further considers that, in particular in view of the arguments presented in recital 203, the capital injections granted to vh Saar do not constitute State aid within the meaning of Article 107(1) of the Treaty, as vh Saar passed on all the public funds received and therefore did not itself obtain an economic advantage.

5.1.4. LAWFULNESS OF THE AID

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

(238) As the financing has already been put at the disposal of FSBesitzG/FSG the Commission considers that Germany has not respected the prohibition of Article 108(3) of the Treaty ([51]).

5.1.5. COMPATIBILITY

5.1.5.1. *The applicability of the 2014 and 2005 Aviation Guidelines*

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

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

([51]) Case T 109/01 *Fleuren Compost* v *Commission* [2004] ECR II–127.

(241) According to the 2014 Aviation Guidelines, the Commission considers that the Commission Notice on the determination of the applicable rules for the assessment of unlawful State aid ([52]) applies to unlawful investment aid to airports. In this respect, if the unlawful investment aid was granted before 4 April 2014, the Commission will apply the compatibility rules in force at the time when the unlawful investment aid was granted. The Commission has already concluded in recital 238 that the annual coverage of losses by vh Saar constitutes unlawful State aid granted before 4 April 2014. Accordingly, the Commission will apply the principles set out in the 2005 Aviation guidelines in the case of unlawful investment aid to airports granted before 4 April 2014 ([53]).

(242) According to the 2014 Aviation Guidelines, the Commission considers that the provisions of the notice on the determination of the applicable rules for the assessment of unlawful State aid should not apply to pending cases of unlawful operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid (pending notifications and unlawful non–notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period ([54]).

5.1.5.2. ***Distinction between investment and operating aid***

(243) In view of the provisions of the 2014 Aviation Guidelines referred to in recitals 241 and 242, the Commission has to determine whether the measure in question constitutes unlawful investment or operating aid.

(244) According to point 25 (18) of the 2014 Aviation Guidelines investment aid is defined as 'aid to finance fixed capital assets, specifically, to cover the capital costs funding gap'. Moreover, according to point 25 of the 2014 Aviation Guidelines investment aid can relate both to an upfront payment (that is to say cover upfront investment costs) and to aid paid out in the form of periodic instalments (to cover capital costs, in terms of annual depreciation and costs of financing).

(245) Operating aid, on the other hand, relates to covering all or part of the operating costs of an airport, defined as 'the underlying costs of the provision of airport services, including categories such as costs of personnel, contracted services, communications, waste, energy, maintenance, rent, administration, etc., but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit' ([55]).

(246) In the light of these definitions, it can be considered that the part of the annual capital injections that was used to cover annual operating losses ([56]) of FSBesitzG/FSG net of the costs included in the EBITDA that fall within a public policy remit as established in recitals 186 to 197 constitute operating aid to FSBesitzG/FSG.

(247) The Commission notes that FSBesitzG/FSG received a total of up to around […] to cover its losses in the years 2000–2012. In this time period, total cumulated EBITDA of FSBesitzG (FSBG)/FSG amounted to approximately — […]. From this amount the costs falling within the public policy remit would have to be deducted ([57]). Against this background, the Commission considers that the maximum amount of operating aid granted in implementation of the P&L agreement to FSBesitzG/FSG in the years 2000–2012 is up to around […].

([52]) OJ C 119, 22.5.2002, p. 22.
([53]) Point 173 of the 2014 Aviation Guidelines.
([54]) Point 172 of the 2014 Aviation Guidelines.
([55]) Point 25 (22) of the 2014 Aviation Guidelines.
([56]) Expressed in Earnings Before Interest, Taxes, Depreciation and Amortisation (hereinafter: EBITDA).
([57]) No precise figures on costs related to the public policy remit in the years 2000–2012 are however available.

(248) Finally, the part of the annual capital injections that covers losses of FSBesitzG/FSG that are not already included in the EBITDA (that is to say the annual depreciation of assets, costs of financing, and others.), minus costs falling within a public policy remit as established in recitals 186 to 197 constitute investment aid in favour of FSBesitzG/FSG.

(249) In view of the considerations in recitals 247 to–248, it can be concluded that the maximum amount of investment aid is approximately […] ([58]).

5.1.5.3. ***Investment aid***

(250) According to point 61 of the 2005 Aviation Guidelines the Commission has to examine whether the cumulative conditions set out in points (a) to (e) are met:

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

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

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

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

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

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

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

(252) The investment aid measures under assessment aimed at financing the construction of a new terminal with a capacity of 700 000 passengers because the old terminal (capacity of 390 000 passengers) was congested already a few years before the construction works started. In addition the investment aid was used to finance a number of measures that helped adapting the airport to the current requirements for modern airport infrastructure with a view to keeping it fully operational.

(253) According to Germany, the main aim of the financing of the infrastructure at Saarbrücken Airport was to improve the air transport accessibility of the region by decongesting the airport and thus to stimulate regional development.

(254) Saarbrücken Airport is crucial for the development of the region in view of the ongoing structural transition of the region and its switch from the mining and steel producing industry to a technology and service–oriented region, for which a good connection to the main German business centres is indispensable. Saarbrücken Airport further satisfies connectivity needs of the region in particular in view of its developing research and academic facilities. The business profile of Saarbrücken Airport corresponds to these needs of the region, offering a well–developed and comfortable infrastructure for a number of scheduled flights to the main business centres in Germany (Berlin, Hamburg and in the past also Munich).

(255) The Commission notes that in view of the close proximity between Saarbrücken and Zweibrücken, a possible duplication of airport infrastructure could militate against finding that the construction and operation of infrastructure in Saarbrücken meets a clearly defined objective of common interest. However, the Commission notes that until 2006, Zweibrücken did not offer commercial aviation airport services ([59]), rendering Saarbrücken the only airport providing aviation connectivity in the region. After 2006, when Zweibrücken airport entered the commercial aviation market, it essentially duplicated the infrastructure in Saarbrücken ([60]); at the same time, it cannot be concluded that due to the market entry of Zweibrücken airport the ongoing public financing of the pre–existing Saarbrücken Airport suddenly turned into duplication financing.

([58]) The Commission notes that no precise figures on costs falling within the public policy remit are available. Against this background, the Commission is not in a position to determine the precise amount of investment aid granted to FSBesitzG/FSG.
([59]) See footnote 46.
([60]) See footnote 46.

(256) The Commission therefore concludes that the construction and operation of the infrastructure at Saarbrücken Airport meets a clearly defined objective of common interest.

The infrastructure is necessary and proportional to the set objective.

(257) The investment aid for the Saarbrücken Airport has to be necessary and proportionate to the pursued objective. One important aspect in this context is whether the investment does not constitute a duplication of an existing unprofitable infrastructure.

(258) Firstly the Commission notes that the new terminal increasing the annual capacity of the airport from 390 000 passengers to 700 000 passengers was constructed in 2000. The annual capacity of the old terminal was for the first time exceeded in 1996 and passenger numbers continued growing until 2000 when they reached 484 566 passengers. During the period 1996 and 2000 the old terminal was frequently congested in particular during the summer periods, causing long waiting times, crowded passenger areas or passengers waiting outside the terminal. In addition, the old terminal did not comply anymore with the security requirements. The new terminal is equipped with a new security system. Furthermore, in 2009–2010 additional security measures in the runway and security area were implemented, in particular the location of the runway lights was adjusted to give better signals to the pilots, the runway guard lights were installed and the superstructure of the runway curve was adjusted to the needs of modern aircrafts. Finally, the runway was maintained to avoid damage to the aircrafts operating at the airport. The Commission therefore considers that the investments into the infrastructure were necessary to adapt to increasing passenger numbers as well as to meet the current requirements for modern airport infrastructure. The airport could serve the connectivity and the development of the region only with the constructed infrastructure.

(259) Secondly, the new investment did not constitute a duplication of existing non–profitable infrastructure since three of the closest airports Luxembourg (121 km from Saarbrücken), Metz–Nancy–Lorraine (96 km from Saarbrücken) and Frankfurt–Hahn (128 km from Saarbrücken) are not located in the same catchment area and pursue business models that are significantly different from that of Saarbrücken Airport. Saarbrücken offers mainly scheduled flights connecting Saarbrücken with main German business centres (Berlin, Hamburg and in the past also Munich) and a number of holiday destinations. Luxembourg offers mainly scheduled flights to European capitals, Metz–Nancy–Lorraine is focused on scheduled flights to French cities and destinations in North Africa and the business model of Frankfurt–Hahn is based on low–cost carriers offering flights to a number of holiday destinations, but none to other German towns, and air freight transport.

(260) The only duplication of infrastructure that can be observed is between Saarbrücken and Zweibrücken (39 km from Saarbrücken). However, it must be said that Saarbrücken is a well–established airport that decided to conduct an investment into a new terminal to decongest the existing old one when its passenger numbers were steadily growing and Zweibrücken Airport did not yet offer airport services far commercial aviation ([61]). The investment decision of Saarbrücken Airport was economically justified and necessary to ensure the connectivity of the region. It was therefore Zweibrücken Airport that duplicated available infrastructure when the decision about its conversion from a military into a commercial airport was taken ([62]).

(261) The necessity and proportionality of the investment aid to Saarbrücken Airport therefore follows from the congestion as well as the need to meet the current requirements for modern airport infrastructure. The constructed infrastructure was necessary for the airport in order to serve the connectivity and the development of the region. The Commission therefore concludes that the infrastructure in question is necessary and proportional to the pursued objectives.

([61]) See footnote 46.
([62]) See footnote 46.

The infrastructure has satisfactory medium–term prospects for use, in particular as regards the use of existing infrastructure

(262) Following a period of significant growth, air traffic in Germany and Europe in recent years has been negatively affected by the economic and financial crisis in 2009, which resulted in a 4,6 % decrease in passenger air transport in Germany in 2009, and, hence, one of the worst years for flight traffic. However, the general trend of growth in air transport has not been stopped, but only delayed. Since June 2010 the monthly growth rates in passenger air traffic in Germany have been increasing and were 7 % higher than the monthly growth rates of the previous year. It also has to be taken into account that, according to forecasts, since 2009 Germany has enjoyed a strong economic growth of around 3 % per annum. The growth of the air traffic market is normally higher than general economic growth ([63]).

(263) The satisfactory mid–term use of the new terminal at the Saarbrücken Airport is confirmed by the fact that annual passenger numbers remain well above the upper limit (that is to say 390 000 pax) of the capacity of the old terminal. The only sharp decrease of passenger numbers occurred in 2007, which coincided with a sharp increase of the passenger numbers at Zweibrücken Airport. This can be explained by the fact that in 2007 the airline Hapag Lloyd/TUIFly left Saarbrücken Airport and started operating from Zweibrücken Airport. The situation changed significantly in 2008 when with 518 288 passengers Saarbrücken noted an absolute peak in its passenger numbers. Due to the financial crisis in Germany, this level could not be maintained in the following years, according to Germany ([64]).

(264) The total monthly capacity of Saarbrücken Airport amounts to […] passengers. Since 2005 at the latest this capacity is fully used or even exceeded in the summer months (July to September) ([65]). It can therefore be concluded that Saarbrücken Airport is already now to a large extent using the new capacity and that the mid–term prospects for the use of the capacity are satisfactory.

All potential users of the infrastructure have access to it in an equal and non–discriminatory manner

(265) According to the information submitted by Germany ([66]) the infrastructure has always been open to all potential users without any commercially unjustified discrimination.

The development of trade is not affected to an extent contrary to the Union interest

(266) According to point 39 of the 2005 Aviation Guidelines the category of the airport can provide an indication of the extent to which airports are competing with one another and therefore also the extent to which public funding granted to an airport may distort competition. While, according to the 2005 Aviation Guidelines, public funding to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest, this was not based on the assumption, and was neither meant to indicate, that competition distortions and effect on trade are excluded.

(267) The annual capacity of the old terminal of Saarbrücken Airport was 390 000 passengers. After the construction of the new terminal, the annual capacity of the airport increased to 700 000 passengers. With this capacity the airport falls in airport category D 'small regional airport', as defined by point 15 of the 2005 Aviation Guidelines. Since 2000 the annual passenger traffic at Saarbrücken Airport has remained stable at the level of around 500 000 passengers, which amounts to half of the passenger number established as an upper limit for a small regional airport. In addition, Saarbrücken Airport is a typical regionally oriented airport, which is reflected by the fact that a significant number of the passengers using this airport come from Saarland. The number of passengers who come from the frontier areas of France and Luxembourg is limited and amounted to [less than 14 %] ([…] from France and […] from Luxembourg) ([67]).

(268) Taking into account the concept of a catchment area of around 100 km and travelling time of 60 minutes, it can be assumed that three of the airports located closest to Saarbrücken, that is to say the Luxembourg Airport (121 km from Saarbrücken), Metz–Nancy–Lorraine Airport (97 km from Saarbrücken) and Frankfurt–Hahn Airport (128 km from Saarbrücken) are not located in the same catchment area. They also pursue business models that are significantly different from that of Saarbrücken Airport.

([63]) Aktualisierte Stellungnahme zur Nachfrageprognose für den Flughafen Kassel–Calden, Intraplan Consult GmbH, 12 March 2012, p. 8.
([64]) Submission of information by Germany of 16 April 2012 p. 65.
([65]) Submission of information by Germany of 16 April 2012 p. 9 and attachment 2.
([66]) Submission of information by Germany of 16 April 2012 p. 66.
([67]) Submission of information by Germany of 16 April 2012 p. 33.

(269) As regards Luxembourg Airport, the business models of Luxembourg and Saarbrücken are different. Luxembourg Airport is with around 1,5 million pax significantly larger than Saarbrücken Airport. It offers a variety of scheduled and charter flights, the latter to the European capitals. This selection of destinations to a large extent meets the needs of the employees of the financial and international institutions located in Luxembourg. In contrast, Saarbrücken Airport mostly offers scheduled flights to a number of German cities that are considered German business centres (Berlin, Hamburg, Munich) and to a number of holiday destinations.

(270) As regards the Airport Metz–Nancy–Lorraine, it can be observed that there is hardly any overlap as regards flights offered by this airport and Saarbrücken Airport, since Metz–Nancy–Lorraine offers mainly scheduled flights to French cities and charter flights to North Africa.

(271) Competition distortions between Saarbrücken and Frankfurt–Hahn can also largely be excluded already because of the distance between those two airports, which amounts to 2 hours' travel time. In addition, Frankfurt–Hahn is served mainly by low–cost carriers (Ryanair) and freight constitutes a rather important element in its business model whereas Saarbrücken Airport offers mainly scheduled flights to national destinations and has only limited air freight transport.

(272) More relevant is the competitive relationship between Saarbrücken Airport and Zweibrücken Airport, which is due to their proximity (39 km or 34 minutes' travel time) and the large overlap of their catchment areas. Germany brings forward that the two airports have different business models: Saarbrücken Airport is a well–established airport (opened more than 80 years ago) and has a more sophisticated infrastructure that offers more comfort to passengers (with a large share of business travellers). It offers mainly scheduled flights to main German business centres and a number of holiday destinations. Zweibrücken Airport has a rather low–comfort infrastructure and its business model is based on low–cost carriers, vacation flights, and air freight transport. The Commission notes, however, that, despite the fact that the business models of the two airports appear to differ to some degree, it is clear that Zweibrücken Airport's core business (vacation flights, in particular to Antalya/Palma de Mallorca) is also catered for by Saarbrücken. It is true that Saarbrücken otherwise concentrates on scheduled flights to major cities such as Luxembourg, Berlin, and Hamburg. This does not, however, change the fact that Zweibrücken appears to have only limited business that is not or could not be served from Saarbrücken.

(273) In addition, it can be observed that a significant increase of the passenger number at Zweibrücken Airport in 2007 coincided with a rather deep drop of passengers in Saarbrücken in the same year. It thus appears that although the business plans of the airports are to some extent complementary, they also compete with each other.

(274) At the same time it should be noted that Saarbrücken has been a well–established airport for more than 80 years. After the construction of the new terminal in the year 2000 its annual capacity increased from 390 000 passengers to 700 000 passengers. This capacity could however never be fully used, potentially because in 2006 also Zweibrücken Airport also started operating services for commercial passenger aviation with gradually increasing passenger numbers. In view of the historical development of the two airports (Saarbrücken has been part of the German airport landscape for over 80 years), their geographical location (overlap of the catchment areas) and the free capacity available at Saarbrücken Airport at the time when Zweibrücken Airport entered the commercial aviation market in 2006, the Commission concludes that the opening of Zweibrücken Airport constitutes an unnecessary duplication of infrastructure with distortive effect on competition, rather than the other way around.

(275) On the basis of the above, the Commission concludes that the investment aid granted to Saarbrücken Airport neither distorts competition nor affects trade to an extent contrary to the common interest.

Aid is necessary and proportional; incentive effect

(276) The Commission must establish, whether the State aid granted to Saarbrücken Airport has changed the behaviour of the beneficiary in such a way that it engaged in activity contributing to the achievement of the objective of common interest that (i) it would not carry out without the aid; or (ii) it would carry out in a more restricted or different manner. In addition, the aid is considered to be proportionate only if the same result could not be reached with less aid and less distortion. This means that the amount and intensity of the aid must be limited to the minimum needed for the aided activity to take place.

(277) According to the information submitted by Germany, without the aid the investment could not have been realised. It appears from Table 3 that the airport is still loss–making. Therefore it can be concluded that the aid was necessary to make investments in order to decongest the airport infrastructure as well as the need to meet the current requirements for modern airport infrastructure. Without the aid Saarbrücken Airport would not have met the expected demand of airlines and passengers in the catchment area; the level of the economic activity of the airport would have been reduced. The Commission therefore considers that the aid measure at stake has an incentive effect, that the amount of aid is limited to the minimum necessary for the aided activity to take place, and is thus proportionate.

Conclusion

(278) Therefore, the Commission concludes that the investment aid granted to Saarbrücken Airport is compatible with Article 107(3)(c) of the Treaty as it complies with the compatibility conditions laid down in point 61 of the 2005 Aviation Guidelines.

(279) The Commission further considers that since it found the State aid to FSBesitzG/FSG to be compatible under Section 4.1 of the 2005 Aviation Guidelines, it does not have to assess any other grounds of potential compatibility put forward by Germany.

5.1.5.4. ***Operating aid***

(280) Section 5.1.2 of the 2014 Aviation Guidelines sets out the criteria that the Commission will apply in assessing the compatibility of operating aid with the internal market pursuant to Article 107(3)(c) of the Treaty. Pursuant to point 172 of the 2014 Aviation Guidelines, the Commission will apply these criteria to all cases concerning operating aid to the airport, including pending notifications and unlawful non–notified aid cases.

(281) Unlawful operating aid granted before the date of application of the 2014 Aviation Guidelines may be declared compatible to the full extent of uncovered operating costs provided that the following conditions ([68]) are met:

(282) The compatibility criteria for operating aid, which may be granted for a transitional period of 10 years starting from the date of the publication of the 2014 Aviation Guidelines, are:

(a) contribution to a well–defined objective of common interest: this condition is fulfilled, inter alia, if the aid increases the mobility of citizens of the Union and connectivity of the regions or facilitates regional development ([69]);

(b) need for State intervention: the aid must be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver ([70]);

(c) existence of incentive effect: this condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of air traffic, the level of economic activity of the airport concerned would be significantly reduced ([71]);

(d) proportionality of the aid amount (aid limited to the minimum necessary): in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place ([72]);

(e) avoidance of undue negative effects on competition and trade ([73]).

([68]) According to point 137 of the 2014 Aviation Guidelines, not all of the conditions set out in Section 5.1 of the Guidelines apply to operating aid granted in the past.
([69]) Points 113 and 137 of the 2014 Aviation Guidelines.
([70]) Points 116 and 137 of the 2014 Aviation Guidelines.
([71]) Points 124 and 137 of the 2014 Aviation Guidelines.
([72]) Points 125 and 137 of the 2014 Aviation Guidelines.
([73]) Points 131 and 137 of the 2014 Aviation Guidelines.

The operating aid contributes to a clearly defined objective of common interest

(283) The operating aid under assessment that comprises the losses of FSBesitzG/FSG since 2000 and the corresponding capital injections by vh Saar, financed from capital injections received from Saarland as demonstrated in Table 3, had the objective of maintaining the appropriate level of operation of Saarbrücken Airport.

(284) According to point 113 of the 2014 Aviation Guidelines operating aid to airports will be considered to contribute to the achievement of an objective of common interest if it increases the mobility of Union citizens and the connectivity of the regions, combats air traffic congestion at major Union hub airports or facilitates regional development.

(285) As explained in recital 235, operating aid to Saarbrücken Airport contributed to the connectivity and development of the region in view of its structural transition from the mining and steel producing industry to a technology and service–oriented region as well as its development to a regional research and academic centre. The development of Saarbrücken Airport was also based on a sound passenger forecast since the extended capacity of the airport is already now to a large extent fully used.

(286) It could, however, be problematic that the airport infrastructure at Saarbrücken Airport has been duplicated by a similar infrastructure at Zweibrücken Airport. In a duplication scenario the 2014 Aviation Guidelines assume in their point 114 that the State aid does not contribute to an objective of common interest. When looking at the sequence of events regarding the extension of Saarbrücken Airport and the conversion of Zweibrücken Airport from a military to a civil aviation airport, it is clearly visible that the P&L agreement under which the losses of Saarbrücken Airport have been compensated was put in place when Zweibrücken Airport had not yet entered the market for commercial aviation and Saarbrücken Airport had been congested for a few years. Therefore, the duplication argument applies rather to the State aid granted to Zweibrücken Airport ([74]).

(287) The Commission therefore considers that the operating aid granted to Saarbrücken Airport contributed to the achievement of the objective of common interest of improving the connectivity and regional development of the Saarland region through the operation of safe transport infrastructure to meet the transport needs of the region.

Need for State intervention

(288) According to point 116 et seq. of the 2014 Aviation Guidelines, operating aid to airports will be considered necessary if it brings about a material improvement that the market itself cannot deliver. The guidelines further recognise that the need for public funding to finance operating costs will normally be proportionately greater for smaller airports due to high fixed costs and that airports with annual passenger traffic between 200 000 and 700 000 passengers may not be able to cover their operating costs to a substantial extent.

(289) Since the construction of the new terminal the annual passenger numbers of Saarbrücken Airport have stabilised at around 500 000, which is well below 700 000 passengers, the number established by the 2014 Aviation Guidelines as an upper limit for this category of regional airports. Although the capacity of the airport is fully used at least in […], the airport is not able to generate enough revenues to cover its operating costs, which the 2014 Aviation Guidelines identify as typical for airports of this size.

(290) Therefore the Commission considers that the operating aid to Saarbrücken Airport is necessary.

([74]) See footnote 46.

Appropriateness of State aid as a policy instrument

(291) According to point 120 of the 2014 Aviation Guidelines operating aid should be an appropriate policy instrument to achieve the intended objective or resolve the problem to be addressed. Since Saarbrücken Airport is loss–making at operating level the only appropriate instrument is operating aid that enables the airport to continue operations ensuring connectivity of the Saarland region. Other instruments such as investment aid or regulatory measures do not seem appropriate to address the financial problems of Saarbrücken Airport at the operating level. Therefore the Commission considers that the operating aid granted to Saarbrücken Airport is an appropriate instrument.

Existence of incentive effect and proportionality of the aid amount (aid limited to the minimum necessary)

(292) According to point 124 of the 2014 Aviation Guidelines the operating aid has an incentive effect if it is likely that in the absence of the operating aid and taking into account the possible presence of investment aid and the level of air traffic, the level of the economic activity of the airport would be significantly reduced.

(293) Saarbrücken Airport received investment aid to construct a new terminal and to implement the current requirements for modern airport infrastructure. This enabled the airport to satisfy the connectivity and transport needs of the Saarland region, which expressed in passenger numbers have stabilised over the last years at the level of 500 000 passengers per annum. Despite rather stable passenger numbers the airport is however not able to cover its operating costs. Without the operating aid the airport could not maintain the current level of traffic and its economic activity would have to be reduced. At the same time the aid did not exceed the amount required to cover operating losses, and therefore the aid amount is limited to the minimum necessary.

(294) Therefore the Commission considers that the operating aid to Saarbrücken Airport has an incentive effect and is proportionate.

Avoidance of undue negative effects on competition and trade

(295) According to point 131 of the 2014 Aviation Guidelines when assessing the compatibility of operating aid to the airport, the Commission will take into account the distortions of competition and the effects on trade. An indication of potential competition distortions or effect on trade may be the fact that the airport is located in the same catchment area as another airport with spare capacity.

(296) As demonstrated in recitals 237 et seq., taking into account the concept of a catchment area of around 100 km and travelling time of 60 minutes, it can be assumed that three of the airports located closest to Saarbrücken, that is to say the Luxembourg Airport (121 km from Saarbrücken), Metz–Nancy–Lorraine Airport (96 km from Saarbrücken) and Frankfurt–Hahn Airport (128 km from Saarbrücken) are not located in the same catchment area and pursue business models that are significantly different from that of Saarbrücken Airport. Saarbrücken offers mainly scheduled flights connecting Saarbrücken with main German business centres (Berlin, Hamburg and in the past also Munich) and a number of holiday destinations. Luxembourg offers mainly scheduled flights to European capitals, Metz–Nancy–Lorraine is focused on scheduled flights to French cities and destinations in Northern Africa and the business model of Frankfurt–Hahn is based on low–cost carriers and air freight transport.

(297) The problem of duplication of the airport infrastructure in the same catchment area arises only regarding Zweibrücken Airport. However, as explained in recital 252 and taking into account the sequence of events regarding the extension of the infrastructure at Saarbrücken Airport and the transformation of Zweibrücken Airport from a military into a civil aviation airport, which created the spare capacity in the Saarland area, it can be concluded that it is Zweibrücken Airport which unnecessarily duplicated infrastructure with distortive effect on competition.

Conclusion

(298) On the basis of the above, the Commission concludes that the operating aid granted to Saarbrücken Airport is compatible with Article 107(3)(c) of the Treaty in the light of the compatibility conditions laid down in Section 5.1.2 of the 2014 Aviation Guidelines.

(299) The Commission further considers that since it found the operating aid to FSBesitzG/FSG to be compatible under the 2014 Aviation Guidelines, it does not have to consider any other grounds of potential compatibility put forward by Germany.

5.2. *THE TRANSFER OF VARIOUS PLOTS OF LAND TO FSBESITZG*

5.2.1. EXISTENCE OF AID

(300) For the reasons set out in recitals 179 to 182, FSBesitzG has to be considered an undertaking from the year 2000 onwards.

Therefore, as far as the various transfers of land that were mentioned in the opening decision are concerned, only those that took place after the year 2000 are relevant for the purposes of the present Decision. Transfers that took place before 2000 did not benefit an undertaking and therefore could not amount to State aid. In relation to the transfers that took place after 2000, Germany brings forward that they were necessary for safety reasons and would hence fall within the public policy remit and be exempted from State aid scrutiny. In Germany's view, the transfers fall under § 8 *Luftsicherheitsgesetz*. By the same token as in recitals 186 to 194, the Commission is of the view that measures pursuant to § 8 *Luftsicherheitsgesetz* can, in principle, be considered to constitute activities falling within the public policy remit. To the extent, however, that the transfer of plots relieved FSBesitzG or FSG of costs they had to bear pursuant to § 8(3) *Luftsicherheitsgesetz*, the transfers are not exempted from scrutiny under Union State aid rules.

(301) After 2000, three transfers of land took place, two of them […] (2002 and 2003) and one against payment (2004). The plots of land were transferred by the Land Saarland. Accordingly, the Commission can conclude that the land transfers to FSBesitzG involve State resources in the form of direct grants from the State budget and are therefore imputable to the State.

(302) The two transfers that took place free of charge must be considered to have granted FSBesitzG an advantage that it could not have otherwise obtained on the market. Germany provided an internal evaluation of the value of these two plots of land, according to which the combined market value would amount to approximately […]. The third plot of land was sold for a price of […]. Germany has provided an evaluation of the plots of land that were transferred in 2002. According to this evaluation, the transferred plots outside the original fence had a value of […]; the plots of land on the premises of the airport had a value of […]. It claims that this evaluation can be used to also determine the value of the plot sold in 2004. On that basis, Germany estimated that the value of the plot sold in 2004 amounted to […] at the time of the transaction, which equals the sales price that FSBesitzG paid. In this regard, the Commission first notes that the evaluation referred to by Germany has not been done by an independent expert, but in house, by the unit in the Saarland's Ministry of finance responsible for sale of land. Moreover, Germany has not provided any explanation on how it arrived at its conclusion. In particular, it remained unclear which plots of land were located on the premises and which ones outside the premises of the airport. The Commission can therefore not exclude that the price paid was below market value and thus conferred an advantage to FSBesitzG. As only FSBesitzG benefited from the three transfers, it must also be considered that they were selective in nature. Finally, by the same token as in recitals 218 to 225, the transfers are liable to distort competition and have an effect on trade. Accordingly, the transfer of three plots of land amounted to State aid.

(303) The Commission furthermore considers that since the aid related to the free transfer of fixed capital assets, the aid must be qualified as investment aid.

5.2.2. COMPATIBILITY

(304) The investment aid was used to allow for the extension of runway end safety areas (RESA). As set out in Section 5.1.5.3, this investment was done with a view to keeping the airport fully operational, thereby enhancing regional development. The Commission considers that the investment aid in the form of a transfer of land also fulfils all the other conditions for establishing compatibility pursuant to point 61 of the 2005 Aviation Guidelines, since the reasons set out in Section 5.1.5.3 equally apply. It is therefore concluded that the investment aid in the form of the transfer of land is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

5.3. *GUARANTEES ON LOANS TO THE BENEFIT OF VH SAAR AND FSBESITZG*

5.3.1. EXISTENCE OF AID

(305) The Commission notes that the Land *Saarland* guaranteed loans to FSBesitzG on three occasions without receiving any remuneration. However, it also notes that the guarantees were all granted before the year 2000. As FSBesitzG could only be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty from the year 2000 onwards, the Commission finds that the guarantees did not grant an advantage to an undertaking and therefore do not amount to State aid.

(306) As regards the comfort letters provided to vh Saar, the Commission recalls its previous conclusion in recital 203 that vh Saar uses the funding it received to fulfil its financing obligations toward Saarbrücken Airport. The loans taken out by vh Saar following the comfort letters were also passed on to Saarbrücken Airport. It can therefore be concluded that the advantage contained in these letters did not benefit vh Saar, but that the advantage therein, if any, was passed on to the Airport.

(307) As to the advantage to the airport, the loans secured by the comfort letters were passed on to finance investments in infrastructure. If the comfort letters involved aid, it would thus be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty for the reasons set out in Section 5.1.5.3.

5.4. *THE LEASE CONTRACT BETWEEN FSBESITZG AND FSBG*

5.4.1. EXISTENCE OF AID

(308) The Commission already determined, in recital 181, that FSBG was an undertaking for the purposes of Article 107 (1) of the Treaty. It therefore only needs to be assessed whether the lease contracts granted an advantage to FSBG, whether such an advantage was granted from State resources, and whether it distorted competition and affected trade between Member States.

Distinction between existing and new aid

(309) The Commission first observes that a distinction needs to be drawn between the lease contract that was concluded on 7 July 1997 and effective until 1 July 2006 ('the 1997 contract'), and the contract that was effective as from 1 July 2006 onwards ('the 2006 contract'). As was stressed above, the construction and operation of an airport was not considered to constitute an economic activity until the year 2000, with the consequence that any aid scheme put into place before that date would, if considered to amount to State aid, constitute *existing aid* after that date (see Section 5.1.2). Hence, it is not necessary to investigate further whether the 1997 contract (which foresaw fixed annual lease payments) did in fact amount to aid, given it would in any event have to be qualified as existing aid.

(310) On the other hand, the conclusion of a new lease contract by FSBG in 2006 with changed conditions for determining the annual lease to be paid (in particular, the introduction of a new price element, namely the transfer of a certain percentage of the annual profit of FSBG) cannot be considered as merely a 'modification of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market' ([75]). The 2006 contract can therefore not, if amounting to State aid, be considered as existing aid, but would rather constitute new aid.

State resources and imputability to the State

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

([75]) Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140/1, 30.4.2004, p. 1).

(312) The 2006 contract was concluded between FSBesitzG and FSBG. FSBesitzG was (indirectly) 100 % owned by the State, which was hence in a position to exercise control over the company. Agreeing to a lease contract with a lease lower than the market price would entail foregone revenues for that company and its owner, that is to say ultimately the Saarland and would hence be financed from State resources. As to the imputability, the Commission notes that according to the statute of FSBesitzG the members of the supervisory board of FSBesitzG are appointed by the government of Saarland and that the president is appointed by the Ministry responsible for aviation. The conclusion of the 2006 contract needed the consent of the supervisory board ([76]), which represents the government of the *Saarland*. The Commission can therefore conclude that the measure is imputable to the State.

Economic Advantage

(313) To determine whether the 2006 contract granted an economic advantage to FSBG, it is necessary to either compare the terms of that contract to those that were common on the market at the relevant time for the same type of contract, or, if that is not possible, to consider whether a profit–oriented market economy operator would have engaged in this transaction.

(314) Germany has not provided any evidence demonstrating that the 2006 contract conformed to normal market conditions at the time. It is therefore necessary to analyse whether a prudent MEO, interested in making a reasonable profit, would have concluded the 2006 contract.

(315) The Commission observes that FSBesitzG consistently incurred losses at least since the year 2000 (see Table 3). Considering that the lease contract with FSBG was virtually its only source of income (apart from the yearly loss cover received from vh Saar), it would appear that a reasonable MEO being in the place of FSBesitzG would have attempted to cover its own costs from the income generated from this lease contract. The costs incurred by FSBesitzG were higher than the income it generated by leasing the airport to FSBG. It also does not appear that FSBesitzG was, in concluding the 2006 contract, pursuing a specific long–term profitability strategy.

(316) In light of these considerations, the conclusion of the 2006 contract cannot be considered as being in line with the MEO principle and it therefore conferred an advantage to FSBG.

Selectivity

(317) Article 107(1) of the Treaty requires that a measure, in order to be defined as State aid, favours 'certain undertakings or the production of certain goods'. As the 2006 contract only benefitted FSBG, it can be considered selective within the meaning of Article 107(1) of the Treaty.

Distortion of competition and effect on trade

(318) Finally, the measure was liable to distort competition and have an effect on trade for the reasons explained in Section 5.1.1.

Conclusion

(319) The Commission therefore considers that the 2006 contract involved State aid for FSBG. It must be assessed as operating aid.

5.4.2. COMPATIBILITY

(320) As described in Section 5.1.5.4, operating aid granted before the date of application of the 2014 Aviation Guidelines may be declared compatible to the full extent of uncovered operating costs provided that the following conditions ([77]) are met:

— contribution to a well–defined objective of common interest,

— need for State intervention,

— existence of incentive effect,

([76]) See § 10 letter (i) of the Statute of FSBesitzG, according to which any change in the lease contract between FSBesitzG and FSBG had to be approved by the supervisory board of FSBesitzG.

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

— proportionality of the aid amount (aid limited to the minimum necessary),

— avoidance of undue negative effects on competition and trade.

(321) The operating aid under assessment, which concerned the leasing of airport infrastructure below market price, had the objective of maintaining the appropriate level of operation at Saarbrücken Airport.

(322) According to point 113 of the 2014 Aviation Guidelines, operating aid to airports will be considered to contribute to the achievement of an objective of common interest if it increases the mobility of Union citizens and the connectivity of the regions, combats air traffic congestion at major Union hub airports or facilitates regional development.

(323) As explained in recital 254, operating aid to Saarbrücken Airport contributed to the connectivity and development of the region. For the reasons set out in recital 284, the duplication argument applies rather to the State aid granted to Zweibrücken Airport.

(324) Therefore, the Commission considers that the operating aid granted to FSBG contributed to the achievement of the objective of common interest of improving the connectivity and regional development of the Saarland region through the operation of transport infrastructure to meet the transport needs of the region.

(325) According to the 2014 Aviation Guidelines, smaller airports may have difficulties in ensuring the financing of their operation without public funding. According to point 118 of the 2014 Aviation Guidelines, airports with an annual passenger traffic below 700 000 passengers per annum may not be able to cover their operating costs to a substantial extent. Traffic at Saarbrücken Airport was constantly below 700 000 passengers. Therefore, the Commission considers that the aid was necessary as it allowed an improvement in the connectivity of the region that the market would not deliver by itself.

(326) As pointed out above, Saarbrücken Airport received investment aid which enabled the airport to satisfy the connectivity and transport needs of the Saarland region (see recital 285). Despite rather stable passenger numbers, the airport is not able to cover its operating costs. In this context, the Commission notes that also FSBG was loss making in the years 2006 and 2007, when the 2006 contract was applicable (the losses recorded amounted to EUR – 214 709 in 2006 and EUR – 2 737 773 in 2007). The losses were incurred despite the fact that the lease paid by FSBG in those years was lower than the lease paid under the 1997 contract (see Table 7). It can hence be assumed that the aid involved in the 2006 contract had an incentive effect and did not exceed the amount required to cover operating losses and thus was limited to the minimum necessary for the aided activity to take place.

(327) On this basis, the Commission concludes that the compatibility conditions laid down in the 2014 Aviation Guidelines are met.

5.5. *DISCOUNTS FOR AIRLINES/MARKETING AGREEMENTS*

5.5.1. EXISTENCE OF AID

(328) By providing air transportation services, airlines are performing an economic activity and therefore constitute undertakings within the meaning of Article 107(1) of the Treaty. It must be analysed whether the arrangements between the airlines and the airport in question granted the former an economic advantage.

Economic advantage

(329) Where an airport has public resources at its disposal, aid to an airline can, in principle, be excluded where the relationship between the airport and the airline satisfies the MEO test. The existence of an advantage can normally be excluded if: (a) the price charged for the services corresponds to the market price; or (b) it can be demonstrated through an *ex ante* analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport and is part of an overall strategy leading to profitability in the long term.

(330) In order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non–aeronautical revenues stemming from the airline's activity should be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes. Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport must be taken into account. Such incremental costs may encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs. In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test.

(331) In addition, the airport infrastructure must be open to all airlines and not dedicated to a specific airline in order to exclude that the advantage resulting from compatible aid to the airport operator is not passed on to a specific airline.

(332) Against this background, the Commission will asses the overall scheme of airport charges applicable at Saarbrücken Airport as well as the individual contracts between airlines and Saarbrücken Airport which deviate from or are outside the scope of the scheme of airport charges.

Discounts for airlines

(333) On 1 April 2007, a new schedule of charges was introduced at Saarbrücken Airport (2007 schedule of charges). This schedule envisaged discounts for airlines fulfilling certain conditions. The 2007 schedule of charges in particular offered discounts for new airlines, new destinations and increased passenger numbers. Until then, no discounts had been foreseen in the schedule of charges. Saarbrücken Airport adopted a new schedule of charges which entered into force on 1 September 2013, replacing the 2007 schedule of charges. The 2013 schedule of charges is not subject to the present decision.

(334) When applying the MEO test to the measure at stake, the Commission first has to determine whether the price charged corresponds to a market price. For this, the Commission has doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. In the absence of an identifiable market benchmark, the Commission has to assess the *ex ante* incremental profitability of the 2007 schedule of charges.

(335) The 2007 schedule of charge was introduced to enhance the competitiveness of Saarbrücken Airport. When drawing up the 2007 schedule of charges, the operator of Saarbrücken Airport analysed passenger numbers, airport movements as well as the financial results of the years 1997–2006. According to Germany, a market analysis undertaken at that time showed that Saarbrücken was one of the most expensive airports in Germany. The Commission observes that TUIFly left Saarbrücken as from late 2006. In addition, Saarbrücken Airport faced new competition from Zweibrücken after 2006. All these factors together led Saarbrücken Airport to reconsider its pricing policy and to introduce a revised schedule of charges offering incentives in form of discounts in order to ensure its future viability and profitability.

(336) While, according to the available information, no *ex ante* profitability studies have been prepared for the 2007 schedule of charges, Germany has submitted that Saarbrücken Airport expected that virtually no additional investments would be required to provide additional airport services to airlines and that no additional operating costs would arise. Therefore, in Germany's view no *ex ante* profitability study was necessary. Hence, the incremental costs were limited to the incentives offered. In this context, the Commission observes that the 2007 schedule of charges indeed offered discounts only for new airlines, new connections, or increased passenger numbers with the consequence that it did not impact negatively on the status quo at the airport. The Commission observes that before the introduction of the 2007 schedule of charges, Saarbrücken airport's capacity was utilised only at 50 %. Indeed, passenger numbers decreased from 487 000 in 2005 to 350 000 in 2007, whereas the airports potential annual capacity would have been 700 000 passengers per annum. The Commission notes that after the departure of TUIFly Saarbrücken Airport had spare capacities, with the consequence that additional traffic could be handled without the need to upgrade infrastructure or acquire additional equipment or hire new staff. Germany confirmed that there was no need to hire new staff or to expand existing infrastructure or other equipment in order to serve new airlines or connections (for instance the existing baggage belts and personnel were sufficient).

(337) With any new airline or connection, aeronautical as well as non–aeronautical revenues would be generated. Given that the level of costs remained stable, any new airline or connection would, according to Germany, provide a positive contribution to the airport's profitability. The fact that Saarbrücken indeed managed to attract a number of new airlines (such as Air Berlin, which started operating from Saarbrücken in late 2007) and to establish new connections after the introduction of the 2007 schedule of charges also indicates that the discount–based strategy to increase its business was successful. The available data finally demonstrates that the 2007 schedule of charges resulted in a gradual increase of revenue for the airport (from […] in 2007 to […] in 2010).

(338) The Commission further notes that when assessing airport/airline arrangements, it should also assess the extent to which the arrangements can be considered part of the implementation of an overall strategy of the airport to lead to profitability at least in the long term. In this respect, the Commission has to take into account the factual evidence that was available, and the developments that could reasonably be expected, at the time when the 2007 schedule of charges was made, in particular the prevailing market conditions, notably the market changes induced by the liberalisation in the air transport market, the market entry and development of low cost carriers and other point–to–point carriers, changes in the organisational and economic structure of the airport industry as well as the degree of diversification and complexity of the functions undertaken by airports, the enhancement of the competition between airlines and airports, the uncertain economic environment due to the changes in the prevailing market conditions or any other uncertainty in the economic environment have to be taken into account. The Commission notes that, as described in 335, several reasons (such as new competition from Zweibrücken after 2006 and the departure of TUIFly from the end of 2006) led Saarbrücken Airport to consider a revised schedule of charges with discounts being a necessary step in ensuring its future viability and profitability.

(339) Finally, the Commission notes that the airport infrastructure is open to all airlines and not dedicated to a specific airline.

(340) In the light of these considerations, accepting that an increase in activity resulted in virtually no incremental costs but could be expected to create incremental revenue, the Commission accepts that in adopting the 2007 schedule of charges and the discounts contained therein, Saarbrücken Airport acted like a MEO. Therefore, the measure did not grant the affected airlines any economic advantage.

Marketing agreement with Air Berlin

(341) In the contract concluded between Air Berlin and Saarbrücken Airport on 6 April 2011, the two parties agreed that Air Berlin would increase the frequency of its flights to and from Berlin by an additional five return–flights per week, and the frequency of its flights to and from […] by an additional three return–flights per week until the end of April 2014. In return for this frequency increase and the commitment from Air Berlin that it would advertise the new frequency, Saarbrücken Airport committed to paying a total of [EUR 800 000–EUR 1 700 000] to Air Berlin in 2011 and 2012.

(342) Germany provided an analysis of the profitability of the contract that could be expected at the time of the conclusion of the contract, undertaken by FSG. It was submitted that apart from the direct marketing payments, the increased frequency would not cause any additional costs ([78]) for the airport, which according to Germany could handle the additional traffic on the basis of the existing infrastructure and personnel. The analysis was based on the following expectations:

Table 10

Ex ante profitability of marketing agreement with Air Berlin (figures in EUR)

	2011	2012	2013	2014	2011–2014
Incremental Revenues	[…]	[…]	[…]	[…]	[…]
Incremental Costs	[…]	[…]	[…]	[…]	[…]

([78]) The incremental costs presented in Table 10 concern the marketing payments.

	2011	2012	2013	2014	2011–2014
Result	[…]	[…]	[…]	[…]	[…]

(343) While the *ex ante* analysis undertaken by FSG and submitted by Germany did not discount the future payments to the date on which the contract was concluded, it is clear that the contract was expected to be profitable. Germany confirmed that to date, the increased frequency as foreseen by the marketing agreement has not required to hire new staff or to make specific investments: Overall, the Airport's expectations were to a large extent met and the contract has been profitable. In this context, Germany provided a projection for the duration of the contract, based on the profits made in the first 8 months of the contract period (from April 2011–January 2012), according to which the contract appears to be profitable.

(344) Having analysed the contract and the expectations of FSG at the time of the conclusion of the contract, the Commission is satisfied that the contract contributed to the profitability of Saarbrücken Airport, in that the expected incremental revenues were higher than the expected incremental costs. As the contract thus complied with the MEO principle, it did not grant Air Berlin an advantage.

Conclusion

(345) Having found that the 2007 schedule of charges and the discounts contained therein as well as the 2011 marketing agreement between Air Berlin and Saarbrücken Airport did not grant the respective airlines an advantage, the other criteria for the existence of aid do not need to be assessed. It can be concluded that no State aid was granted to the airlines in question.

5.6. *START–UP AID TO CIRRUS AIRLINES*

(346) The Commission observes that Cirrus Airlines, which received direct payments from FSBesitzG in 2005 and 2006, filed for insolvency in January 2012; the insolvency procedure was opened in April 2012. As a consequence, Cirrus Airline has ceased its economic activity. As the outcome of the insolvency proceedings is not clear, the Commission is for the moment not in a position to take a view as to whether the investigation concerning the payments to Cirrus Airlines might have become devoid of purpose. The payments to Cirrus Airline are therefore not subject to this Decision.

6. **CONCLUSION**

(347) Therefore, the Commission concludes that the financing of FSBesitzG/FSG by way of capital injection to cover the losses in the years 2000–2012 constitutes State aid in so far as it was related to activities outside the public policy remit. The aid constitutes new aid from 1 June 2007 onwards. Part of the aid is compatible investment aid pursuant to the 2005 Aviation Guidelines and part of the aid is compatible operating aid pursuant to the 2014 Aviation Guidelines. The Commission further concludes that the capital injections granted to vh Saar do not constitute State aid as vh Saar passed on all the public funds received and therefore did not itself obtain an economic advantage.

(348) The transfer of plots of land without a remuneration or at a price below the market price in the years 2002, 2003 and 2004 constitutes State aid in so far as it was related to activities outside the public policy remit. The aid is compatible as investment aid pursuant to the 2005 Aviation Guidelines.

(349) The guarantees on loans were all granted before the year 2000 and therefore do not constitute State aid. The advantage contained in the comfort letters, if any, was passed on from vh Saar to FSBesitzG/FSG.

(350) The 2006 lease contract involved State aid for FSBG, which is compatible operating aid pursuant to the 2014 Aviation Guidelines.

(351) No State aid was granted to airlines through the 2007 schedule of charges and the marketing agreement with Air Berlin. The start–up aid in favour of Cirrus Airline is not subject to the present Decision.

(352) Finally, the Commission notes that on 17 June 2014, Germany informed the Commission that it exceptionally accepts that this decision is adopted in the English language,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Saarbrücken Airport is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty of the Functioning of the European Union.

The measures which Germany has implemented for airlines (2007 schedule of charges, marketing agreement with Air Berlin) do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 2014.

For the Commission

Joaquín ALMUNIA

Vice–President