

II

(Non-legislative acts)

DECISIONS

COMMISSION

COMMISSION DECISION (EU) 2016/632

of 9 July 2014

on the State aid No SA. 32009 (11/C) (ex 10/N) which Germany plans to grant to BMW AG for a large investment project in Leipzig*(notified under document C(2014) 4531)***(Only the German 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,

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 those provisions ⁽¹⁾,

Whereas:

1. PROCEDURE

- (1) By letter dated 30 November 2010, Germany notified the Commission of its intention to grant regional aid under the Guidelines on national regional aid 2007-2013 ⁽²⁾ (hereinafter 'RAG') to BMW AG for an investment project in Leipzig, Saxony, Germany ⁽³⁾.
- (2) By letter dated 13 July 2011, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereafter 'TFEU') in respect of the notified aid measure.

⁽¹⁾ OJ C 363, 13.12.2011, p. 20.

⁽²⁾ OJ C 54, 4.3.2006, p. 13.

⁽³⁾ The Commission learnt during the formal investigation that the aid beneficiary had been implementing a second very large investment project during the same period on the same site. Subsequently, Germany pre-notified (SA. 37291 (13/PN)) individually notifiable aid for this second project; however, the notification has not yet been formally submitted to the Commission. If aid for this second project should be notified, the Commission will establish in the context of the examination of that notification whether the electric car project which is the subject of the present formal investigation, and the second investment project constitute a single investment project within the meaning of paragraph 60 of the RAG.

- (3) By letter dated 12 September 2011, Germany submitted its comments on the Commission decision to initiate the procedure. Additional information was submitted by the German authorities by letter dated 27 September 2011.
- (4) The Commission decision was published in the *Official Journal of the European Union* on 13 December 2011 ⁽⁴⁾. The Commission called on interested parties to submit their comments.
- (5) The Commission did not receive any comments from interested third parties. By letter dated 3 February 2012, the Commission services informed the German authorities of this fact.
- (6) On 17 January 2012, the German authorities amended the initial notification to include additional aid for an additional investment element ⁽⁵⁾ which was decided by the aid beneficiary after the decision to open the formal investigation. On 17 December 2013, the German authorities withdrew that amendment.
- (7) By letter dated 17 February 2012, Germany was requested to submit further information necessary for the in-depth assessment of the aid. Germany submitted this information by letters of 29 February, 23 March, 5 April, 31 August and 28 September 2012. In its letter of 19 July 2012, Germany requested the Commission to suspend the examination of the case for an indefinite time. The Commission rejected this request by letter of 10 August 2012. Following a communication from Germany on 26 October 2012 about two investment activities for non-electric cars (see footnote 3), clarifying information was requested from Germany by letters of 31 October 2012 and 24 January 2013 to which Germany responded on 14 December 2012 and 15 March 2013, respectively. Additional clarifications were requested from Germany by letter of 9 July 2013, to which Germany replied on 5 August 2013.
- (8) By letter of 5 August 2013 Germany informed the Commission of a further amendment of the aid project (reduction of the aid amount and aid intensity).
- (9) Meetings between the Commission services and the German authorities took place on 8 March, 14 August and 3 October 2012.

2. DETAILED DESCRIPTION OF THE NOTIFIED MEASURE

2.1. Objective

- (10) The German authorities intend to promote regional development by providing regional investment aid to BMW for the setting up of a new production facility within the existing BMW plant in Leipzig.
- (11) On the date of notification, Leipzig was an assisted area pursuant to Article 107(3)(a) of the TFEU; its standard regional aid ceiling for large enterprises was 30 % ⁽⁶⁾ gross grant equivalent (GGE) according to the German regional aid map 2007-2013 ⁽⁷⁾. The German authorities indicated that the investment project will create some 800 new direct jobs in the assisted region.

⁽⁴⁾ Cf. footnote 1.

⁽⁵⁾ The additional investment element concerned the production of plastic bumpers for the combustion engine cars from the lower compact class (GBP-Class, namely models BMW 1st and BMW X1). By letter of 3 February 2012 and electronic mails of the same date, the Commission services requested further information on this amendment, which Germany submitted by letters dated 25 January 2012 and 24 February 2012. On 17 December 2013, the German authorities clarified that this investment does not constitute a single investment project with the originally notified project (for production of i3 and i8), but constitutes part of the second project (see footnote 3) for which aid had been pre-notified (SA. 37291 (13/PN)). Therefore, Germany withdrew aid for the plastic bumper investment project from the scope of the present notification. Germany was requested to provide further information by letter of 23 January 2014. Germany replied to this request by letter of 11 February 2014. The bumper investment will have no impact on the eligible costs or the aid for the i3/i8 project, and aid to be granted for this investment will be assessed in another context.

⁽⁶⁾ Applicable at the date of the initial notification, i.e. on 30 November 2010.

⁽⁷⁾ Commission decision of 8 November 2006 on State aid Case N 459/06 — Regional State aid map for Germany 2007-2013 (OJ C 295, 5.12.2006, p. 6).

2.2. Legal basis and the aid granting authority

- (12) The national legal basis for granting the aid is the Investment Allowance Act (*Investitionszulagengesetz 2010*) of 7 December 2008, block exempted under X 167/2008⁽⁸⁾.
- (13) The aid will be granted by the Munich tax office (Finanzamt München).

2.3. The beneficiary

- (14) The beneficiary of the aid is BMW AG (the parent company of the BMW Group) with headquarters in Munich, Bavaria, Germany. The BMW Group focuses on the manufacturing of cars and motorbikes under the following brands: BMW, MINI and Rolls-Royce Motor Cars. The plant in Leipzig is one of BMW Group's 17 production facilities; it has no independent legal personality.
- (15) Since BMW Leipzig is not an independent legal entity, no separate financial data could be provided. In 2009 it had [...] (*) employees. The German authorities provided the following information about the BMW Group.

Table 1

Turnover of the BMW Group (in million EUR)

	2011	2012	2013
Worldwide	68 821	76 848	76 058
EEA	[...]	[...]	[...]
Germany	12 859	12 186	11 796

Table 2

Number of employees of the BMW Group by 31 December of a given year

	2011	2012	2013
Worldwide	100 306	105 876	110 351
EEA	[...]	[...]	[...]
Germany	73 338	76 911	78 961

⁽⁸⁾ X 167/2008 — Germany — *Investitionszulagengesetz* (IZ) 2010 (OJ C 280, 20.11.2009, p. 7).

(*) Business secret.

2.4. The investment project

2.4.1. The notified project

- (16) The investment project aims at setting up a new production facility for the manufacturing of electric cars with a car body made of carbon fibre reinforced plastic materials. The manufacturing of the following two new models is planned: the model 'i3', also called Mega City Vehicle (hereinafter 'i3' or 'MCV'), and the luxury sport car model 'i8'. According to the beneficiary, they represent completely innovative products which have not been manufactured in the past and they will be assembled in the Leipzig plant. The engines and batteries for both the i3 and i8 will be produced in the Landshut plant of the BMW Group, whereas the intermediate products for the carbon fibre body of both the i3 and i8 models will be produced in the Wackersdorf plant of the same group (and from there on delivered partly to Leipzig and partly to Landshut where these intermediary products are to be further reworked).
- (17) The base model of the MCV (i3) is a purely electric car without combustion engine, driven by electricity stored in a battery, a so-called BEV⁽⁹⁾ (Battery Electric Vehicle). The car body is made from carbon fibre reinforced plastic material; as a result, the car's weight does not exceed 1,3 t for a length between 3,95 and 4,05 m. The car is envisaged for urban use, with a reach of up to 150 km without battery recharge and its speed is up to 140 km/h. The notified i3 production capacity of the Leipzig plant is [10 000-50 000] vehicles per year.
- (18) The sport car model 'i8' is a plug-in hybrid car, a PHEV (Plug-in Hybrid Electric Vehicle)⁽¹⁰⁾, benefitting from the advantages of the light-weight carbon fibre reinforced plastic car body and an innovative aerodynamic concept. In addition to the electric engine, it will contain a small 3-cylinder combustion engine which will mitigate the handicaps of a fully electric vehicle, in situations when this is necessary: i.e. (1) when the distance is longer than a battery without recharge could cover and, (2) when the speed desired for sport cars is higher than that attained by the electric engine. The length of the car should be around 4,6 m for less than 1,5 t weight. The maximum speed of the 'i8' model is 250 km/h. The production of this model is included in the total of [10 000-50 000] electric cars to be produced in Leipzig. It will be manufactured on the same production lines as the MCV 'i3' model (its combustion engine will be manufactured in the BMW Group plant in Hams Hall, UK).
- (19) At the date of the opening decision, both models were planned to be introduced on the market at the end of 2013. The works on the investment for the i3 model started in December 2009 and the investment was completed in 2013. The works on the investment for the i8 model started in April 2011 and it will be completed later in 2014.

2.5. Eligible costs, notified aid amount and aid intensity

- (20) The notified eligible expenditure of the investment, as set out in the opening decision, amounts to EUR 392 million in nominal value (EUR 368,32 million in discounted value⁽¹¹⁾). The table below sets out the breakdown of the planned eligible expenditure in nominal terms over the investment implementation period.

⁽⁹⁾ 'Electric vehicles do not have dual mechanical and electrical powertrains. 100 % of their propulsion comes from an electric motor, energised by electricity stored in batteries.' (Source: Deutsche Bank: Electric Cars: Plugged In Batteries must be included, 9 June 2008, p. 10).

⁽¹⁰⁾ Plug-in hybrids feature both a conventional combustion engine and an electric engine. They can be charged through a power outlet and can run independently from the combustion engine for a limited distance (Source: 'Impacts of Electric Vehicles — Deliverable 1 — An overview of Electric Vehicles on the market and in development', Delft Report, April 2011, p. 30, http://www.cedelft.eu/publicatie/impact_of_electric_vehicles/1153).

⁽¹¹⁾ In line with the provisions for individually notified aid of the RAG, the nominal value was discounted to the year of notification (2010). All values are discounted to this year. In line with the applicable legislation, the interest rate used for discounting purposes is 2,24 % — the base rate of 1,24 % applicable at the time of grant (1 January 2010) plus 100 basis points. cf. http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

Table 3

Breakdown of the planned eligible costs (in million EUR — nominal value)

	2009	2010	2011	2012	2013	2014	Total
Building	1	2	86	40	1	1	131
Plant/Machinery	2	3	34	163	53	6	261
Total	3	5	120	203	54	7	392

- (21) As notified, and set out in the opening decision, Germany intended to support the investment by granting aid for the eligible expenditure planned for the period between 2009 and 2014 in the form of a fiscal allowance up to a total of EUR 49,0 million, which corresponds to an aid intensity of 12,5 %.
- (22) On 5 August 2013, Germany amended the notification indicating that under the national legal basis ('Investitionszulagengesetz 2010') only expenditure incurred until 31 December 2013 will be eligible for aid. Therefore, the maximum amount of aid is reduced to EUR 48,125 million (EUR 45 257 273 in discounted value), and the aid intensity falls to 12,29 %.
- (23) The beneficiary will be entitled to deduct the investment allowance the year after the costs are incurred. As a result, the allowance deductions will take place according to the following schedule:

Table 4

Schedule for implementing the foreseen aid in the form of a fiscal allowance (in EUR million — nominal value)

	2010	2011	2012	2013	2014	2015	Total
Investment allowance	0,375	0,625	15	25,375	6,750	0,0	48,125

2.6. Financing of the investment

- (24) The German authorities confirm that the beneficiary's own contribution to the investment, which is free of any public support, exceeds 25 per cent of the eligible costs. The European Investment Bank and the *Kreditanstalt für Wiederaufbau* (KfW) Bank awarded loans to the beneficiary for the project. The EIB loan amounts to EUR [...] million, and the KfW loan amounts to EUR [...] million ⁽¹²⁾. Germany assured the Commission that both loans have been provided on market terms.

2.7. Incentive effect

- (25) The national legal basis creates an automatic legal entitlement (where relevant, subject to Commission approval) to the aid if the conditions of the law are complied with. No discretionary granting decision or confirmation of eligibility is required for this automatic fiscal aid.

⁽¹²⁾ Only a portion of this loan covers expenses related to the MCV investment.

2.8. Maintenance of the investment

- (26) The German authorities confirmed that the investment project is required to be maintained in the assisted region in question for a minimum period of 5 years from the day of its completion.

2.9. General provisions

- (27) The German authorities undertook to submit to the Commission:

- within 2 months of granting the aid, a copy of the relevant acts concerning this aid measure,
- within 6 months after payment of the last tranche of the aid, based on the notified payment schedule, a detailed final report.

3. DOUBTS AND GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (28) In its decision to initiate the formal investigation pursuant to Article 108(2) of the Treaty, the Commission noted that the aid project respects the standard compatibility criteria under the RAG, and that the proposed aid amount and intensity do not exceed the maximum allowable. Nonetheless, in application of the provisions of paragraph 68 (a) of the RAG, it was unable to confirm the compatibility of the aid with the internal market within the preliminary examination.
- (29) Paragraph 68(a) of the RAG requires that the Commission opens a formal investigation and proceeds to an in-depth assessment of the incentive effect, the proportionality, as well as the positive and negative effects of the aid where the beneficiary's market share in the relevant product and geographic market exceeds 25 % before or after the investment.
- (30) Although Germany argued that the investments carried out by BMW AG in Leipzig create a new product market within the meaning of footnote 65 of the RAG⁽¹³⁾, the Commission could not share that opinion⁽¹⁴⁾. The Commission decided therefore to carry out the tests laid down in paragraph 68(a) and (b) of the RAG. In order to do so, the Commission had first to establish the product(s) concerned by the investment and the appropriate product and geographic market definitions.
- (31) As this was the first case of notified regional aid for investment in electric passenger vehicles (BEV/PHEV), the Commission encountered serious difficulties in determining the relevant product and geographic markets in the preliminary examination phase.
- (32) In particular, the Commission was not in a position to take a definite view on the question of whether the market for electric cars constitutes an independent product market, or forms part of the overall passenger car market without distinction of propulsion. Market information provided by Germany indicated that 1 % of all cars in the EEA in 2015 will be electric⁽¹⁵⁾. Germany used this figure to indicate the number of newly registered electric cars in the traditional segments of the conventional car market.

⁽¹³⁾ According to footnote 65 of the RAG, if the Member State demonstrates that the aid beneficiary creates a new product market, the tests laid down in paragraph 68(a) and (b) do not need to be carried out, and the aid will be authorised under the scale in paragraph 67.

⁽¹⁴⁾ The Commission accepted that electric car models present such a degree of innovation that they create a new product which is not comparable to cars manufactured in the past, in particular given their use of a carbon fibre reinforced plastic car body. However, the Commission noted that BMW does not seem to be the first, or the only manufacturer of this type of vehicles.

⁽¹⁵⁾ Source: Deutsche Bank: Electric Cars: Plugged In, Batteries must be included, 9 June 2008. <http://electricdrive.org/index.php?ht=a/GetDocumentAction/id/27929>

- (33) The Commission also faced difficulties in assigning the electric cars to individual segments of the passenger car market that were developed in the past for combustion engine cars. The key assignment criteria for the segmentation are the length and the price of a car. Many electric vehicles appear to belong to the smaller segments in terms of length, but to higher segments if classified according to their price.
- (34) Finally, the Commission was also unable to conclude that it was appropriate to assign the electric car models in question to specific segments of the conventional passenger car market, such as the C or D segments according to the HIS Global Insight car classification ⁽¹⁶⁾, the combined C&D conventional car segment, or to a combined C&D 'electric car' segment.
- (35) In addition, the Commission was not able to conclude definitely within the preliminary examination phase that the relevant market for electric cars was global or at least wider than the EEA.
- (36) Since the Commission was not in a position to take a definite view on the determination of the relevant product and geographic market, it carried out the market share test on all plausible markets. The beneficiary's market share information was based on data assembled and submitted by Germany, using the 1 % share of electric cars in the conventional car market segments (see recital 32 above) (making up a total of 150 thousand purely electric cars in the EEA in 2015), as foreseen by the study of the Deutsche Bank ⁽¹⁷⁾. The Commission concluded that the beneficiary's market share would exceed 25 % in the EEA 'electric car market' which was calculated by applying Deutsche Bank's 1 % estimation of electric car sales/conventional car sales proportion to the various conventional car segments. According to this method, the beneficiary's market share in the EEA would exceed 25 % in the B, C, D and E+F segments in 2015 ⁽¹⁸⁾, and it would also exceed 25 % of the worldwide market in the D and E+F segments ⁽¹⁹⁾.
- (37) Thus, the Commission could not exclude in the preliminary examination phase that the beneficiary's market shares did not exceed, in at least some conceivable product markets in the EEA (and in some relevant market segments at the worldwide level), the threshold laid down in paragraph 68(a) of the RAG. Therefore, it opened the formal investigation procedure pursuant to Article 108(2) of the TFEU.
- (38) As stated in the opening decision ⁽²⁰⁾, in the event that the comments received in the context of the formal investigation would not allow the Commission to conclude without any doubt that either the aid can be exempted from the application of the tests laid down in paragraph 68 of the RAG pursuant to footnote 65 of the RAG, or that the threshold in paragraph 68(a) is not exceeded, it would carry out an in-depth assessment of the investment project on the basis of its Communication concerning the criteria for an in-depth assessment of regional aid to large investment projects (hereinafter 'IDAC') ⁽²¹⁾.

⁽¹⁶⁾ There are a number of service providers analysing the car market. Among the most renowned ones are ISH Global Insight and POLK. Member States and beneficiaries usually provide information based on segmentation by one of these consultancies. ISH Global Insight proposes a narrow segmentation of passenger cars (27 segments). From the smaller segments to the larger ones, the average price, size and engine performance of passenger cars gradually increase.

⁽¹⁷⁾ The Commission expressed its view in the opening decision (recital 84) that the 1 % share of electric cars in the overall market may be too conservative, but pointed out that Germany was not able to provide any other independent estimates.

⁽¹⁸⁾ The beneficiary indicated that [...] out of the total [10 000-50 000] production is envisaged for consumption within the EEA and the rest is expected to be sold outside the EEA. This is the figure used for the calculation of the beneficiary's market share in the EEA, according to which in the B (electric car) segment it was [$> 25\%$] ([...] divided by [...]), in the C segment [$> 25\%$] ([...] divided by [...]), for the D segment [$> 25\%$] ([...] divided by [...]) and for the E+F segment [$> 25\%$]; See recitals 84-87 of the opening decision.

⁽¹⁹⁾ [$> 25\%$] in the D segment and [$> 25\%$] in the E+F segment in 2015.

⁽²⁰⁾ Recital 103 of the opening decision.

⁽²¹⁾ Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment projects (OJ C 223, 16.9.2009, p. 3).

4. COMMENTS FROM INTERESTED PARTIES

- (39) The Commission received only comments from Germany.

4.1. Comments from Germany

- (40) Germany maintains the argument that electric cars form part of the conventional car market. In that market, the BMW Group's market share for whatever product market segmentation is below the 25 % threshold, both at the global level and in the EEA market.
- (41) However, Germany also argues that if the Commission should consider electric cars to constitute a separate product market from conventional cars, then footnote 65 of the RAG should be applied.
- (42) According to Germany, even if the Commission were unable to consent to the application of footnote 65 of the RAG and considered the electric car market to constitute a separate product market, the aid should be approved without an in-depth assessment, since the beneficiary's market share in this (non-segmented electric car) market is below 25 % and the opening decision did not express doubts regarding the standard compatibility criteria of the RAG. Alternatively, the Commission should apply IDAC in a flexible manner.

4.1.1. Market definition and market shares

Relevant market is the global conventional car market

- (43) Germany argues that the relevant product market should be defined as the conventional car market and the relevant geographic market as the global worldwide market. As hybrid cars do already today, electric cars will compete in the future with conventional cars, and electric and conventional cars will be considered by the consumers as substitutable products.
- (44) Despite admitted differences in range between the i3 model and comparable conventional cars (the i3 needs recharging long before fuel tanks are empty), both the i3 and comparable conventional cars serve the same purpose, as they have the same passenger room and attain the same speed. Demand side substitutability is even stronger for the i8 model, which attains the same range as conventional or hybrid cars. The price difference between electric and conventional cars can be reduced through subsidies for the buyer.
- (45) According to Germany, customers do not differentiate between hybrid, electric or conventional cars because they are aware of the environmental consequences of the production of electricity which is used to propel electric cars and because they have uniform expectations regarding environmental protection standards and other parameters for all types of car.
- (46) The relevant geographic market for electric cars is the worldwide market, as trade flows are expected to develop in all directions. China, Japan and the USA (as well as some EU countries) which subsidise the use of electric cars and partially apply mandatory quotas for the share of alternative cars within the overall car market, represent a significant portion of the world market. In addition, the framework conditions for world trade in electric cars are the same or more favourable than those applied to conventional cars.

- (47) Even if the geographic market were the EEA market (for conventional cars), the BMW AG's market share would not reach the 25 % threshold either before or after the investment as it was recognised in recital 88 ⁽²²⁾ of the opening decision.

Applicability of footnote 65

- (48) Germany considers that if the Commission should decide to define electric cars as a separate product market, footnote 65 of the RAG should be applied.
- (49) Germany accepts that despite the innovative car body construction that distinguishes the i3/i8 models from competing products, the beneficiary is neither the first, nor the only producer of electric vehicles. It also agrees that some producers manufacturing electric vehicles already exist and that others will enter the electric car market by 2013/2014.
- (50) Germany suggests, however, that even if therefore footnote 65 were not directly applicable, it could be applied by analogy to the present case, given the philosophy and reasoning behind the existence of this footnote.
- (51) According to Germany, the rationale that led to the introduction of footnote 65 into the RAG is that the initially significant market shares of innovators and the resulting short term distortion of competition are outweighed by the advantages that a true innovation provides for competitiveness and for the competitive conditions in the relevant market. The application of the tests laid down in paragraph 68 of the RAG presupposes the existence of a market. New markets cannot meet this condition; an in-depth assessment in application of paragraph 68 would punish the first mover and impede the establishment of a functioning market.
- (52) Germany considers that the statistically high initial market share and capacity created by an early mover on a market where only a small number of models are offered and where serial production started only recently does not allow the application of the paragraph 68 tests in a meaningful way. In Germany's view, the investment at stake is neither conducive to the creation of a market dominating position, nor does it lead to the creation of overcapacities in a declining market.
- (53) In sum, this case presents the exact situation which the direct application of footnote 65 intends to address. Therefore, Germany concludes that the paragraph 68 tests should not be carried out and that the aid should be approved without in-depth assessment.

Market share is below 25 % even in the electric car market (both global and EEA)

- (54) Germany argues that even if the Commission would find that (1) electric cars do not form part of the conventional car market and (2) footnote 65 of the RAG is not applicable, the beneficiary's market share in the electric car market (whether or not it is further segmented) is below 25 %.
- (55) Germany states that although it is difficult to apply the traditional segmentation of the conventional car market to the electric car market in view of the differences in prices and lengths of car, this is how forecasts of electric car market shares are established. This is why Germany tried to assign the i3 model to a combined C and D segment, as the car's price puts it into the D segment and its length into C. It must also be borne in mind that electric car customers come from all segments of the conventional car market, therefore a strict segmentation of the electric car market is not meaningful.
- (56) Germany considers that the electric car market will very likely develop dynamically both in the EEA as well as globally: the proportion of electric cars within the overall car market, as well as the number of producers will increase strongly within a few years. Even if the beneficiary would reach a market share exceeding 25 % in some electric car segments, this would be an unrealistic scenario, or would only be a 'snap-shot'.

⁽²²⁾ Recital 88 of the opening decision states that it is only the conventional car market, where the beneficiary's market share is below the 25 % level at both the EEA level as well as the global level.

- (57) Germany proposes that the rationale behind footnote 65 be followed also in respect of this aspect and that the tests laid down in paragraph 68 of the RAG should not be applied: The transitory high market share of an innovator should be viewed in the light of the dynamic development of the market, including the likelihood of new entries into the market. A different view would hinder innovation and undermine competition and competitiveness. Therefore, Germany proposes that a situation where the 25 % market share threshold is exceeded in the electric car market for a transitory period, which, as such, is already unrealistic, should not be viewed as a factor indicating that the 25 % market share threshold in paragraph 68(a) of the RAG is exceeded.
- (58) Regarding the reliability of the data on market shares, Germany points out that no separate segmentation of the electric car market has been established and that the only estimation of market figures that exists for 2015 is the study of Deutsche Bank dating from 2008. This study estimates that the part of electric cars within the overall car market will be 1 % in 2015; Germany used this figure for its estimation of the beneficiary's market share on the combined electric C-D segment. Germany also assumes that most electric cars are likely to be offered in the A to C segments, and that therefore the proportion of electric cars in the A to C overall car segment will be higher (i.e. about 2,5 % — although this could not be supported by independent studies). This alone would prove that the Commission's estimation of the BMW Group's market share is too high and not plausible. Furthermore, it notes that consultancies such as Deutsche Bank and Boston Consulting Group predict that by 2020 the proportion of electric cars in the overall car market will reach 3 %, which will again lead to a reduction of the BMW Group's market share. Finally, Germany argues that in case an electric car segmentation system is established which allocates models clearly to a segment, it is to be expected that the BMW Group's market share in a saturated market will become comparable to its existing market share in the conventional car market, i.e. between [0-8 %] and [1-9 %].
- (59) The German authorities also refer to two more recent studies, arguing that they demonstrate that the beneficiary's market share will never exceed the 25 % market threshold, as they forecast a much higher number of cars on the market than earlier studies. The first of these studies, titled 'European Roadmap — Electrification of Road Transport (hereinafter 'the Roadmap study')' ⁽²³⁾, indicates that there might be 5 million electric (including plug-in-hybrid) vehicles in the EU by 2020, and a chart appears to forecast, on the assumption that major technological breakthroughs are achieved, about 1 million such cars in 2016. The other study, titled 'Impacts of Electric Vehicles — Deliverable 1 — An overview of Electric Vehicles on the market and in development', (hereinafter 'the Delft report'), from April 2011 was prepared for the Commission on the impact of electric vehicles on the market ⁽²⁴⁾.

4.1.2. Application of IDAC

- (60) Regarding the application of the IDAC, Germany puts forward the following arguments.
- (a) Since the market share thresholds are not exceeded, there is no reason to carry out the in-depth assessment of the measure.
- (b) In a formal investigation, the focus is exclusively on the elimination of serious doubts regarding the compatibility of the measure that arose during the preliminary phase, and not on the assessment of the compatibility criteria which have already been examined during the preliminary phase and did not raise any doubts at that stage. The Commission did not express any doubts in the decision to open the formal investigation regarding the compliance of the measure with the standard compatibility criteria of the RAG, including its incentive effect and proportionality; the formal investigation was only opened because the Commission could not conclusively exclude that the market share threshold in paragraph 68(a) of the RAG was exceeded.

⁽²³⁾ European Roadmap — Electrification of Road Transport, 2nd edition, of June 2012 by Emma Briec of Renault, Carolien Mazal of BOSCH, Gereon Meyer and Beate Müller of VDI/VDE Innovation + Technik GmbH, European Technology Platforms ERTRAC, EPoSS and SmartGrids and also supported by the European Commission through the Coordination Actions Capire and ICT4FEV.

⁽²⁴⁾ 'Impacts of Electric Vehicles — Deliverable 1 — An overview of Electric Vehicles on the market and in development', a report by Delft, April 2011, pp. 13-16, http://www.cedelft.eu/publicatie/impact_of_electric_vehicles/1153.

- (c) The Commission should adopt a 'conditional' decision⁽²⁵⁾ authorising the aid — without in-depth assessment — pursuant to the footnote to paragraph 56 of the IDAC, subject to the annual submission by the beneficiary of data on the development of its share in a market segmented in the traditional way.
- (d) In view of the important positive effects of the aid (new, environmentally friendly technology and innovation, creation of a significant volume of employment), the Commission should either not apply the IDAC, or at least take account of the 'proportionality requirement': paragraph 9 of the IDAC states that the detailed assessment of a measure should be proportionate to the potential distortion which may be caused by the aid. Germany argues that no noteworthy distortion of competition can be expected. The beneficiary advances competition by taking upon itself a pioneering role through an innovative and high risk investment.
- (e) Germany also claims that the judgment of the General Court of 10 July 2012 in Case T-304/08⁽²⁶⁾ requires the Commission to exercise its wide discretion under the EC Treaty to ascertain whether the expected benefits of the aid in terms of regional development outweigh distortions of competition and the impact of the subsidised project on trade between Member States.
- (f) Germany refers to the footnote to paragraph 56 of IDAC⁽²⁷⁾, and takes the view that the Commission's authority not to approve aid on the basis of IDAC is limited to the portion of the notified aid amount that exceeds the threshold for notification.

4.1.3. *In-depth assessment of the measure*

4.1.3.1. *Positive effects of the aid*

- (61) Germany points out that the strategy for cleaner and more energy efficient vehicles is part of the Europe 2020 strategy. The Commission's White paper on a roadmap to a single European Transport Area — Towards a Competitive and resource efficient transport system⁽²⁸⁾ establishes the objective to reduce by 50 % the share of conventional cars in the overall car market by 2030, and to eliminate them completely in city centres by 2050.
- (62) Germany contributes to these objectives: it aims to put one million electric vehicles on the streets by 2020, and already 100 000 such vehicles by 2014. Germany wants to become a leading market for electric mobility. Since these targets have not yet been achieved, further efforts are necessary. The investment at hand contributes to the achievement of these European and German objectives.
- (63) The investment project also promotes the objectives of the recommendations proposed in a report of the High Level Expert Group on Key Enabling Technologies (HLG KET) which emphasises the risk that Europe may fall behind in international location competition, in particular in view of its insufficient capacity to 'transform' technological know-how into marketable products.

⁽²⁵⁾ 'The Commission may decide to approve, condition, or prohibit the aid. If it adopts a conditional decision pursuant to Article 7(4) of the [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)], it may attach conditions to limit the potential distortion of competition and ensure proportionality. In particular it may reduce the notified amount of aid or aid intensity to a level considered to be proportional and thus compatible with the common market.'

⁽²⁶⁾ *Smurfit Kappa v Commission*, T-304/2008, paragraph 91.

⁽²⁷⁾ This footnote reads: 'When the aid is granted on the basis of an existing regional aid scheme, it is however to be noted that the Member State retains the possibility to grant such aid up to the level which corresponds to the maximum allowable amount that an investment with eligible expenditure of EUR 100 million can receive under the applicable rules.'

⁽²⁸⁾ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0144>

- (64) The 'large production run' of an electric car in combination with a carbon fibre car body, which no other car manufacturer so far undertakes, can accelerate technological change and promote competition on the relevant market.
- (65) Germany considers that the investment project contributes to the long term leadership of Europe in the automobile industry.
- (66) Germany further states that the project contributes to the objectives of the European Regional Development Fund's operational programme for Saxony⁽²⁹⁾.
- (67) The new federal states of Germany still have fewer car manufacturing plants than the old ones. Support for this investment would reduce the differences between the old federal states and the new ones.
- (68) The GDP per capita of Saxony is still below the German and EU averages: the unemployment rate is still higher than the German average. The investment creates 800 new direct jobs.
- (69) The investment increases also indirect employment in the region. The beneficiary is planning to conclude further contracts with suppliers from the region. This will lead to the creation of jobs primarily for highly qualified workers who are employable in the new technical positions of a new and changed supply chain. The successful completion of the investment is expected to be followed by further investments of the beneficiary at the Leipzig location.
- (70) The new production will lead to the training of workers in new areas, such as technicians specialised in plastic and rubber technology related to fibre reinforced material. Since the demand for specialists able to work in the electric car industry will increase, Saxony could develop into an attractive location for such specialised workforce.
- (71) The investment will also have positive cluster effects (i.e. the attraction of further investments in the region in the automobile industry). The beneficiary is already active in ACOD⁽³⁰⁾, Eastern Germany's automotive cluster alliance, which selected the Leipzig region as the region where electric mobility should be promoted. In terms of specific investment by other, unrelated undertakings, Germany referred to SB-Li-Motive, a lithium ion battery producer who planned to invest in the region.
- (72) Undertakings not related to the BMW Group are likely to benefit from knowledge spill-over; in addition, the beneficiary envisages cooperating more closely with the University of Dresden, where automotive industry related studies can be pursued.

4.1.3.2. Appropriateness of aid

- (73) Germany refers to the fact that aid granted on the basis of the 'Investitionszulagegesetz' is exempted from notification under the General Block Exemption Regulation⁽³¹⁾ (hereinafter 'GBER') which would by itself already show its appropriateness.
- (74) Germany considers that regional aid is an appropriate instrument to reduce the economic disadvantages of the region. Alternative measures, such as infrastructure projects, would not achieve comparable results, as the region already has a highly developed infrastructure, including an international airport.

⁽²⁹⁾ See http://www.strukturfonds.sachsen.de/download/2013_12_17_OP_EFRE_2007-2013_in_der_Fassung_des4._Aenderungsantrages_Stand_Genehmigung.pdf

⁽³⁰⁾ Verein Automotive Cluster Ostdeutschland.

⁽³¹⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

- (75) A package of general measures did not yet suffice to achieve the electric mobility targets (100 000 electric cars in use by 2014 and one million electric cars in use by 2020), set both by German ⁽³²⁾ and European initiatives.

4.1.3.3. Incentive effect/Counter-factual scenario

- (76) Germany considers that the incentive effect of the aid cannot be assessed exclusively on the basis of a scenario 1 or of a scenario 2 analysis ⁽³³⁾, as the investment is a special project with a highly innovative character, where both the internal rate of return of the project and a comparison of the advantages/disadvantages of possible locations (including the consideration of possible State aid measures) were analysed. Therefore, Germany submitted information for both scenarios.

Scenario 1:

- (77) In a scenario 1 analysis, the Member State must prove that the aid provides an incentive for the beneficiary to adopt an investment decision in favour of a project which, without the aid, would not be profitable for the company at any location.
- (78) Germany submitted information, according to which the internal rate of return (IRR) of the project is [0-8 %] without the aid, and [1-9 %] with the aid. The underlying calculations assumed a life-cycle of 7 years, did not take into account the start-up costs, the planning costs and development costs of the project, and were based on an annual output of [40 000-120 000] cars (the normal minimum production volume applied by the beneficiary for conventional small and medium sized cars), instead of the [10 000-50 000] cars planned for this project. This IRR is significantly below the usual ROCE ⁽³⁴⁾ target of 26 % required by the beneficiary for conventional car projects, and its weighted average cost of capital (WACC) of 12 %.
- (79) Nonetheless, the beneficiary decided to carry out the investment. Despite its low profitability, the beneficiary considered that the project enables it to secure its strong, long standing position in the international competition in the long term. Germany underlines the pilot project character of the investment, and refers to the high risks it involves which result from the use of carbon fibres as raw material for the car body, the untested production technology, the small scale of production, and demand-side uncertainties.

Scenario 2:

- (80) Germany' submitted information to demonstrate that the aid has an incentive effect to bring the investment project to the targeted assisted region. In the absence of the aid, the investment would have taken place in a non-assisted area.

Cost difference/Strategic considerations

- (81) On the basis of company documents dating from December 2009, such as one discussed during an informal [...] conversation of managers, a summary of analysis submitted for a board meeting and a document recording a board decision on the location decision, Germany demonstrated that a number of locations were considered for the investment. These locations included Munich ⁽³⁵⁾, [...], US/Canada, Mexico, and China.

⁽³²⁾ See 'Deutsche Bank Research: Elektromobilität', 12. September 2011. Germany refers to the Deutsche Bank study which predicts that high state support levels and fast technological progress will result in a 7 % portion of electric vehicles of all newly registered cars in Germany in 2020, whereas a low level of state support and technological progress will reduce this share to only 2 % by.

⁽³³⁾ As required by paragraph 22 of the IDAC.

⁽³⁴⁾ ROCE: Return on capital employed is an accounting ratio used in finance, valuation, and accounting. It is used to prove the value a business gains from its assets and loses through its liabilities.

⁽³⁵⁾ The location choice 'Munich' is in fact 'Munich in combination with Wackersdorf', as described by Germany.

- (82) These documents only refer to the investment into the i3 model. The decision to produce also the i8 model on the same production line as the i3 was taken only in 2011. Germany did not notify any additional eligible expenditure or aid for the production of the i8, nor did it submit any documents on the decision-making process for location of the i8 investment.
- (83) According to the submitted documents, a comparison among the different locations was carried out on the basis of a series of quantitative and qualitative factors, such as investment costs ⁽³⁶⁾, proximity to production of plastics and carbon fibre plastics, the possibility of avoiding greenfield investments, language difficulties, lack of know-how protection, distance from development centre and logistics. In a pre-selection, [...] ⁽³⁷⁾, US/Canada, Mexico, and China were eliminated on the basis of a combination of these factors, and the choice was narrowed down to Leipzig and Munich.
- (84) Neither in Munich nor in Leipzig would greenfield investment be needed; investment in these locations is not affected by language difficulties, lack of know-how protection, logistical difficulties, or a long distance from the BMW Group's development centre in Munich. The lowest investment cost would indeed have been incurred in Munich, which would also be closest to the BMW Group's development centre. On the other hand, Leipzig benefits from easy capacity extension possibilities that would allow the beneficiary to increase production rapidly to [50 000-90 000] thousand electric vehicles per year without substantial additional costs.
- (85) Germany explains that for the location choice, calculations were based on an annual production volume of [10 000-50 000] cars, the use of the WACC of 12 % as a discounting factor, and included product investment costs, structural investment costs, planning and start-up costs, production costs, costs of supply, fixed costs, so called 'inbound/outbound' costs (logistics costs and international tariffs for shipments). These calculations date from December 2009 and show that, without aid, the location of the investment project in Munich would have been EUR 17 million less costly than its location in Leipzig.
- (86) In terms of strategic considerations, Germany mentioned advantages relating to the beneficiary's supply strategy, without providing further details. None of the advantages identified for the Leipzig and/or the Munich locations was expressed in monetary terms.

Role of State aid

- (87) Germany argues that the aid was of crucial importance for the location decision. In view of the cost difference between the two locations, the investment without the aid would not have taken place in Leipzig. In Germany's view, it is proven that the aid provided an incentive to locate the investment in Leipzig.
- (88) The calculations of the investment cost themselves do not include State aid measures. Germany nevertheless emphasises that the consideration of possible subsidies played a central role in the decision-making process ⁽³⁸⁾, and insists that the board of directors (Vorstand) of BMW AG decided to locate the investment in Leipzig in view of the expected EUR 50 million State aid. Indeed, two tables attached to the summary submitted to the BMW AG's board for the purpose of its location decision list the various aid amounts and aid intensities which would, in principle, be available at the various locations, including [...]. Finally, the board document clearly states that State aid/subsidy measures that would be available in [...], Mexico, the US and China would not be sufficient in their amount to compensate the beneficiary for the disadvantage of locating the investment at these locations.

⁽³⁶⁾ A chart discussed during the informal [...] conversation showed that the foreseeable additional investment costs of the various locations in comparison to Leipzig were as follows: In Canada: + EUR [20-120] million, in [...]: + EUR [40-150] million, in US: + EUR [40-150] million.

⁽³⁷⁾ The site in [...], the only location situated in an assisted area other than Leipzig, was eliminated due to the necessity to do a greenfield investment, expected language and translation difficulties, its distance from the development centre of the company, and disadvantages related to logistics.

⁽³⁸⁾ See paragraph 81 of the submission of 5 April 2012.

4.1.3.4. Proportionality

- (89) In accordance with paragraph 32 of IDAC), in a scenario 1 situation the aid will generally be considered proportionate if, because of the aid, the return on investment is in line with the normal rate of return applied by the company in other investment projects, with the cost of capital of the company as a whole or with returns commonly observed in the industry concerned.
- (90) Germany admits that the aid amount is far from sufficient to reach the rate of return usually achieved in other investment projects of the beneficiary, but again argues that other considerations of a strategic nature (see recitals 79 and 84 above) were pursued through its decision.
- (91) Despite the wording of paragraph 33 of IDAC, which considers the aid measure to be proportionate in a scenario 2 situation if it equals the difference between the net costs of the beneficiary company to invest in the assisted region and the net costs to invest in the alternative region(s)', Germany argues that the entire aid amount of about EUR 50 million notified in 2009 is proportionate. Indeed, Germany takes the view that the Commission, in its assessment as to whether or not the difference between the net costs of the investment at the two locations of Leipzig and Munich satisfies the requirement of proportionality under the IDAC, should not take into account the estimated cost disadvantage of EUR 17 million of the Leipzig location compared to the Munich location, as identified by the BMW AG's board in December 2009, but decide on the basis of concrete investment costs incurred by the beneficiary in the implementation of the investment project, i.e. after the initial investment was completed⁽³⁹⁾.
- (92) According to Germany, proportionality does not need to be proven on the basis of the same documents on the basis of which the incentive effect was demonstrated. Germany cites paragraph 35 of the IDAC, which states that the Member State must 'demonstrate the proportionality [of the aid measure] on the basis of appropriate documentation, *such as* (emphasis added) that mentioned in paragraph 26.'
- (93) Germany also refers to a consultation paper on the 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3' which was published by DG Competition some years ago. Germany refers to this paper in support of its argument that while in the case of incentive effect the verification focuses on the question of whether there was a change in the behaviour of the beneficiary as a result of the aid, the proportionality of the aid measure must be based on a more detailed assessment of the measure's effect on competition, which must focus on whether the aid amount is higher than the necessary minimum⁽⁴⁰⁾.
- (94) In support of its argument, Germany also quotes paragraph 107 of the judgment of the General Court in Case T-396/08, *Freistaat Sachsen v Commission*. According to Germany, that paragraph states that 'in the framework of the verification of proportionality [of an aid measure], all elements must be provided which are useful for the evaluation of the measure⁽⁴¹⁾'. Germany further refers to this case in support of its argument that, for the purpose of evaluating the compatibility of the given aid measure, the Commission is permitted to consider all specific and actual circumstances relevant to the beneficiary⁽⁴²⁾. Germany believes that, for the purpose of evaluating the proportionality of the aid, an updated version of the documents on the basis of which the incentive effect was established, could be used by the Commission.

⁽³⁹⁾ The relevant details are described in recital 102 below.

⁽⁴⁰⁾ No specific paragraph of the consultation paper was referred to by Germany. The paper is available under the following link: http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf

⁽⁴¹⁾ T-396/08, judgment of 8 July 2010, paragraph 107. Paragraph 107 simply recalled the case-law stating that "when examining the compatibility of an aid measure with the common market, the Commission must examine all relevant factors."

⁽⁴²⁾ Paragraph 108 of the judgment in Case T-396/08, *Freistaat Sachsen v Commission* (only the German and French versions are available) reads: 'die Kommission für die Zwecke der Prüfung der Vereinbarkeit der fraglichen Beihilfe die den Beihilfeempfänger betreffenden konkreten tatsächlichen Umstände (...) berücksichtigen durfte.' It is unclear to the Commission whether Germany is arguing that the Commission *must* or that the Commission *can* examine all factors that it considers to be relevant in a given case. In addition, this ruling was made in a case where the Member State claimed that the Commission should not have examined certain factors for assessing the compatibility of the aid at stake in that case.

- (95) Furthermore, Germany suggests that the IDAC does not contain any provision defining the point in time for which proportionality has to be established, and takes the view that the assessment of proportionality is not linked to the behavioural change of the beneficiary when it takes the location decision.
- (96) In addition, other than for the incentive effect, the decisive element is not whether the document existed already when the decision on the location of investment was adopted, but — according to paragraph 35 of the IDAC — that the document is ‘appropriate’ for the assessment of proportionality.
- (97) Germany considers that it would be inappropriate to use the document already used to prove the incentive effect of the aid as the basis for the assessment of the proportionality of the aid. The possible changes in the economic circumstances should be taken into account, in particular the fact that since the original location decision, further investment decisions (production of the i8) were adopted.
- (98) Therefore, Germany maintains that in accordance with the case-law, and in order to ensure that the proportionality of the aid is assessed in an economically meaningful way, more recent documents should be used. Such approach would also be in line with the practice in other areas, e.g. in cases of *ex post* monitoring of aid.
- (99) More recent company and market data would provide a more precise picture about the real net cost disadvantage of Leipzig.
- (100) Germany considers that the board document identifying the EUR 17 million cost difference between the two locations does not contain enough information for the assessment of proportionality, as for example, it does not contain a cost/benefit analysis such as the one described in the Community Framework for State aid to the motor vehicle industry of 1997 ⁽⁴³⁾. The board document reflected only selective information based on certain assumptions and cost and benefit figures. In order to evaluate proportionality on the basis of the real cost difference between the two locations, other assumptions and other cost/benefit figures would need to be considered.
- (101) Germany therefore submits that additional costs of EUR 29 million, established until September 2012, should be added to the EUR 17 million costs that were estimated in December 2009 as additional costs entailed by the Leipzig location.
- (102) Germany submitted a document prepared in September 2012 listing those further cost disadvantages ⁽⁴⁴⁾ (additional costs that would arise in both locations are not taken into account).
- (a) Extension of the building for the assembly of the i3 model, to accommodate also the assembly of the i8 model: EUR [...] million.
- (b) Extension of a building for the construction of the car body for the i3 and i8 models (e.g. for the manufacturing of more complex car body components): EUR [...] million.
- (c) At a more advanced stage of the product development, a reallocation of the value creation between the two locations became necessary, involving the extension of the assembly building: EUR [...] million.
- (d) The covers for automotive body shells (Außenhautumfänge) for the i3 model were initially to be provided by a supplier; but are now produced by BMW AG in a new building in Leipzig that was not originally planned. The Munich location could have been served from the beneficiary’s close-by Landshut plant. Cost of the new building: EUR [...] million.

⁽⁴³⁾ OJ C 279, 15.9.1997, p. 1.

⁽⁴⁴⁾ Germany argues in particular that the existing Munich facilities had the necessary floor space, and would not require extensions of buildings, or only at a smaller scale.

- (e) Due to the additional production, additional investments into non-production-related logistics ⁽⁴⁵⁾ (fire extinguishing facility and fire trucks, waste disposal facility, etc.) became necessary. These investments would have been less significant in Munich, which already has extended capacities: EUR [...] million.
- (f) The further developed products need a more complicated than planned quality control process, requiring additional investment in quality control equipment, which would already be available in Munich: EUR [...] million.
- (g) Finally, the introduction of a new logistics strategy in all plants of the beneficiary causes higher costs in Leipzig than in Munich: EUR [...] million.

4.1.3.5. Negative effects

- (103) As regards the potential negative effects of the aid on the relevant product market, Germany limits its arguments to effects which are relevant in a scenario 2 situation. It points out that according to paragraph 40 of the IDAC, where the investment would have gone ahead even without the aid, and where the aid is proportionate, the aid itself has no effect on competition; in particular, any increase in the market power of the beneficiary would take place also without the aid. In addition, in view of the policies promoting electro mobility, the market is not in decline, and the aid will not contribute to the maintenance of inefficient market structures. Germany considers that the absence of comments by competitors supports this assessment.
- (104) Germany also emphasises that the demand of the beneficiary for carbon fibre is unlikely to prevent the access of competitors to carbon fibre supply, as numerous suppliers of carbon fibre are on the market and, according to independent analysts, both demand and supply of carbon fibre are expected to increase, with future supply at least equalling future demand. Thus, the beneficiary does not have market power on this input market.
- (105) The only temporary advantage that the beneficiary may obtain in the market lies in the knowhow that it will acquire in the [...]. However, in view of the numerous participants in the [...], the opportunity for market entry or cooperation is always available.

5. ASSESSMENT

5.1. Existence of aid

- (106) In order for a measure to qualify as State aid, the following conditions must be met on a cumulative basis: (i) the aid has to be granted by an act of a Member State or out of State resources, (ii) it has to confer an economic advantage to undertakings, (iii) the advantage has to be selective, and (iv) the measure distorts or threatens to distort competition and affect trade between Member States.
- (107) The financial support will be provided by the German authorities in the form of a fiscal allowance for investment. The support can thus be considered as granted by the Member State and through State resources within the meaning of Article 107(1) TFEU.
- (108) Since the aid is granted to a single company, BMW AG, the measure is selective.
- (109) The aid will relieve the company from costs which it normally would have to bear itself under normal market conditions when setting up the production facility and, therefore, the undertaking benefits from an economic advantage over its competitors.
- (110) The aid will be granted by the German authorities for an investment resulting in the manufacturing of electric and hybrid passenger cars. Since electric and hybrid cars are subject to trade between Member States, the support provided is likely to affect trade between Member States.

⁽⁴⁵⁾ In German: *Nicht-Serien-Logistik*.

- (111) The economic advantage granted to BMW AG over its competitors for production of goods which are subject to intra-EU trade has the potential to distort or threaten to distort competition.
- (112) Consequently, the Commission considers that the notified measure constitutes State aid to BMW AG within the meaning of Article 107(1) TFEU.

5.2. Legality of the aid measure

- (113) By notifying the planned aid measure before putting it into effect, the German authorities respected their obligation under Article 108(3) TFEU and complied with the individual notification requirement following from Article 6(2) of the General Block Exemption Regulation.

5.3. Legal basis for the assessment

- (114) As the national legal basis for granting the aid, the *Investitionszulagengesetz*, creates a legal entitlement (subject to Commission approval) of the beneficiary to the aid for expenditure incurred before 1 January 2014, the aid can be considered to have been awarded⁽⁴⁶⁾ before July 2014. Since the objective of the aid is to promote regional development, the RAG constitute the basis for assessing its compatibility with the internal market, in particular the provisions of section 4.3, relating to large investment projects, and the criteria for the in-depth assessment of regional aid to large investment projects laid out in the IDAC.

5.4. Conformity of the measure with the standard compatibility criteria of the RAG

- (115) As the Commission stated in the opening decision, the notified support to BMW AG's investment meets the general compatibility criteria of the RAG: it meets the formal incentive effect criterion, the beneficiary is not a firm in difficulty, the aid is granted for an initial investment in form of the diversification of an existing establishment into new, additional products, the eligible costs are defined in line with the relevant provisions, the beneficiary provides a financial contribution from its own resources of at least 25 % of eligible costs, and the beneficiary undertook to maintain the investment in the region for a minimum period of 5 years. In addition, the total amount of aid in present value does not exceed the maximum State aid intensity permissible pursuant to the rules on the scaling down mechanism as laid down in paragraph 67 of the RAG.

5.5. Applicability of footnote 65

- (116) According to footnote 65 of the RAG, if a Member State demonstrates that the aid beneficiary creates a new product market, the tests laid down in paragraph 68(a) and (b) of the RAG will not need not be carried out, and the aid will be authorised up to the reduced aid amount determined pursuant to the scale in paragraph 67 of the RAG.
- (117) The rationale of the footnote 65 of the RAG is to recognise that where a new product market is created, the tests laid down in paragraph 68(a) and (b) do not serve any useful purpose as the reference market does not yet exist before completion of the investment. The firm creating the new product market will attain a very high share of that market, probably as high as 100 %. The paragraph 68(b)-test which measures the capacity increase in an underperforming market could not be carried out as the required market growth over the 5-year reference period is unavailable.
- (118) The Commission notes that while BMW AG may have been the first electric car manufacturer to formally apply for regional aid, some competitors have already started production before BMW AG, and others may be starting soon.
- (119) Germany accepts that some car makers manufacturing electric vehicles already exist and that others will enter the market by 2013/2014. However, it argues that even if the footnote cannot be applied to the case directly, it can be applied to it by analogy.

⁽⁴⁶⁾ Within the meaning of paragraph 20(d) of the Guidelines on regional State aid for 2014-20 (OJ C 209, 23.7.2013, p. 1).

- (120) The arguments put forward by the German authorities in support of the application of footnote 65 of the RAG are not sufficiently persuasive to warrant a waiver of the tests laid down in paragraph 68 of the RAG. Footnote 65 applies to a situation where the beneficiary creates a new product market. The production of an innovative product does not necessarily entail the creation of a new product market.
- (121) Where, as in the present case, products already offered on the market by competitors which compete with the new, innovative product manufactured by BMW AG, the relevant product market is not composed exclusively of the innovative product produced by the beneficiary. In fact, the products offered by competitors also need to be taken into account. If footnote 65 could cover aid granted to BMW AG, it would have to cover also regional aid granted to its competitors offering electric cars on the market. The Commission therefore decides that footnote 65 cannot apply in this case, and that the tests under 68(a) and (b) must be carried out.

5.6. Application of market share and capacity increase tests laid down in paragraph 68(a) and (b) of the RAG

- (122) The Commission has to decide whether the comments received in reply to the opening decision permit to exclude without doubt that the threshold of the 68(a) test is exceeded, and that therefore it is not necessary to carry out an in depth assessment within the formal investigation. As the Commission explained already in recitals 93 to 99 of the opening decision, the test of paragraph 68(b) of the RAG is not relevant in this case, since the electric car market is growing and the capacity created for the production of the i3 or the i8 models is not problematic.
- (123) The test in paragraph 68(a) of the RAG will trigger an in-depth assessment if the Commission is able to establish, on the basis of the information available to it, that the aid beneficiary has a market share exceeding the 25 % threshold in the relevant product and geographic market. Where a conclusive definition of the relevant product or geographic market cannot be reached, the in-depth assessment is triggered if the aid beneficiary is shown to have a market share exceeding the 25 % threshold in at least one plausible relevant market that could be affected by the aid. In any event, the Commission emphasises that a decision to carry out an in-depth assessment does not prejudice the compatibility of the aid measure with the internal market.

5.6.1. Market definition and market share

5.6.1.1. Relevant product market

Do conventional and electric cars belong to the same product market?

- (124) Germany had argued in the preliminary examination that electric cars form part of the conventional passenger car market, and that the i3 model (pure electric vehicle) should be attributed to the conventional C or D segment, or a combination thereof, and that the i8 (hybrid car) should be attributed to the F segment according to the IHS Global Insight classification.
- (125) In the opening decision, the Commission explained that, in view of the lack of supply side substitutability and the limited degree of demand side substitutability, it was not in a position to establish whether or not electric cars constitute an independent product market or form part of the conventional car market without distinction as to type of propulsion. It was also unable to determine whether, in case there is a separate market for electric cars, this separate electric car market can be further segmented, and if so, whether the segmentation applied in the conventional car market can be applied to this separate electric car market. Finally, the Commission was unable to conclude whether the models in question should be assigned to the C or D segments or to the combined segment of C&D for the i3 model, and the F segment for the i8 model.
- (126) As described in recitals 43 to 45 above, Germany argued in its comments that just like hybrid cars today, electric cars will compete with conventional cars and will be considered by the consumers as substitutable. It also argued that, despite the range issue, there is demand side substitutability between the i3 and i8 models and conventional cars, as the general purpose of both electric and conventional cars is passenger transport, and that the price difference between electric cars and comparable conventional cars can be narrowed down by consumer subsidies.

- (127) The Commission notes that no third parties provided comments on the general question of whether the conventional car market is the relevant product market for electric and hybrid cars. Since the Commission does not have enough information to decide on the issue of whether all different types of electric and hybrid cars in general form part of the conventional car market, it decides to leave open the question of whether electric and hybrid cars are part of the general car market.

Are the conventional car segments C or D and the conventional car segments E2 or F the relevant product markets for the purposes of this case?

- (128) As indicated in recital 123 above, the in-depth assessment will be carried out if the market share threshold of 25 % is exceeded in at least one of the plausible markets, for any of the two models concerned. Therefore, it is enough if the Commission examines only the issue of whether the i3 model undoubtedly forms part of the C or D segment of the conventional car market, without also going into the question of whether the i8 model forms part of the E2/F segment. The Commission therefore decides to limit its examination to the question of whether or not the model i3 forms part of the conventional car segments C or D.
- (129) With regard to the issue of whether or not the only relevant product market for the i3 model should be the conventional car market (segment C or D), the Commission is not able to eliminate the doubt it expressed in its decision to open the formal investigation procedure. First, no third party comment was received during the procedure. Second, as Germany admitted (see recital 55 above), it is difficult to apply the traditional segmentation criteria as there is a discrepancy between the prices and length of electric vehicles and the same parameters of conventional vehicles belonging to a given traditional segment.
- (130) Further, no information was submitted to eliminate the Commission's doubts as to whether there is a sufficient degree of demand side substitutability⁽⁴⁷⁾ between the purely electric vehicle i3 model and a conventional car. There appears to be a consensus in the relevant literature⁽⁴⁸⁾ about the significance of the difference in range (i.e. the driver's ability to drive the car without recharging/refuelling), the time necessary for recharging, the availability of locations where recharging is possible, and the life expectancy of EV batteries. The i3 model for example, will have to be recharged after driving only 150 km. Therefore, the Commission is not convinced, on the basis of the information available to it, that sufficient demand side substitutability exists between the i3 model and conventional models in the C and D segments in order for them to be considered as belonging to the same product market.
- (131) In addition, it is not contested that no supply side substitutability⁽⁴⁹⁾ exists between the electric car product in question (i3 model) and conventional cars, as the carbon reinforced plastic car body vehicle cannot be produced on production lines suitable for the production of conventional vehicles.

⁽⁴⁷⁾ Demand side substitutability between two products exists if they are considered to be substitutes by the consumer in view of their characteristics, prices and intended use.

⁽⁴⁸⁾ See for example 'Impacts of Electric Vehicles — Deliverable 1 — An overview of Electric vehicles on the market and in development', Delft Report, April 2011, p. 30. http://www.cedelft.eu/publicatie/impact_of_electric_vehicles/1153. This report states that 'within the crucial areas for future market penetration, the EV model almost always performs weaker against the ICE version. In particular, vehicle price is higher and range is lower for EVs — two essential purchase criteria.' But also 'Elektromobilität — Sinkende Kosten sind conditio sine qua non,' a study by Deutsche Bank research of 12 September 2011, p. 7, which states that deficiencies of existing batteries for purely electric cars limit the range of application of purely electric cars to short or maximum medium distance, because a battery which could store enough energy for longer journeys would be too heavy for the car. The study further states that it takes another 10 to 15 years, before the necessary technology (i.e. post-lithium-ion technology) develops to enable purely electric vehicles to compete with conventional cars.

⁽⁴⁹⁾ Supply side substitutability between two products exists if the production facility to produce one of the products is flexible enough so that the other product can also be produced on it without major additional expenditure.

- (132) The Commission therefore is not convinced that the i3 model forms part of segment C or D of the conventional car market.

Is the combined electric car segment C&D the relevant product market for i3?

- (133) Germany argued in the preliminary examination that instead of considering individual electric car segments, a combined segment, consisting of the C and the D electric car segments should be considered as the relevant product market ⁽⁵⁰⁾. The Commission had raised doubts in the opening decision whether such a combination of segments was appropriate ⁽⁵¹⁾ and no third party comment was received during the formal investigation phase.
- (134) In this context, the Commission takes the view that plausible product markets should include the lowest level for which statistics are available, which means, in the present case, the electric car market, as segmented along the lines of the conventional segmentation. Therefore, and in line with general practice, the Commission rejects the combined C+D electric car segment as the lowest level of a plausible product market ⁽⁵²⁾. In fact, if the test in paragraph 68(a) of the RAG were applied only to combined segments, an in-depth assessment of the aid could be avoided, even if the beneficiary is a dominant player in one of the individual segments concerned, because of the lower market shares it holds in the other individual segments that have been combined. The Commission, therefore, cannot exclude without doubt that the relevant product market for the i3 model is the individual C or the D segment of the electric car market.

5.6.1.2. Relevant geographic market for electric cars

- (135) To carry out the paragraph 68(a) test, the Commission has to establish the appropriate geographic market for which it carries out the market share analysis. In the opening decision, the Commission raised doubts that this geographic market is larger than the EEA market.
- (136) Germany submits that the geographic market for electric cars should be defined as the global market, underlining that China, Japan and the USA (as well as some EU countries), where considerable levels of public subsidies are available for such cars, have a significant portion of world market. Besides, trade flows will develop in all directions, and the framework conditions for world trade in electric cars are the same or more favourable than for conventional cars.
- (137) The Commission's notice on market definition states in general that 'the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved in terms both of products/services and of geographic location of suppliers' ⁽⁵³⁾. The notice further states that when it comes to the definition of relevant geographic markets, further factors may also be examined, such as local presence, conditions of access to distribution channels, presence or absence of regulatory barriers, price regulations, tariffs, quotas etc. ⁽⁵⁴⁾ Finally, trade flows can also be useful as supplementary indication regarding the importance of demand and supply factors ⁽⁵⁵⁾.
- (138) The German authorities' argumentation in support of defining the geographic market for electric cars as global lacks detailed data about the factors described in the notice.

⁽⁵⁰⁾ See recitals 74 and 75 of the opening decision and recital 34 of this decision.

⁽⁵¹⁾ Idem.

⁽⁵²⁾ The fact that the segmentation of the market for electric cars is less developed and its criteria less clear than for conventional cars does not affect the validity of the Commission's general approach.

⁽⁵³⁾ Commission Notice on the definition of relevant market for the purposes of Community competition law, paragraph 13 (OJ C 372, 9.12.1997, p. 5).

⁽⁵⁴⁾ Idem. Paragraph 30.

⁽⁵⁵⁾ Idem. Paragraph 31.

- (139) The argument alone that trade will develop in all directions, is not sufficient to prove that a geographic market larger than the EEA exists. In fact, there may well be shipments between the EEA and other regions, but that does not mean that markets are integrated in the sense that market conditions (e.g. prices) in one market influence market conditions in the other. In sum, the Commission sees no reason to deviate from its standard practice in State aid cases, which is to consider that the car market is either the EEA market or larger. On the basis of the information submitted, the Commission is not in a position to exclude without doubt that the geographic market for electric cars (or for hybrid cars) is the EEA market.
- (140) Finally, as explained in recital 36 above, in the D segment for example, the beneficiary's market share exceeds 25 % even in the worldwide electric car market. Thus, a conclusion on the existence of a worldwide market for electric cars is not decisive for the question of whether the beneficiary's share in the relevant (product and geographic) market exceeds 25 %.

5.6.1.3. The beneficiary's market shares

Conventional car market

- (141) The BMW AG's market share on any segment of the conventional passenger car market, regardless of the underlying definition of the geographic market, does not exceed the 25 % threshold.

Electric car market

- (142) On the basis of the information submitted by Germany, as well as of studies carried out by independent sources such as the Deutsche Bank, the Commission understands Germany's argument regarding the beneficiary's market share in the total (purely) electric car market to be as follows: [...] out of 15 000 ([...])%, namely that in an electric car market without segmentation, the beneficiary's market share is not likely to exceed the 25 % market threshold, which would require the sale of more than 37 500 electric vehicles out of a total of 150 000.
- (143) In an early submission in the formal investigation phase, the German authorities argued that a Deutsche Bank study from 2008 stated that about 1 % of all cars would be electric in 2015, resulting in a total of 150 thousand purely electric cars in the EEA in 2015 ⁽⁵⁶⁾. This was also the figure used by Germany to calculate the portion of electric cars within the conventional car segments in the context of preliminary examination ⁽⁵⁷⁾. The beneficiary's market shares calculated on this basis were projected to exceed 25 % in the EEA market in the B, C, D and E2+F segments in 2015 ⁽⁵⁸⁾.
- (144) In a later submission in the formal investigation phase, Germany referred to two more recent studies, the Roadmap study and the Delft report, which are said to forecast a much higher number of cars (i.e. 5 million in the EU by 2020) on the market of electrified vehicles than forecast by earlier studies ⁽⁵⁹⁾.

⁽⁵⁶⁾ See recital 58 above.

⁽⁵⁷⁾ See recital 84 of the decision to open the formal investigation procedure.

⁽⁵⁸⁾ For the B segment it was [$> 25\%$] ([...]) (which is to be sold within the EEA) divided by [...], the C segment [$> 25\%$] ([...]) divided by [...], for the D segment [$> 25\%$] ([...]) divided by [...] and for the E2+F segment [$> 25\%$]. See recitals 84 to 87 of the opening decision.

⁽⁵⁹⁾ See recital 59 above.

- (145) The Commission cannot accept the information derived from these reports as an appropriate proof to support Germany's argument, for the following reasons.
- (a) First, the Roadmap study's forecast of 5 million electric vehicles on the EU market in 2020 refers to all kinds of vehicles that provide at least 50 km of pure-electric range such as pure electric vehicles and plug-in hybrids. The report does not contain a forecast of the number of pure electric vehicles, on which basis it would be possible to calculate the market share of the beneficiary.
 - (b) Second, the figure of 5 million electric vehicles in 2020 is proposed on the optimistic assumption that major technological breakthroughs in terms of energy storage systems, drive train technologies, system integration solutions, grid infrastructures, safety systems and road infrastructures are achieved, so that electric vehicles provide a range comparable to that of conventional cars. A less optimistic scenario also presented in the Roadmap study, reflecting an 'evolutionary' development, without major technological breakthroughs, forecasts a market size of one million pure electric and hybrid cars for 2025, and a market of only around 100 000 cars by 2016⁽⁶⁰⁾. The Roadmap study therefore does not change the initially presented figures resulting from the Deutsche Bank study, which are relevant for assessing the market share of the beneficiary of the aid in the purely electric car market.
- (146) The section of the Delft report submitted by Germany does not contain any numerical information about market share forecasts on the pages that it referred to. Thus, it is unclear why Germany considered these pages of the report to be relevant for the debated issues.
- (147) The Commission would like to point out that, currently, there are very divergent forecasts about the future market position of electric vehicles. For example, the Delft report itself contains various estimates about the number of electric cars⁽⁶¹⁾ expected to be on the market in 2015 and their proportion within the overall car market. The estimates are linked to different scenarios⁽⁶²⁾. According to one estimation, for example, under the most positive scenario in which electric vehicles reach a break-through, the study estimates that there will be about 30 000 purely electric cars newly registered in the EU in 2015. Under the most pessimistic scenario, there will be only 10 000 newly registered purely electric cars, and under the most realistic scenario, there will be 20 000 newly registered purely electric vehicles in the EU in 2015⁽⁶³⁾. The report predicts the existence of 100 000 purely electric cars in the EU-27 in 2015⁽⁶⁴⁾.
- (148) It is to be noted that there are independent estimates that appear to suggest that the 1 % market share that the Deutsche Bank study uses as the proportion of purely electric cars in the overall car market in 2015 is too high. For example, a report from 2014 titled 'The xEV Industry insider Report'⁽⁶⁵⁾ claims that purely electric vehicles will account for only 0,6 % of total worldwide market in **2020**. There is no reason to believe that the percentage of purely electric cars within the overall car market would be as high as 0,6 % 5 years before the year indicated in this forecast, i.e. in 2015.

⁽⁶⁰⁾ See chart on page 21 of the Roadmap study.

⁽⁶¹⁾ Regarding propulsion, the Delft report categorizes cars as conventional, fully electric (FEV), Plug-in-hybrid (PHEV) and Electric Vehicles with a Range Extender (EREVs).

⁽⁶²⁾ For example, the most realistic scenario assumes that current government subsidies will remain in place and that input parameters and conventional car development expectations will not change radically, and that about 5 % of all car buyers are interested in buying electric (including PHEV vehicles). The second scenario assumes a breakthrough for the conventional car technology leading to a significant increase in CO₂ efficiency, a reduction in government subsidies and slow reduction in the price of battery. Scenario 3 foresees a breakthrough for the electric car segment driven by a rapid decrease in battery costs from 2015 on.

⁽⁶³⁾ See Table 17 on page 145 of 'Impacts of Electric Vehicles — Deliverable 5 — Impact analysis for market uptake scenarios and policy implications'.

⁽⁶⁴⁾ See Tables 22 and 24 on page 148 of the 'Impacts of Electric Vehicles — Deliverable 5 — Impact analysis for market uptake scenarios and policy implications'.

⁽⁶⁵⁾ <http://www.advancedautobat.com/industry-reports/2014-xEV-Industry-Report/Executive-Summary-Selections.pdf>

- (149) The Commission notes that none of the estimates in the more recent reports foresees a higher number of purely electric cars in 2015 than the Deutsche Bank study on the basis of which the beneficiary's market shares were calculated. The Commission concludes from the existence of divergences in forecasts that future market shares of electric cars in 2015 and beyond, in the EEA and worldwide, cannot be predicted with any degree of certainty.

5.6.1.4. Conclusion regarding the market share test

- (150) In sum, the evidence submitted by Germany, combined with information from independent sources, does not prove that the beneficiary's market share will not exceed 25 % in 2015, in at least some plausible product market in the EEA and in the worldwide D segment.⁽⁶⁶⁾ This conclusion is reached by applying the Deutsche Bank's estimation that electric car sales will represent 1 % of the car sales in the various conventional car market segments. In addition, as explained in recital 147 above, a market share exceeding 25 % in a non-segmented EEA electric car market (based on the forecasts of 10 000, 20 000 and 30 000 purely electric cars in the EEA in 2015) can also be established on the basis of other independent sources.
- (151) Therefore, the Commission decides to carry out the in-depth assessment of the notified aid measure on the basis of the IDAC.

5.7. On the applicability of the IDAC

- (152) According to the paragraph 68 of the RAG, where the relevant conditions set out in that paragraph are met, the Commission will approve regional investment aid only after a detailed verification, following the opening of the procedure provided for in Article 108(2) of the Treaty, that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition and effect of trade between Member States. The relevant guidance, announced in footnote 63 of the RAG, is given by the IDAC.
- (153) With respect to Germany's argument that the formal investigation procedure should focus exclusively on the elimination of serious doubts and not on compatibility criteria which have already been examined under the RAG⁽⁶⁷⁾, the Commission must emphasise that the architecture of the applicable legal provisions for the assessment of notifiable aid to large regional investment projects is conceived in such a way that the results of the beneficiary's market share test laid down in paragraph 68(a) of the RAG are of critical importance. If the beneficiary's market share in the relevant product and geographic market exceeds the threshold set in the paragraph 68(a) test, there can be no positive presumption as regards the outcome of the balancing test.
- (154) Germany's suggestion to approve the aid without in-depth assessment, subject to the annual submission of proof relating to the beneficiary's market share⁽⁶⁸⁾ seems impractical, as it may become impossible to repair in an effective way the negative effects of the aid.
- (155) With regard to the argument that pursuant to paragraph 9 of the IDAC, the Commission's detailed assessment should be proportionate to the potential distortion of competition and therefore not apply to cases where there is no 'noteworthy distortion of competition' and where the beneficiary takes upon itself an innovative and high risk investment⁽⁶⁹⁾ the Commission considers that the absence of a 'noteworthy distortion' is not proven, and that a 50 million aid for a 400 million investment has a noteworthy potential for distortion of competition.

⁽⁶⁶⁾ See recital 36 and footnotes 18 and 19 above.

⁽⁶⁷⁾ See recital 60(b) above.

⁽⁶⁸⁾ See recital 60(c) above.

⁽⁶⁹⁾ See recital 60(d) above.

- (156) The Commission considers that the judgment of the General Court of 10 July 2012 in Case T-304/08, *Smurfit Kappa v Commission* ⁽⁷⁰⁾ cannot be interpreted as imposing an obligation on the Commission to refrain from applying the IDAC in cases such as the one at hand. The judgment rather requires the Commission to carry out a substantive assessment in situations where the positive effects of the regional aid do not obviously outweigh its possible negative effects, even when the thresholds in paragraph 68 of the RAG are not exceeded.

5.8. In-depth assessment

- (157) In the present case, the Commission has to assess in detail, on the basis of the criteria laid down in the IDAC, whether the aid is necessary to provide an incentive effect for the investment and whether the benefits of the aid measure outweigh the resulting distortions of competition and effect on trade between Member States.

5.8.1. Appropriateness of aid

- (158) According to paragraph 18 of the IDAC, only 'measures for which the Member State considered other policy options, and for which the advantages of using a selective instrument such as State aid for a specific company are established, are considered to constitute an appropriate instrument'.
- (159) Germany submitted sufficient evidence ⁽⁷¹⁾ to prove that infrastructural developments and other general measures alone are insufficient to reduce the regional disparities within Germany. Therefore, the Commission concludes that the aid measure is an appropriate instrument to pursue the regional development objective in the assisted region concerned.

5.8.2. Incentive effect/Counterfactual scenario

- (160) As there are many reasons for a company to locate in a certain region, even without any aid being granted, paragraph 19 et seq. of the IDAC require the Commission to verify in detail that the aid is necessary to provide an incentive effect for the investment. The objective of this detailed assessment is to determine whether the aid actually contributes to changing the behaviour of the beneficiary, so that it undertakes (additional) investment in the assisted region concerned.
- (161) The IDAC states that the incentive effect can be proven in two possible scenarios: in the absence of aid, no investment would take place at all, since the investment would not be profitable for the company at any location (scenario 1), in the absence of aid, the investment would take place in another location of the EU (scenario 2).
- (162) The Member State thus needs to provide clear evidence that the aid effectively had an impact on the investment decision or the location choice. The Commission has to establish that the proposed counter-factual scenarios are realistic.
- (163) The IDAC places the burden of proof regarding the existence of incentive effect on the Member State. Paragraphs 24 and 25 of the IDAC indicate that the Member State could give proof of the incentive effect of the aid by providing company documents that show that 1) the investment would not be profitable without the aid and no other location was envisaged for the investment, or 2) that a comparison has been made between the costs and benefits of locating the investment in the assisted region and choosing an alternative location. The Member State is invited to rely on financial reports, internal business plans and documents that elaborate on various investment scenarios.

⁽⁷⁰⁾ See footnote 26.

⁽⁷¹⁾ See recitals 74 and 75 above.

- (164) Without providing documentary evidence that such analysis took place before the investment decision, Germany first tentatively argued that the incentive effect should be assessed in the context of scenario 1 within the meaning of paragraph 22 of the IDAC. The Member State must prove that the aid provides an incentive for the beneficiary to adopt a positive investment decision because the investment, which without the aid would not be profitable for the company at any location, can take place in the assisted region. The information submitted by Germany shows that the required State aid amount will increase the internal rate of return of the project only by 1 %, (lifting the IRR from [0-8]% to [1-9]%), which would be significantly below both the internal ROCE target of 25 %, or the beneficiary's weighted average cost of capital (WACC) of 12 %.
- (165) It is obvious that the marginal increase in the internal rate of return which, even with the aid, is far below the company's benchmark, does not permit a conclusion that the aid provided an incentive effect to carry out the investment.
- (166) It is also clear that the decision to invest into the manufacturing of electric cars was based on the beneficiary's longer term strategic objective of developing innovative key technologies for the purpose of meeting the mobility standards of the future, and to make them suitable for use in industrial mass production. This objective is also demonstrated by the fact that, in 2009, the beneficiary and its owners entered into a strategic alliance with SGL Carbon, a company engaged in the production of carbon fibre material.
- (167) The fact that the incentive effect was not proven in a scenario 1 context, however, does not mean that the incentive effect cannot be proven in a scenario 2 context.
- (168) Indeed, the German authorities later argued that the aid to the beneficiary falls under scenario 2, and presented the Munich location as an alternative location to Leipzig.
- (169) An assessment of the incentive effect in a scenario 2 situation aims at proving that the aid measure provided an incentive for the beneficiary to locate the investment in the target region rather than in another region, because the aid compensates for the net handicaps and costs linked to the location in the assisted region.
- (170) As explained above in recital 81, Germany's proof of the incentive effect in a scenario 2 situation (for the i3 model) is based on documents dating from December 2009, such as the minutes registering the board decision (Vorstandsbeschluss vom 15. Dezember 2009). From these documents, it is apparent that initially a number of locations were considered for the investment, but that nearly all (including most importantly, [...])⁽⁷²⁾ were eliminated from the final comparison based on specific strategic reasons, such as necessity of greenfield investment, distance from site of production of carbon fibre reinforced plastics, language difficulties, lack of know-how protection, too long a distance from the beneficiary's development centre, production capacity and logistics. By the time the location decision was adopted, the alternatives had been narrowed down to two locations which received serious consideration: Leipzig and Munich. The decisive documents submitted to the board BMW AG in December 2009 state that — calculated over a [...] year life cycle — the project would have been EUR 17 million less costly in Munich than in Leipzig, without the aid.
- (171) Another element which was taken into account by the company while deciding on the location of the investment was the long-term strategic possibility to extend the production capacity in the future. Leipzig offered the possibility to double the production capacity from [10 000-50 000] items per year to [50 000-90 000] items per year, whereas such extension was not considered feasible in Munich. According to the documents submitted by Germany, this strategic factor was not quantified in monetary terms by the company.

⁽⁷²⁾ See recital 83 above.

- (172) The documents also show that the availability of State aid in the amount of EUR 50 million was analysed in preparation of the decision on the investment/location.
- (173) The Commission is of the opinion that Germany successfully proved, on the basis of these genuine, contemporary documents, that the availability of State aid triggered the decision to locate the investment into the production of the i3 model in Leipzig rather than in Munich.

5.8.3. Proportionality

- (174) In a scenario 2 situation, paragraph 33 of the IDAC states that the aid measure is 'considered to be proportionate if it equals the difference between the net costs of the beneficiary company to invest in the assisted region and the net costs to invest in the alternative region(s)'.
- (175) As explained above, in the documents dating from December 2009, Germany demonstrated that the cost difference between the two locations (i.e. Leipzig and Munich) amounted to EUR 17 million, as was identified at the time when the investment/location decision was taken and calculated over a [...] -year life cycle. This cost difference was calculated by the company on the basis of product investment costs, structural investment, planning and start-up costs, production costs, costs of supply, fixed costs, 'inbound/outbound' costs, such as logistics costs and international tariffs for shipments. The Commission therefore considers that Germany proved that aid of EUR 17 million is the minimum amount necessary to change the location decision of the aid beneficiary, and thus proportionate to the regional development objective pursued by the aid. The Commission considers, in this context, that the strategic extension possibility which is not available in Munich should not be taken into account for the proportionality test of the notified aid, since it becomes relevant only in the very long-term, beyond the 7-year life cycle of the investment project at hand.
- (176) Germany later ⁽⁷³⁾ argued that the entire initially notified amount of EUR 50 million State aid is proportionate because an additional EUR 29 million in costs must be added to the EUR 17 million identified in December 2009 as the disadvantage of locating the investment in Leipzig. The additional EUR 29 million costs arose before the end of 2012, i.e. after the location and investment decision were taken and works on the project had started.
- (177) Germany justifies this amount by arguing that the proportionality of the aid does not need to be demonstrated on the basis of the same documents which proved the incentive effect. According to Germany, the Commission should also take into consideration other cost information, relating to costs incurred in the assisted region after the decision about the investment location had been made.
- (178) The Commission notes that the documents submitted by Germany in September 2012 and listing the additional ⁽⁷⁴⁾ are neither genuine nor contemporary to any investment decision, as they were established only in September 2012.
- (179) The Commission rejects the argument of the German authorities that proportionality should not be decided exclusively on the basis of documents reflecting the situation at the time of the relevant location/investment decision for the following reasons.
- (180) It is true that paragraph 35 of the IDAC, which describes the types of documents suitable to prove proportionality, does not literally require that proportionality is demonstrated on the basis of the *same* [emphasis added] documents as the ones on the basis of which the incentive effect is proven, but on the basis of documents *such as* [emphasis added] the ones described in paragraph 26 of IDAC. However, the wording of paragraph 35 cannot be interpreted as allowing the incentive effect and proportionality of the aid to be proven on the basis of documents containing wholly different figures regarding the net handicaps and costs linked to locating the investment in the assisted region. In particular, it does not allow the use of documents detailing costs that emerged several years after the relevant investment/location decision was taken.

⁽⁷³⁾ See recitals 101 and 102 above.

⁽⁷⁴⁾ See recital 102 above.

- (181) It is also true that there is no explicit provision in the IDAC specifying the point in time which should be considered for the assessment of proportionality. Similarly, there is no such explicit provision relating to the precise point in time that must be taken into account for the assessment of incentive effect. However, it is obvious that the relevant figures for determining the incentive effect of the aid over the investment/location decision must be available and relied upon *before* that decision is made. This is why paragraph 26 of the IDAC, which describes the types of documents suitable for proving incentive effect, refers to 'documents (...) *submitted to an investment committee* [emphasis added] (...) that elaborate on various investment scenarios (...)'. It is exactly this type of documents, which were submitted to the board of the beneficiary and contained the various investment scenarios and the relevant figures for each of them that the Commission examined in this case. Those documents demonstrate that the disadvantages linked to the location of the investment in Leipzig were estimated at EUR 17 million before the decision to select that location was made.
- (182) Further, the inherent logic of a scenario 2 analysis is that from an *ex ante* perspective, i.e. before the decision about the investment location is made, the extra costs that would be incurred by investing at the target location where, in the absence of the aid, the investment would not take place, have to be compensated by State aid. The principle of proportionality, however, also implies that aid in excess of what is necessary to trigger the decision to locate the investment in the assisted area must be considered superfluous, because it constitutes free money to the beneficiary which serves no purpose that would be compatible with the State aid rules.
- (183) Paragraph 33 of the IDAC provides explicitly that for the aid to be proportionate, it must equal the difference between the net costs at the alternative locations. Therefore, the Commission is of the view that the aid can only be considered proportionate if it does not exceed the amount that was necessary to trigger the decision by the aid beneficiary to carry out an investment at a particular location.
- (184) Contrary to what was argued by Germany, the Commission services consultation paper of 2007 on the Common principles for an economic assessment of the compatibility of State aid under Article 87.3, published some years ago by DG Competition, does not mandate a different solution. Paragraph 41 of the consultation paper, which in any event is not binding on the Commission, rather supports an approach which focuses on avoiding that aid in excess of the necessary amount is granted for an investment project. It clearly states that in cases that fall under the detailed assessment of existing guidelines, it has to be verified whether the aid intensity is too high and the same result could not be obtained with less aid. If it is proven, like in the current case, that there was only a difference of EUR 17 million between the investment costs in Leipzig and in Munich when the decision to invest in Leipzig was made, (i.e. when the investment was triggered) then aid in excess of that amount is superfluous also under the consultation paper invoked by Germany.
- (185) Nor does the *Freistaat Sachsen v Commission* judgment compel the Commission to take its decision on the basis of documents that the Member State considers to be 'appropriate' within the meaning of paragraph 35 of the IDAC⁽⁷⁵⁾ but which could not have determined the decision of the aid beneficiary to carry out the investment in a particular location.
- (186) Regarding the additional costs which arose in connection with the extension of the investment that took place after the initial investment decision was taken in December 2009, the Commission would like to express the following concerns regarding the new pieces of information which were submitted by Germany in September 2012, in the context of the formal investigation.

⁽⁷⁵⁾ See recital 92 and 94 above.

- (187) Additional costs relating to the production capability for the i8 model were not within the scope of the investment decided in 2009, as the decision to produce the i8 was made only in early 2011. The relevant decision of the board is a separate decision from the location/investment decision concerning the production of the i3 model. Also, the decision to produce the i8 model did not require a choice to invest in Leipzig or in an alternative location (scenario 2), but only a decision whether to produce the i8 model or not (scenario 1). In fact, in view of the small number of cars to be produced, the investment decision made economic sense only when the production relied on the production facilities being erected in Leipzig. Indeed, Germany stated in a response to an information request that the originally planned investment volume will not be affected⁽⁷⁶⁾ and the Commission has no knowledge of additional aid having been requested for any additional investment cost relating to the production of the i8 model.
- (188) The Commission takes the view that no incentive effect or proportionality can be proven regarding the portion of the aid that covers investment costs which had not been included in the notification.
- (189) The Commission is thus unable to confirm the proportionality of regional investment aid in the amount of EUR 45 257 273 (in discounted value). It concludes that the portion of the notified aid amount in excess of the EUR 17 million, (i.e. EUR 28 257 273) constitutes resources put at the disposal of the beneficiary which does not serve the achievement of any of the objectives enumerated in Article 107(3) of the Treaty. Moreover, it considers that the grant of this additional aid amount of EUR 28 257 273 would have negative, i.e. highly distortive effects on competition, as it might, in particular, discourage competitors to invest in similar products, thus contributing to the crowding out of private investment in the relevant market.

5.8.4. *Positive effects of the aid*

- (190) Under the IDAC, the Member State needs to substantiate the contribution of the aided investment project to the development of the region⁽⁷⁷⁾, and the Commission can only approve the aid if, in addition to providing incentive for the investment and being proportional, its positive effects outweigh its negative effects⁽⁷⁸⁾.
- (191) The Commission considers that Germany has successfully demonstrated that aid in the amount of EUR 17 million will have a positive contribution to regional development⁽⁷⁹⁾.

5.8.5. *Negative effects of the aid on competition*

- (192) According to paragraph 40⁽⁸⁰⁾ of the IDAC, in a scenario 2 analysis, where the investment would have gone ahead even without the aid, and the aid is proportionate, the aid has no effect on competition, as the pre-existing factors, such as the high market share of the beneficiary, remain the same.
- (193) The Commission was able to confirm the incentive effect of the aid and the proportionality of the aid in the amount of EUR 17 million. If the aid is limited to this amount, it has no negative effects on competition.

⁽⁷⁶⁾ See response of Germany of 25 May 2011 (reference 2011/054659), p. 3.

⁽⁷⁷⁾ Paragraph 11 of IDAC.

⁽⁷⁸⁾ Paragraph 52 of IDAC.

⁽⁷⁹⁾ See recitals 61 to 72 above.

⁽⁸⁰⁾ 'If (...) the contra-factual analysis suggests that without the aid the investment would have gone ahead in any case, albeit possibly in another location (scenario 2) and if the aid is proportional, possible indications of distortions such as a high market share and an increase in capacity in an underperforming market would in principle be the same regardless of the aid.'

5.8.6. Negative effects of the aid on trade

- (194) Regional aid has an effect on trade between Member States, since it encourages undertakings to locate investment in assisted areas of certain Member States rather than in alternative locations in other Member States. However, the investment project in Leipzig did not distract investment from another assisted area in a different Member State, nor from an equally disadvantaged area within Germany. The site in [...] was excluded as an alternative location due to qualitative and strategic considerations at an earlier planning stage. Therefore, the aid does not run counter to the cohesion objectives enshrined in the Treaty. Besides, since the investment does not involve the relocation of an existing plant into Leipzig, paragraph 54 of the IDAC does not apply to the notified aid.

5.8.7. Balancing of positive and negative effects of the aid

- (195) Having established that the aid provides an incentive for carrying out the investment in the region concerned and is proportionate to pursue that objective if limited to the amount of EUR 17 million, it is necessary to balance the positive effects of the aid with its negative effects.
- (196) The assessment confirmed that the aid measure amounting to EUR 17 million has attracted an investment project to a disadvantaged region which is eligible for regional aid pursuant to Article 107(3)(c) TFEU. The investment offers an important contribution to regional development by creating 800 direct jobs. Since the decision to locate the investment in Leipzig does not affect a region with the same or a higher aid intensity ceiling, the aid measure does not run counter to cohesion objectives. The Commission considers that attracting an investment to a poorer region is more beneficial for cohesion within the Union than if the same investment would have been carried out in a more developed region.
- (197) In view of the above, the Commission finds that the positive effects of the aid in the amount of EUR 17 million outweigh the negative effects on trade between Member States and any negative social and economic effects in the alternative location, which is a more developed and advantaged region.
- (198) In accordance with paragraph 68 of the RAG, and in light of the in-depth assessment conducted on the basis of the IDAC, the Commission considers that Germany successfully demonstrated the positive contribution of the aid in the amount of EUR 17 million to regional development. The Commission concludes that the aid limited to the amount of EUR 17 million is necessary to provide an incentive effect for the investment in Leipzig and that the benefits of the aid measure outweigh the resulting distortion of competition and effect on trade between Member States.

5.8.8. Possibility to grant aid up to the notification threshold laid down in the GBER

- (199) The Commission rejects the argument put forward by Germany, according to which the Commission's authority to examine the compatibility of the aid measure in question under the IDAC is limited to the portion of the requested aid amount which is above the notification threshold laid down in Article 6(2) of the GBER.
- (200) The Commission must recall its obligation to verify, on the basis of a more detailed assessment carried out pursuant to the IDAC, the incentive effect and proportionality of aid measures to which that in-depth assessment is applicable, i.e. notifiable regional aid granted to large investment projects that meet the relevant conditions laid down in the RAG.
- (201) As regards the possibility for Germany to grant aid to BMW AG up to the level of the notification threshold laid down in Article 6(2) of the GBER, which in this case would be EUR 22,5 million, it is important to note that the wording of the footnote to paragraph 56 of the IDAC merely states that the Member State *retains* that possibility. It does not follow from the footnote invoked by Germany that the Commission itself is obliged to authorise the grant of regional aid up to the amount which is exempted from notification under a block exempted scheme.

- (202) The Commission is therefore entitled to assess the incentive effect and the proportionality of the entire amount of the aid notified by Germany, and to find that the aid is compatible with the internal market only if it is limited to EUR 17 million.

6. CONCLUSION

- (203) The Commission concludes that the regional investment aid amount that Germany envisages to implement in favour of BMW AG is compatible with the internal market pursuant to Article 107(3)(a) TFEU up to the maximum amount of EUR 17 million.
- (204) There is no indication that any of the other derogations from the prohibition of State aid contained in Article 107 TFEU is applicable, nor was any such derogation been invoked by the German authorities.
- (205) The EUR 28 257 273 portion of the notified aid that Germany envisages to grant to BMW AG is therefore incompatible with the internal market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany is planning to implement in favour of BMW AG's investment in Leipzig, amounting to EUR 45 257 273 is compatible with the internal market only if it is limited to an amount of EUR 17 million (in prices of 2009); the exceeding amount (EUR 28 257 273) is incompatible with the internal market.

The aid may accordingly only be implemented up to the amount of EUR 17 million.

Article 2

Germany shall submit to the Commission:

- within 2 months of granting the aid, a copy of the relevant acts concerning this aid measure,
- within 6 months after payment of the last tranche of the aid, based on the notified payment schedule, a detailed final report.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 9 July 2014.

For the Commission

Joaquín ALMUNIA

Vice-President
