

## COMMISSION DECISION (EU) 2016/789

of 1 October 2014

**on the State aid SA.21121 (C29/08) (ex NN 54/07) implemented by Germany concerning the financing of Frankfurt Hahn airport and the financial relations between the airport and Ryanair**

(notified under document C(2014) 6853)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

#### 1. PROCEDURE

- (1) Between 2003 and 2006, the Commission received complaints from various parties alleging that *Ryanair plc* ('Ryanair' (³)) as well as the Frankfurt Hahn airport operator *Flughafen Frankfurt-Hahn GmbH* (hereinafter: 'FFHG') had been granted unlawful State aid by the company *Fraport AG* and the *Länder* (Federal States) of Rhineland-Palatinate and Hesse. The complainant provided further information on 22 September 2003 and 1 June 2006.
- (2) By letters dated 25 September 2006 and 9 February 2007, the Commission requested information from Germany. Germany responded by letters dated 20 December 2006 and 29 June 2007 respectively.
- (3) By letter dated 17 June 2008, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the Treaty with regard to the financing of FFHG and its financial relations with Ryanair (the '2008 opening decision'). Germany transmitted its comments on 27 October 2008.
- (4) The 2008 opening decision was registered under case number SA.21121 (C29/08). The 2008 opening decision was published in the *Official Journal of the European Union* (⁴) on 17 January 2009. The Commission invited interested parties to submit their comments on the measures in question within 1 month of the date of publication.
- (5) The Commission received comments from *Deutsche Lufthansa AG* ('Lufthansa'), the Federal Association of German Air Carriers (Bundesverband der Deutschen Fluggesellschaften, 'BDF'), Ryanair, Société Air France SA ('Air France') and the Association of European Airlines (AEA). It forwarded the comments to Germany by letter dated 16 April 2009. Germany was given the opportunity to respond to them within 1 month and transmitted its comments and more information on 1 July 2009.

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

(²) OJ C 12, 17.1.2009, p. 6.

(³) Ryanair is an Irish airline and Member of the European Low Fares Airlines Association. The business of the airline is linked with secondary, regional airports. The airline operates currently approximately 160 European destinations. Ryanair has a homogenous fleet consisting of 272 Boeing 737-800 aircraft with 189 seats.

(⁴) See footnote 2.

(6) By letter of 4 March 2011, Lufthansa provided further information with regard to the 2008 opening decision addressing new alleged State aid measures.

(7) By letter dated 18 March 2011 the Commission forwarded the complaint to Germany and requested further information on the new allegations concerning State aid measures. Germany replied by letters dated 19 May 2011 and 23 May 2011.

(8) However, those replies were incomplete. Therefore, by letter dated 6 June 2011 the Commission sent a reminder pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 (⁹). Germany responded by letters dated 14 June 2011 and 16 June 2011.

(9) By letter dated 13 July 2011 the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the Treaty with respect to the credit line provided to FFHG by the cash pooling facility of *Land Rhineland-Palatinate*, the loan provided to FFHG by Investitions-und Strukturbank of *Land Rhineland-Palatinate* ('ISB') and the guarantee for the ISB loan provided to FFHG by *Land Rhineland-Palatinate* (the '2011 opening decision'). The 2011 opening decision was registered under case number SA.32833 (2011/C). The 2011 opening decision was published in the *Official Journal of the European Union* on 21 July 2012 (⁹).

(10) By letter dated 20 February 2012 the Commission requested further information regarding the 2008 opening decision. Germany responded by letter dated 16 April 2012. By letter of 27 July 2012, the Commission again requested further information. Germany replied by letter dated 4 September 2012.

(11) By a letter dated 25 February 2014 the Commission informed Germany of the adoption of the Commission guidelines on State aid to airports and airlines (⁹) (the '2014 Aviation Guidelines') on 20 February 2014. The Commission informed Germany that those guidelines would become applicable from the date of their publication in the *Official Journal of the European Union*. It gave Germany the opportunity to comment on those guidelines and their possible application to the present case within 20 working days. By letter dated 17 March 2014 the Commission reminded Germany that, in case it would not receive any comments within the deadline of 20 working days, the Commission would consider that Germany had no comments.

(12) By letters dated 23 March 2014 and 4 April 2014 the Commission requested further information from Germany. Germany replied by letters dated 17 April 2014, 24 April 2014 and 9 May 2014.

(13) The 2014 Aviation Guidelines were published in the *Official Journal of the European Union* on 4 April 2014. They replaced the 1994 Aviation Guidelines (⁹) as well as the 2005 Aviation Guidelines (⁹).

(14) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within 1 month of their publication date (⁹). Lufthansa and Transport & Environment submitted observations. By letter dated 26 August 2014, the Commission forwarded those observations to Germany. By letter dated 3 September 2014, Germany informed the Commission that it had no observations.

(15) By letter dated 17 June 2014, Germany agreed exceptionally to have this decision adopted and notified in English only.

(⁹) 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).

(⁹) OJ C 216, 21.7.2012, p. 1.

(⁹) Communication from the Commission — Guidelines on State aid to airports and airlines (C(2014) 963) (OJ C 99, 4.4.2014, p. 3).

(⁹) Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the Aviation Sector (OJ C 350, 10.12.1994, p. 5).

(⁹) Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

(⁹) OJ C 113, 15.4.2014, p. 30.

## 2. CONTEXT OF THE MEASURES

### 2.1. CONVERSION OF THE AIRPORT AND ITS OWNERSHIP STRUCTURE

(16) Frankfurt Hahn airport is located in *Land* Rhineland-Palatinate, approximately 120 km west of the city of Frankfurt/Main. Frankfurt Hahn airport was a US military airbase until 1992. Subsequently, it was converted into a civil airport. It holds a 24-hour operating licence.

(17) *Holding Unternehmen Hahn GmbH & Co. KG* ('Fraport'), a public private partnership between Wayss & Freytag and *Land* Rhineland-Palatinate, acquired ownership of the infrastructure of Frankfurt Hahn airport from Germany on 1 April 1995. Between 1995 and 1998, this public private partnership developed the airport with the goal of developing there an industrial and commercial area. According to Germany, when the partnership between Wayss & Freytag and *Land* Rhineland-Palatinate did not turn out to be successful, on 1 January 1998, *Flughafen Frankfurt/Main GmbH* ('Fraport') <sup>(1)</sup> started getting involved in the project and eventually took over the operation of the airport.

(18) According to Germany, Fraport, who was already operating and managing the international Frankfurt Main airport, located approximately 115 km from Frankfurt Hahn airport, got involved for several strategic reasons. Firstly, Germany stated that Frankfurt Hahn airport was the only airport in the proximity of Frankfurt Main airport which had the potential of becoming a fully-fledged international airport. As Frankfurt Main airport was already at its full capacity at that moment, there was the potential for a second profitable airport in the region. Secondly, Frankfurt Hahn airport was then the only German airport with a 24 hour operation licence, especially useful for cargo and freight flights. Thirdly, the runway was fully equipped and could be used in all weather conditions. Furthermore, Germany submitted that the owners of Schiphol airport were also thinking about acquiring Frankfurt Hahn airport, and hence by taking over the operation of Frankfurt Hahn airport it was possible for Fraport to keep out an unwanted competitor.

(19) Fraport purchased 64,90 % of the shares in the operator *Flughafen Hahn GmbH & Co. KG Lautzenhausen* ('FFHG & Co KG') for the price of [...] (\*). Payment of part of the purchase price (EUR [...]) was due on 31 December 2007, under certain conditions <sup>(12)</sup>. In August 1999, Fraport acquired 73,37 % of the shares of Holding Hahn and 74,90 % of the shares of its general partner *Holding Unternehmen Hahn Verwaltungs GmbH* for the price of EUR [...]. Thereby Fraport effectively became the new partner of *Land* Rhineland-Palatinate.

(20) Fraport's focus at Frankfurt Hahn airport was to systematically develop the airport's passenger and cargo business. In that respect, Fraport was one of the first undertakings to apply a business model which aimed especially at attracting low-cost airlines. On that basis, Fraport concluded a new profit and loss transfer agreement with Holding Hahn upon conversion of the latter into a German limited liability company (*Gesellschaft mit beschränkter Haftung*, 'GmbH'). The conversion and the conclusion of that agreement took place on 24 November 2000.

(21) Subsequently, Holding Hahn and FFHG & Co KG merged to form *Flughafen Hahn GmbH*. *Land* Rhineland-Palatinate held 26,93 % and Fraport 73,07 % of the shares in the new company. Later, the business name of the company was again changed to *Flughafen Frankfurt-Hahn GmbH* ('FFHG'). In 2001, the two shareholders, Fraport and *Land* Rhineland-Palatinate, injected fresh capital into FFHG (see detailed description in Section 3).

(22) Until 11 June 2001, 100 % of the shares in Fraport were held by public shareholders <sup>(13)</sup>. On 11 June, Fraport was floated on the stock exchange and 29,71 % of its shares were sold to private shareholders, with 70,29 % of shares remaining with the public shareholders.

(23) In November 2002, *Land* Rhineland-Palatinate, *Land* Hesse, Fraport and FFHG concluded an agreement on the further development of Frankfurt Hahn airport. That agreement provided for a second increase of the authorised

<sup>(11)</sup> Hereafter in this decision the term 'Fraport' is used to mean both 'FAG' prior to the change of the business name and 'Fraport AG' thereafter.

(\*) Confidential information

<sup>(12)</sup> Pursuant to Section 7(3) of the purchase agreement part of the purchase price can be reduced for instance if the costs incurred by FFHG for noise protection were to exceed a certain ceiling.

<sup>(13)</sup> *Land* Hesse held 45,24 % of Fraport's shares, *Stadtwerke Frankfurt am Main Holding GmbH* (owned for 100 % by the municipality Frankfurt am Main) held 28,89 % and the Federal Republic of Germany held 25,87 %.

capital. On that occasion, and *Land Hesse* acceded to FFHG as a third shareholder. Fraport then owned 65 % of the shares, *Land Hesse* and *Land Rhineland-Palatinate* held 17,5 % each. That ownership structure remained unchanged until 2009, when Fraport sold all of its shares to *Land Rhineland-Palatinate*, which has, since then, held a 82,5 % majority share. The remaining 17,5 % are still held by *Land Hesse*.

## 2.2. PASSENGER AND FREIGHT TRAFFIC DEVELOPMENT AND AIRPORTS IN THE VICINITY

(24) The passenger traffic at the airport increased from 29 289 in 1998 to 4 million in 2007 and decreased to approximately 2,7 million in 2013 (see Table 1). The airport is currently served by Ryanair, Wizz Air <sup>(14)</sup> and other airlines. Ryanair's passenger share amounted to approximately [80-100 %] in 2013.

Table 1

### Passenger development at Frankfurt Hahn airport in 1998 to 2013

Year	Number of passengers	Number of Ryanair passengers
1998	29 289	0
1999	140 706	89 129
2000	380 284	318 664
2001	447 142	397 593
2002	1 457 527	1 231 790
2003	2 431 783	2 341 784
2004	2 760 379	2 668 713
2005	3 079 528	2 856 109
2006	3 705 088	3 319 772
2007	4 015 155	3 808 062
2008	3 940 585	3 821 850
2009	3 793 958	3 682 050
2010	3 457 540	[2 766 032-3 457 540]
2011	2 894 363	[2 315 490-2 894 363]
2012	2 791 185	[2 232 948-2 791 185]
2013	2 667 529	[2 134 023-2 667 529]

<sup>(14)</sup> Wizz Air is a Hungarian airline and Member of the European Low Fares Airlines Association. Wizz Air group consists of three operating companies, namely Wizz Air Hungary, Wizz Air Bulgaria and Wizz Air Ukraine. The business model of the airlines is linked with secondary, regional airports. The airline operates currently approximately 150 European destinations. Wizz Air has a homogenous fleet with an average age of less than 3 years, which consist of 34 Airbus A 320 aircrafts with 180 seats.

(25) Frankfurt Hahn airport has also experienced growth in air freight. The air freight at the airport increased from approximately 16 000 tonnes in 1998 to approximately 286 000 tonnes at its peak in 2011, with a subsequent decrease to approximately 151 000 tonnes in 2013 (see Table 2). The total freight, including freight forwarders, handled at the airport amounted to approximately 447 000 tonnes in 2013.

Table 2

**Cargo development at Frankfurt Hahn airport in 1998 to 2013**

Year	Total air freight in tonnes	Total freight including freight forwarder in tonnes
1998	16 020	134 920
1999	43 676	168 437
2000	75 547	191 001
2001	25 053	133 743
2002	23 736	138 131
2003	37 065	158 873
2004	66 097	191 117
2005	107 305	228 921
2006	123 165	266 174
2007	125 049	289 404
2008	179 375	338 490
2009	174 664	322 170
2010	228 547	466 429
2011	286 416	565 344
2012	207 520	503 995
2013	152 503	446 608

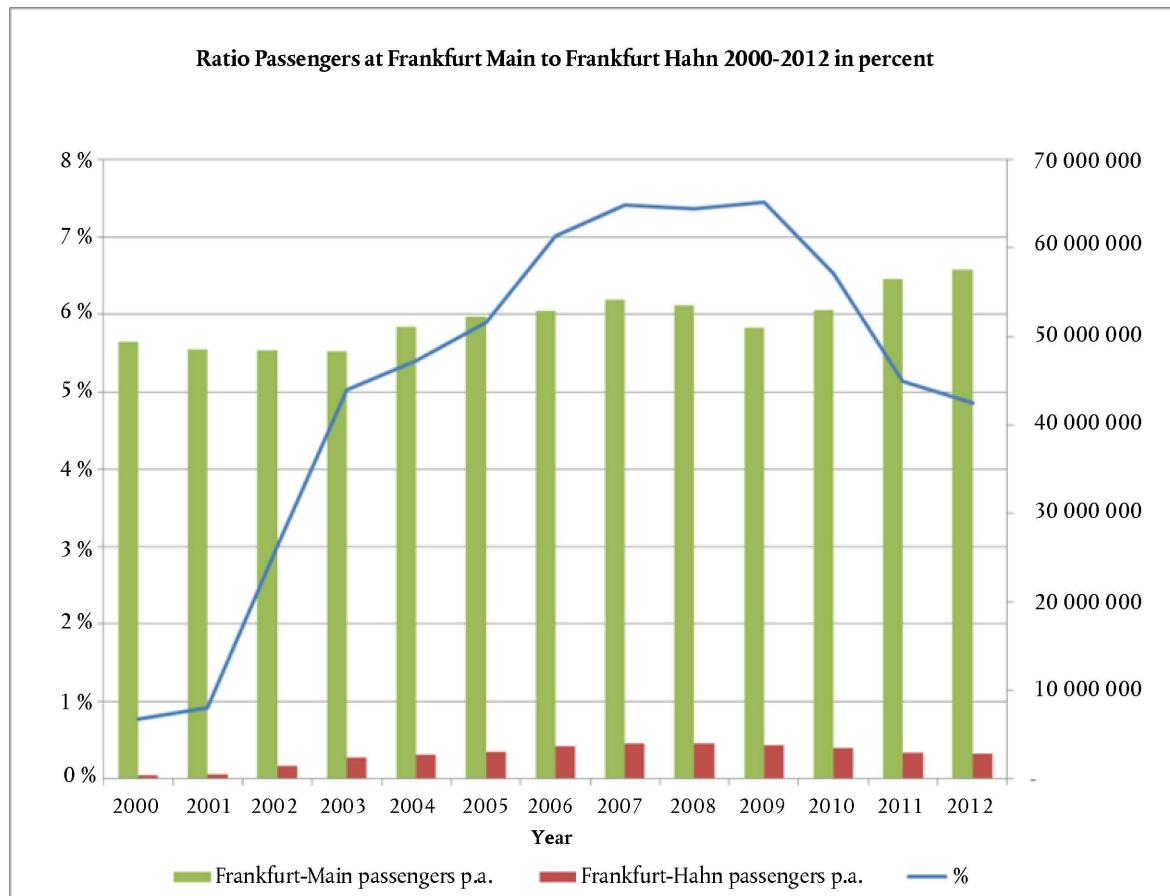
(26) The following airports are located in the proximity of Frankfurt Hahn airport:

(i) Frankfurt Main airport (~ 115 kilometres from Frankfurt Hahn airport, ~ 1 hour 15 minutes travelling time by car) is an international hub airport with a wide variety of destinations, ranging from short to long-haul. It is predominantly served by network carriers offering connecting traffic, although it also provides point-to-point connections and charter flights. Besides passenger traffic (approximately 58 million in 2013), Frankfurt Main airport also handles air freight (approximately 2 million tonnes in 2013). Figure 1 shows the development of traffic at Frankfurt Main and Frankfurt Hahn airports in 2000-2012.

- (ii) Luxembourg airport (~ 111 kilometres from Frankfurt Hahn airport, ~ 1 hour 30 minutes travelling time by car) is an international airport providing a wide variety of destinations. In addition to passenger traffic (approximately 2,2 million in 2013), it also served 673 500 tonnes of air freight.
- (iii) Zweibrücken airport (~ 128 kilometres from Frankfurt Hahn airport, ~ 1 hour 35 minutes travelling time by car).
- (iv) Saarbrücken airport (~ 128 kilometres from Frankfurt Hahn airport, ~ 1 hour 35 minutes travelling time by car).
- (v) Köln-Bonn airport (~ 175 kilometres from Frankfurt Hahn airport, ~ 1 hour 44 minutes travelling time by car).

Figure 1

**Passenger traffic development at Frankfurt Main and Frankfurt Hahn airports in 2000-2012**



## 2.3. OVERVIEW OF INVESTMENTS UNDERTAKEN BY FFHG AND ITS FINANCIAL RESULTS

(27) Table 3 provides an overview of investments undertaken by FFHG from 2001 to 2012, amounting in total to approximately EUR 216 million.

Table 3

## Overview of investments undertaken from 2001 to 2012

In 1 000 EUR	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total 2001-2012
Investments into infrastructure and equipment													
Anlagenzugänge inkl. Umbuchungen													
Land	3 174,00	6 488		2 994	4 284	3 086	8 613	593		...			
Terminal		2 519	3 310					251					
Cargo Hangar			3 850		3 222								
Office building								2 428		...			
Other infrastructure investments			10 194	1 152			13 275			...	...	...	
Apron	1 008,30	5 684			3 394		10 224	2 848		...	...	...	
Other infrastructure	1 502,20	3 848	2 071	2 692	3 911	1 761	1 558	2 608	384	...	...	...	
Immaterial assets (e.g. IT)	6,1	14,50	28	219	487	45	170	121	20	...	...	...	7 108
Equipment	8 208,89	1 097,09	12 308,42	1 814,00	2 294,54	20 232	7 550	3 823	359	...	...	...	75 550
<b>Total</b>	<b>13 899</b>	<b>19 650</b>	<b>31 761</b>	<b>8 871</b>	<b>17 592</b>	<b>25 123</b>	<b>41 390</b>	<b>12 673</b>	<b>763</b>	<b>17 289</b>	<b>19 346</b>	<b>7 930</b>	<b>216 287</b>

(28) Table 4 provides an overview of the annual financial results of FFHG from 2001 to 2012.

Table 4

Annual financial results of FFHG in 2001 to 2012

In 1 000 EUR	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
<b>Profit and loss statement</b>												
Revenues	10 077,61	14 908,11	22 574,22	29 564,18	36 859,08	43 479,85	41 296,34	45 383,60	42 036,70	43 281,58	43 658,38	40 983,45
Other revenues (including compensation for public policy remit)	7 771,31	5 514,63	3 686,87	3 039,35	3 618,93	6 097,29	5 436,58	4 858,16	11 540,36	14 554,55	9 313,99	21 390,92
<b>Total Revenue</b>	<b>17 848,92</b>	<b>20 422,75</b>	<b>26 261,09</b>	<b>32 603,53</b>	<b>40 478,01</b>	<b>49 577,14</b>	<b>46 732,92</b>	<b>50 241,76</b>	<b>53 577,06</b>	<b>57 836,14</b>	<b>52 972,37</b>	<b>62 374,37</b>
Costs of material	– 7 092,39	– 10 211,13	– 12 560,46	– 14 601,17	– 17 895,97	– 24 062,81	– 22 491,85	– 25 133,61	– 24 979,59	– 27 650,17	– 20 017,99	– 21 871,65
Costs of personnel	– 9 185,12	– 9 672,37	– 10 734,62	– 11 217,21	– 12 101,84	– 13 337,28	– 14 433,17	– 15 758,34	– 15 883,08	– 17 893,60	– 18 228,23	– 18 349,10
Other costs (including marketing)	– 5 692,81	– 11 434,31	– 10 521,27	– 11 454,36	– 14 058,15	– 12 885,28	– 9 897,46	– 9 630,21	– 7 796,81	– 8 029,40	– 6 760,92	– 6 643,00
<b>EBITDA</b>	<b>– 4 121,41</b>	<b>– 10 895,06</b>	<b>– 7 555,27</b>	<b>– 4 669,21</b>	<b>– 3 577,94</b>	<b>– 708,22</b>	<b>– 89,56</b>	<b>– 280,39</b>	<b>– 4 917,58</b>	<b>– 4 262,96</b>	<b>– 7 965,23</b>	<b>– 15 510,62</b>
<b>EBITDA (excl other revenues)</b>	<b>– 11 892,72</b>	<b>– 16 409,69</b>	<b>– 11 242,13</b>	<b>– 7 708,56</b>	<b>– 7 196,87</b>	<b>– 6 805,51</b>	<b>– 5 526,13</b>	<b>– 5 138,56</b>	<b>– 6 622,78</b>	<b>– 10 291,59</b>	<b>– 1 348,76</b>	<b>– 5 880,30</b>
Depreciation	– 5 325,63	– 5 674,68	– 6 045,39	– 7 699,33	– 7 973,46	– 10 527,90	– 10 191,89	– 11 855,19	– 12 482,28	– 11 827,19	– 13 297,31	– 12 733,48
Financial results (interest received — interest paid)	– 2 896,64	– 3 013,42	– 4 006,57	– 4 105,53	– 4 548,42	– 4 588,16	– 5 235,30	– 5 693,02	– 4 915,39	– 2 778,06	– 5 063,04	– 8 177,54
Extraordinary revenues and costs	– 431,54	– 206,00	– 10,46	0,00	0,00	0,00	0,00	0,00	0,00	– 272,55	0,00	0,00
Taxes	– 580,13	– 204,74	– 215,18	– 323,82	– 228,44	– 242,33	– 245,00	– 238,66	– 257,45	– 240,85	– 231,03	– 277,52
<b>Coverage of losses by Fraport through the profit and loss transfer</b>	<b>13 355,35</b>	<b>19 993,90</b>	<b>17 832,87</b>	<b>16 797,89</b>	<b>16 328,26</b>	<b>16 066,61</b>	<b>15 761,75</b>	<b>18 067,26</b>	<b>5 621,37</b>	<b>0,00</b>	<b>0,00</b>	<b>0,00</b>
<b>Annual result (profit/loss)</b>	<b>0,00</b>	<b>0,00</b>	<b>0,00</b>	<b>0,00</b>	<b>0,00</b>	<b>0,00</b>	<b>0,00</b>	<b>0,00</b>	<b>– 7 114,17</b>	<b>– 10 855,69</b>	<b>– 10 626,14</b>	<b>– 5 677,92</b>

### 3. DESCRIPTION OF THE MEASURES

#### 3.1. POSSIBLE STATE AID GRANTED TO FFHG

##### 3.1.1. MEASURE 1: 2001 PROFIT AND LOSS TRANSFER AGREEMENT

- (29) FFHG and Fraport concluded an agreement according to which Fraport was entitled to all profits generated by FFHG. In return, Fraport was obliged to assume all the losses of FFHG. *Land Rhineland-Palatinate and Fraport concluded an agreement on 31 August 1999 in which Fraport committed to conclude a Profit and Loss Transfer Agreement ('PLTA'). The corresponding notarial agreement was concluded on 24 November 2000 and the 2001 PLTA took effect on 1 January 2001 ('2001 PLTA')* <sup>(15)</sup>.
- (30) Fraport had the right to terminate the 2001 PLTA by giving six months' notice, but only from 31 December 2005. If not terminated, the agreement was tacitly prolonged at the end of each calendar year for another year, but no longer than until 31 December 2010.
- (31) The conclusion of the 2001 PLTA was approved by Fraport's supervisory board and shareholders <sup>(16)</sup>. The duration of the 2001 PLTA was later extended until 2014 by an agreement of 5 April 2004 ('PLTA 2004'). By the time the 2001 PLTA was replaced by the 2004 PLTA ('2004 PLTA', see recital 45), Fraport had assumed losses of EUR [...] million.

##### 3.1.2. MEASURE 2: 2001 CAPITAL INCREASE

- (32) A report for the holding committee of Fraport <sup>(17)</sup> noted on 19 January 2001 that the losses accumulated by FFHG between 1998 and 2005 would presumably amount to EUR [...] million, and therefore be more than twice as high as forecasted in 1997. In addition, two of FFHG's major freight clients shifted or reduced their business from Frankfurt Hahn airport at the same time, which resulted in a substantial decrease of freight traffic volume, namely by 45 % in the first semester of 2001.
- (33) Following that report, Fraport mandated a consultant, the Boston Consulting Group ('BCG'), as well as its own Strategic Department Acquisitions and Holdings ('SD') in the beginning of 2001 to develop a strategy for FFHG. Both BCG and SD concluded that a positive long-term development of FFHG was only possible with a substantial improvement of the infrastructure, as a prerequisite to further increase traffic volume. SD also pointed out that such a substantial extension of FFHG would be financially risky, and that even in case of the most positive scenario, a positive annual result (net annual profit after tax) would presumably be reached at the earliest in 2013.
- (34) Based on the BCG study and its own analysis, SD drafted a development programme for FFHG, which envisaged investments of EUR 172 million until 2007. Those investments consisted of an 'emergency' programme, valued at EUR 27 million, covering the extension of the runway to 3 400 meters and the planning costs for the plan approval procedure ('Planfeststellungsverfahren') to extend the runway to 3 800 meters, as well as the additional costs of the commenced construction of the new passenger terminal.
- (35) However, in 2001 FFHG had an equity-to-debt ratio of only 4 % <sup>(18)</sup>. In addition, as of 31 December 2005 Fraport had a right to terminate the 2001 PLTA. Under those conditions, FFHG could not finance the 'emergency' programme through further debt, but needed fresh capital.
- (36) The capital increase was decided by a resolution of Fraport's supervisory board on 14 December 2001 and subsequently by a resolution of FFHG's shareholders on 9 January 2002. Any increase of the authorised capital of a limited liability company, such as FFHG, requires the approval of all participating shareholders.

<sup>(15)</sup> Notarial deed of notary Jürgen Scherzer (Roll of deeds No 268/2000) dated 24 November 2000.

<sup>(16)</sup> Resolution by the meeting of shareholders of 3 May 2000.

<sup>(17)</sup> The holding committee of Fraport is a committee created by the supervisory board which follows the economic development of Fraport's holdings.

<sup>(18)</sup> Or, in other words, a debt-to-equity ratio of 96 %.

(37) Following that approval, Fraport and *Land* Rhineland-Palatinate increased the authorised capital by EUR 27 million from EUR 3,5 million to EUR 30,5 million. On 9 January 2002 Fraport contributed EUR 19,7 million and *Land* Rhineland-Palatinate EUR 7,3 million. The capital increase was intended to finance the extension of the runway and investments into other infrastructure to increase the profitability of the airport.

### 3.1.3. MEASURE 3: 2004 CAPITAL INCREASE

(38) On 27 November 2002, it was agreed by Fraport, *Land* Rhineland-Palatinate, *Land* Hesse and FFHG that *Land* Hesse would become the third shareholder of FFHG and would as such contribute EUR [...] million at the time when additional capital will be required to finance the investments. It was also agreed to create a close cooperation between Frankfurt Main airport and Frankfurt Hahn airport.

(39) It was agreed that further investments were necessary to increase the profitability of Frankfurt Hahn airport. Those investments concern for example the extension of the runway to 3 800 meters. A draft shareholder agreement between Fraport, *Land* Rhineland-Palatinate, and *Land* Hesse was prepared on 22 March 2004. The final shareholder agreement regarding the decision to realise this 2004 capital increase was signed by Fraport, *Land* Rhineland-Palatinate, and *Land* Hesse on 30 March 2005 and registered in the commercial registry on 19 May 2005

(40) The three parties agreed on a capital increase of EUR 19,5 million for FFHG's authorised capital, thereby continuing the investment programme proposed in 2001 by SD (see recitals 33-34). *Land* Rhineland-Palatinate and *Land* Hesse agreed to this capital increase subject to the condition that a new PLTA between FFHG and Fraport would be concluded, covering the period until 31 December 2014. The shareholders also agreed that any further debt FFHG was going to incur had to be secured by Fraport, *Land* Rhineland-Palatinate and *Land* Hesse at a ratio corresponding to the distribution of capital in FFHG. On that basis Fraport, *Land* Rhineland-Palatinate and *Land* Hessen committed to re-finance the infrastructure investments of FFHG.

(41) Between 2004 and 2009, fresh capital of EUR 19,5 million was injected into FFHG in several instalments. Fraport's share in the capital increase amounted to EUR 10,21 million, *Land* Rhineland-Palatinate's to EUR 0,54 million, and *Land* Hesse contributed EUR 8,75 million.

(42) In addition, both *Land* Hesse and *Land* Rhineland-Palatinate committed and injected according to the payment schedule (see Table 5 below) another EUR 11,25 million as capital reserve, to be paid by the former between 2007 and 2009, and by the latter between 2005 and 2009.

(43) Therefore, the total amount of capital increase decided in 2005 was EUR 42 million.

(44) The payments were due according to the following schedule in Table 5 (in thousand EUR):

Table 5

#### Payment schedule of capital injections

Fraport

	2005	2006	2007	2008	2009	Total
Payments on capital contributions	2 554	1 915	1 915	1 915	1 915	10 214
Capital reserve	0	0	0	0	0	0
<i>Total equity</i>						<b>10 214</b>

*Land Hesse*

	2005	2006	2007	2008	2009	Total
Payments on capital contributions	4 000	4 000	750	0	0	8 750
Capital reserve	0	0	3 250	4 000	4 000	11 250
<i>Total equity</i>						<b>20 000</b>

*Land Rhineland-Palatinate*

	2005	2006	2007	2008	2009	Total
Payments on capital contributions	537	0	0	0	0	537
Capital reserve	1 821	2 357	2 357	2 357	2 357	11 249
<i>Total equity</i>						<b>11 786</b>

## 3.1.4. MEASURE 4: 2004 PLTA

(45) As it had been a condition for approval of the capital increase, FFHG and Fraport extended the duration of the 2001 PLTA until 2014 by an agreement of 5 April 2004. The new PLTA agreement became however only effective after the approval of Fraport's shareholder assembly. As agreed by the shareholders of FFHG with respect to the capital increase, it was laid down in this 2004 PLTA stated that any further debt accrued by FFHG had to be compensated by Fraport, *Land Rhineland-Palatinate* and *Land Hesse* at a ratio which corresponded to their equity.

(46) Under the 2004 PLTA, Fraport took over approximately EUR [...] million worth of losses until 2009. Therefore, under the two successive PLTA's together, a total of EUR [...] million of losses, accrued between 2001 and 2009, were compensated by Fraport. Out of this sum, EUR [...] million concern depreciation of assets and EUR [...] million the interest payments on loans to finance infrastructure.

(47) In 2009, Fraport sold its entire share in FFHG to *Land Rhineland-Palatinate* and thereby also terminated the PLTA.

## 3.1.5. MEASURE 5: COMPENSATION OF FFHG FOR SECURITY CHECKS

(48) *Land Rhineland-Palatinate* collects an airport security tax from all departing passengers at Frankfurt Hahn airport. The *Land* does not carry out the security checks itself, but has subcontracted that task to the airport, which in turn has subcontracted that task by agreement on to a security company. As consideration for carrying out the security checks, the *Land* transfers the entire revenue from the security tax to the airport.

## 3.1.6. MEASURE 6: DIRECT GRANTS BY LAND RHINELAND-PALATINATE

(49) According to the financial reports for *Land Rhineland-Palatinate* holding companies <sup>(19)</sup>, the *Land* subsidised FFHG in the following amounts as summarised in Table 6.

<sup>(19)</sup> *Land Rhineland-Palatinate* Holding companies annual reports of 1999, 2001, 2003, 2004.

Table 6

**Direct grants by *Land* Rhineland-Palatinate**

Year	Direct Grants (EUR)
1997	[...]
1998	[...]
1999	[...]
2000	[...]
Total 1997-2000	[...]
2001	[...]
2002	[...]
2003	[...]
2004	[...]
Total 2001-2004	[...]

(50) The direct grants before 12 December 2000 by *Land* Rhineland-Palatinate to FFHG amount to [...] million, whereas the direct grants by *Land* Rhineland-Palatinate to FFHG between 2001 and 2004 amount to EUR [...] million.

### 3.2. POSSIBLE STATE AID GRANTED BY FFHG TO RYANAIR AND ALL OTHER AIRLINES TRANSPORTING PASSENGERS

(51) In 1999, FFHG attracted its first low-cost carrier, Ryanair. FFHG concluded three agreements with Ryanair in 1999, 2002 and 2005. Furthermore, FFHG introduced new airport charges in 2001 and 2006.

#### 3.2.1. MEASURE 7: 1999 RYANAIR AGREEMENT

(52) The first agreement with Ryanair entered into force with retroactive effect as of 1 April 1999, and had a duration of 5 years (the '1999 Ryanair agreement'). Ryanair commenced operating from Frankfurt Hahn airport into London Stansted on 22 April 1999, when all essential conditions of the agreements had already been agreed upon.

(53) A *Deckungsbeitragsrechnung* (break-even analysis) for the 1999 Ryanair agreement had been submitted by the management board of FFHG to the Supervisory Board in its meeting of 5 May 1999. According to Germany, FFHG's Supervisory Board did not vote on the 1999 Ryanair agreement or the break-even analysis, since the conclusion of the agreement was deemed to be operational day-to-day business being within the sole competence of FFHG's Management Board.

(54) Table 7 summarises the charges to be paid by Ryanair under Annex 1 of the 1999 Ryanair agreement.

Table 7

**Charges to be paid by Ryanair under Annex 1 of the 1999 Ryanair agreement**

Charge/fee/tax type	EUR
Turnaround fee (per flight comprising landing charge, ramp handling and passenger clearance) <sup>(1)</sup>	[...]
Passenger fee (per arriving passenger)	[...]
Air security tax (per departing passenger)	[...]
De-icing fluid including hot water (per litre)	[...]

<sup>(1)</sup> The annual turnaround fee to be paid by Ryanair in case of up to 6 flight frequencies per day was capped at a ceiling of EUR [...].

(55) Under Annex 3 of the 1999 Ryanair agreement, FFHG additionally received a [...] % commission on each ticket sold (cash or credit card) or issued by FFHG's ticket counters, a [...] % commission on excess baggage charges collected by FFHG, EUR [...] for each prepaid ticket processed by Ryanair and a [...] % commission for each car rental booked through FFHG.

(56) Ryanair was entitled to marketing support amounting to an annual maximum of EUR [...], which was to be paid by FFHG in quarterly instalments and only for the first 3 years of operation. The marketing support had to be used exclusively for advertisements concerning routes departing from Frankfurt Hahn airport. Ryanair had to provide supporting invoices and detailed proof of how the money was spent.

## 3.2.2. MEASURE 8: 2001 SCHEDULE OF AIRPORT CHARGES

(57) On 16 October 2001, Frankfurt Hahn airport's 2001 schedule of airport charges was approved and published by the *Land* Rhineland-Palatinate's Transport Department. It entered retroactively into force on 1 October 2001 <sup>(20)</sup>.

(58) As Frankfurt Hahn airport's business strategy was focused on low cost carriers, which typically operate Boeing 737 or Airbus A 319/320 aircraft with a maximum take-off weight ('MTOW') of approximately 50 to 80 tonnes, it introduced a zero landing and take-off charge for aircraft between 5,7 and 90 tonnes MTOW.

(59) Table 8 summarises the charges per aircraft for central ground handling infrastructure services to be paid by airlines under the 2001 schedule of airport charges.

Table 8

**Charges for central ground handling infrastructure services to be paid by airlines under the 2001 schedule of airport charges**

	Charge per aircraft in EUR
<b>MTOW up to 90 tonnes</b>	included in the take-off and landing charge
<b>MTOW of more than 90 tonnes</b>	50,00

<sup>(20)</sup> File No V/21-1011/1.

- (60) The passenger charge was set at EUR 4,35 per arriving passenger. The passenger security fee based on the number of passengers aboard the aircraft when departing is EUR 4,35 per passenger, payable to *Land Rhineland-Palatinate's Highways and Transport Department — Air Transport Section*.
- (61) For each approach of an aircraft under Instrument Flight Rules, an Air Traffic Control approach charge has to be paid to the airport operator. That charge for commercial or non-commercial flights is included in the landing and take-off charge if the flight is operated for purposes other than training and instruction. It hence is zero for aircraft to which the zero landing and take-off charge applies.

### 3.2.3. MEASURE 9: 2002 RYANAIR AGREEMENT

- (62) The second agreement with Ryanair is dated 14 February 2002 (the '2002 Ryanair agreement') and was submitted to FFHG's Supervisory Board held on 16 November 2001. The minutes of that meeting report that the majority of the members of the Supervisory Board approved it.
- (63) The copy of the 2002 Ryanair agreement that was transmitted to the Commission is not signed. According to Germany, although that agreement was never signed, it has nevertheless been applied by the parties since 14 February 2002.
- (64) According to Germany, the 2002 Ryanair agreement replaced the 1999 Ryanair agreement, and it was concluded for a period of [...] years (until [...]). The passenger fee however remained identical as in the initial agreement of 1999. Ryanair has the option to prolong the agreement on similar terms and conditions until [...].
- (65) The 2002 Ryanair agreement is based upon the Standard Ground Handling Agreement of the International Air Transport Association, which has been adapted to the needs of the parties. It consists of the following elements:
  - (i) The Main Agreement
  - (ii) Annex A — Description of Ground Handling Services;
  - (iii) Annex B — 1.0 Location, agreed services and charges for Frankfurt Hahn airport;
  - (iv) Second Annex B — 1.0 Location, agreed services and charges for Frankfurt Hahn airport;
  - (v) Annex 3 and Appendixes 1-3 <sup>(21)</sup> to the second Annex B — 1.0;
  - (vi) Annex C — Airport charges;
  - (vii) Annex D — Description of the ground handling service package 'Hahn-Smart'
  - (viii) Third Annex B — Location, agreed services and charges for Frankfurt Hahn airport — 'Hub Agreement'
  - (ix) Annex E — Marketing Agreement
- (66) The Main agreement, Annex A and Annex B — 1.0 are simply copies of the standard form. The parties have not filled in any of the fields, as this part of the standard form was not considered applicable.
- (67) The second Annex B — 1.0 has been filled in by the parties, in so far as names of the parties, bank accounts and the price for de-icing fluid (EUR [...] per litre) and hot water (EUR [...] per litre) are concerned.
- (68) Annex 3 and its Annexes 1-3 concern 'further strategic agreements' between the parties. They relate to the technical arrangements for ground handling, ticketing and branding space at the airport.

<sup>(21)</sup> Annex 3: FFHG received a [...] % commission on each ticket sold (cash or credit card) or issued by FFHG's ticket counters, a [...] % commission on excess baggage issued by FFHG, EUR [...] for each prepaid ticket processed by Ryanair and a [...] % commission to FFHG for each car rental booked through FFHG.

(69) Annex D stipulates that for ground-handling the charges summarised in Table 9 apply, under the condition of a turnaround-time not exceeding 30 minutes.

Table 9

**Charges for ground-handling if maximal 30 minutes turnaround**

Aircraft with a MTOW	Unit	EUR
Up to 5,7 tonnes	Handling	[...]
Up to 14 tonnes	Handling	[...]
Up to 20 tonnes	Handling	[...]
Up to 90 tonnes	Handling	[...]
More than 90 tonnes	Handling	[...]

(70) The blank fields for aircraft of 'up to' and 'more than' [...] tonnes appear to indicate that [...] charged for aircrafts between [...] and [...] tonnes <sup>(22)</sup>.

(71) Annex E (i.e. Hahn Smart Agreement) confirms that analysis. It stipulates in point 1:

'[...]'

(72) The airport fee level was frozen until 30 April 2004 and thereafter was to be adjusted corresponding to the German Consumer Price Index, if the latter increased by more than [...] % compared to the previous year.

(73) Annex E also foresees the payment of marketing support. Ryanair is entitled to the following marketing support:

- (i) one-off payments of EUR [...] for each new route departing from Frankfurt Hahn airport and established after 13 February 2002, and
- (ii) rebates on the airport charges dependent on the number of aircrafts based at Frankfurt Hahn airport and on the number of landing passengers as summarised in Table 10.

Table 10

**Rebates on airport charges**

Number of aircraft based at Frankfurt Hahn airport	Marketing support per passenger (EUR)
Up to 2	[...]
3 to 4	[...]
5-8	[...] <sup>(1)</sup>

<sup>(1)</sup> [...].

<sup>(22)</sup> This also results from point 68 of the market economy operator test submitted by PwC on behalf of *Land Rhineland-Palatinate*.

(74) Annex E also provides that VAT will be added to every payment or price in the agreement, in so far as turnover tax law is applicable.

(75) [...].

(76) In conclusion, according to the 2002 Ryanair agreement the airline pays the charges summarised in Table 11.

Table 11

## Overview of airport charges to be paid by Ryanair

Charge/fee/tax type	EUR
Passenger fee (per arriving passenger)	[...]
Air security tax (per departing passenger)	[...]
De-icing fluid (per litre)	[...]
Hot water (per litre)	[...]
Revenue for prepaid tickets processed by Ryanair	[...]

### 3.2.4. MEASURE 10: 2005 RYANAIR AGREEMENT

(77) On 4 November 2005, an amendment to the agreement of 2002 was agreed, the 'Agreement Ryanair/Flughafen Frankfurt-Hahn GmbH Delivery of aircraft 6 to 18 — year 2005 to year 2012' (the '2005 Ryanair agreement'). On 18 November 2005, the conclusion of the 2005 Ryanair agreement was approved by the supervisory board of FFHG.

(78) The relevant parts of the 2005 Ryanair agreement are:

- (i) [...];
- (ii) [...];
- (iii) [...];
- (iv) [...].

(79) The 2005 Ryanair agreement is valid until [...]. The other elements of the 2002 Ryanair agreement, in particular the Main Agreement and Annex E (i.e. Hahn Smart-Agreement), were also prolonged until [...].

(80) Table 12 shows the number of Ryanair aircraft to be based at Frankfurt Hahn airport and the envisaged passenger volume under the 2005 Ryanair agreement:

Table 12

## Ryanair aircrafts and passenger growth foreseen under the 2005 Ryanair agreement

(81) Table 13 provides an overview of the rebate system on airport charges introduced by the 2005 Ryanair agreement.

Table 13

**Amended airport rebates introduced by the 2005 Ryanair agreement**

In EUR		Total average rebate per passenger	Average passenger fee
Rebate on all inbound passengers	[...]	[...]	[...]
Additional rebate on all departing passengers above [...] Mio and up to [...] Mio per year	[...]	[...]	[...]
Additional rebate on all departing passengers above [...] Mio per year	[...]	[...]	[...]

(82) [...].

**3.2.5. MEASURE 11: 2006 SCHEDULE OF AIRPORT CHARGES**

(83) The 2006 schedule of airport charges was approved for Frankfurt Hahn airport by the *Land* Rhineland-Palatinate's Transport Department on 26 April 2006 <sup>(23)</sup> and entered into force on 1 June 2006. It follows the same basic principles as the 2001 schedule of airport charges (see above recital 57 and following).

(84) The changes compared to the previous schedule concern the take-off and landing charges, the passenger fee and the marketing support. The 2006 schedule of airport charges maintains the two fundamental principles of the 2001 schedule of airport charges:

- (i) Air traffic control charges and ground handling charges are included in the take-off and landing charges;
- (ii) Aircraft with a MTOW of more than 5,7 tonnes do not have to pay take-off and landing charges (or air traffic control charges or ground handling charges) at all.

(85) The 2006 schedule introduces, however, two limitations to those principles. First of all, only passenger aircraft can claim those advantages. Secondly, the advantages are limited to aircraft with a turn-around time of less than 30 minutes.

(86) Furthermore, the passenger charges are set per departing passenger, and as a function of the total number of passengers transported by the airline (departing and arriving) to which the airplane belongs. Table 14 provides an overview of the passenger charges to be paid under the 2006 schedule of airport charges depending on the total number of departing and arriving passengers.

Table 14

**Passenger charges under the 2006 schedule of airport charges**

Total number of departing and arriving passengers	Passenger charge per departing passenger in EUR	Minimum amount of overall airport charges to be paid in EUR
Less than 100 000	5,35	
100 001-250 000	4,40	267 500,00

<sup>(23)</sup> File number V/20-1011/1.

Total number of departing and arriving passengers	Passenger charge per departing passenger in EUR	Minimum amount of overall airport charges to be paid in EUR
250 001-500 000	3,85	550 000,00
500 001-750 000	3,45	962 500,00
750 001-1 000 000	3,15	1 293 750,00
1 000 001-1 500 000	2,90	1 575 000,00
1 500 001-2 000 000	2,68	2 175 000,00
2 000 001-3 000 000	2,48	2 680 000,00
3 000 001-5 400 000	2,48 per passenger 1 to 3 000 000 2,24 per passenger 3 000 001 to 5 400 000	Not applicable.
5 400 001-10 000 000	2,48 per passenger 1 to 3 000 000 2,24 per passenger 3 000 001 to 5 400 000 2,21 per passenger 5 400 001 to 10 000 000	Not applicable.
More than 10 000 000	2,48 per passenger 1 to 3 000 000 2,24 per passenger 3 000 001 to 5 400 000 2,21 per passenger 5 400 001 to 10 000 000 2,19 per passenger	Not applicable

(87) Table 15 shows the amount of marketing support that can be granted to airlines using the airport.

Table 15

**Marketing support**

Total number of departing passengers	Minimum number of destinations and frequency from Frankfurt Hahn airport	Marketing support in EUR
5 000-100 000	[...]	[...]
100 001-250 000	[...]	[...]
250 001-500 000	[...]	[...]
500 001-750 000	[...]	[...]
750 001-1 000 000	[...]	[...]

(88) Moreover, marketing support is regulated in a separate document available on the web site of Frankfurt Hahn airport. One-time marketing support is granted under the following conditions:

- (i) eligible are flights to destinations which have not been served from Frankfurt Hahn airport in the last 24 months;
- (ii) the maximum support is 33,3 % of the proven marketing costs for a new destination;
- (iii) the airline has to demonstrate the medium-term profitability of the new destination through appropriate supporting documents;
- (iv) FFHG can request the reimbursement of the marketing support in the event that the airline does not fulfil its obligations with respect to the new destination.

### 3.3. MEASURES OUTSIDE THE SCOPE OF THE 2008 OPENING DECISION (MEASURE 12)

(89) Germany committed to inject into FFHG's equity EUR [...] million to refinance FFHG's loans.

(90) Those funds refinance infrastructure measures irrevocably decided by the public authorities prior to 31 December 2012, but which were not covered through the PLTAs, capital increases or other grants.

## 4. GROUNDS FOR OPENING THE PROCEDURE AND INITIAL ASSESSMENT

### 4.1. POSSIBLE STATE AID GRANTED TO FFHG

#### 4.1.1. MEASURE 1: 2001 PLTA

(91) With regard to the 2001 PLTA, the Commission found in the 2008 opening decision that the annual losses were assumed by Fraport, a company which is predominantly publicly owned. The Commission therefore established that it needed to examine whether Germany could be regarded as having been involved in the conclusion of the 2001 PLTA.

(92) The Court of Justice held in *Stardust Marine* (<sup>24</sup>) that the resources of an undertaking incorporated under private law, whose shares are in majority publicly owned, constitute State resources. The Commission considered that the conclusion of the agreement was also to be considered as imputable to the State as it would have been impossible to do so without taking into account the requirements of the public authorities.

(93) Furthermore, in contrast to the arguments raised by Germany, the Commission expressed doubts that a market economy investor would have concluded such an agreement as the agreement clearly seemed to constitute an advantage for FFHG in relieving it from a financial burden which otherwise it would have had to shoulder.

(94) The Commission also considered that the measure was selective as only FFHG's losses were covered and that the measure concerned distorted or threatened to distort competition within the market of airport operators and affected trade between Member States.

(95) The Commission thus took the preliminary view that the measure at issue might constitute State aid in the form of operating aid.

(96) Since Germany did not provide any evidence or argue that such operating aid could be considered compatible with the internal market pursuant to Article 107(3)(c) of the Treaty, and in the light of the 2005 Aviation Guidelines, the Commission raised serious doubts that that aid could be deemed compatible.

<sup>(24)</sup> Case C-482/99 *France v Commission ('Stardust Marine')* [2002] ECR I-4397, paragraph 51 and following.

#### 4.1.2. MEASURE 2: 2001 CAPITAL INCREASE

(97) In the 2008 opening decision, the Commission found that Fraport and *Land* Rhineland-Palatinate had increased FFHG's capital by EUR 27 million, contributing EUR 19,7 million and EUR 7,3 million respectively. Concerning the existence of aid, the Commission pointed out that Fraport's as well as *Land* Rhineland-Palatinate's resources constitute State resources, according to the criteria established in the case *Stardust Marine* <sup>(25)</sup>. Furthermore, the Commission took the preliminary view that Fraport's decisions are also likely to be imputable to the State.

(98) Moreover, the Commission indicated that it was not convinced that the market economy operator test (MEOT) for the capital increase was fulfilled. The Commission has accepted in principle that an assessment carried out by one or more independent audit companies can serve as proof that a transaction has taken place at market value <sup>(26)</sup>. However, the Commission had doubts whether the report handed in by PwC on account of Fraport sufficed to exclude the presence of an advantage.

(99) The doubts were due to the content of the MEOT carried out by PwC as it was purely qualitative and did not assess the cost of disengagement by Fraport. The report also did not quantify or explain in detail the 'high risks' identified by BCG and Fraport's SD, and generally limited the assessment to Fraport, without considering whether *Land* Rhineland-Palatinate acted like a market economy investor. For those reasons, the Commission could not exclude that the capital increase provided an advantage to FFHG.

(100) The Commission also concluded that the measure was selective as only FFHG was granted the 2001 capital increase and that it distorted or threatened to distort competition within the market of airport operators and affected trade between Member States.

(101) The Commission therefore took the preliminary view that the measure at issue might constitute State aid in the form of investment aid and raised doubts as to its compatibility with the internal market, notably in view of Article 107(3)(c) of the Treaty and the 2005 Aviation Guidelines.

#### 4.1.3. MEASURE 3: 2004 CAPITAL INCREASE

(102) With regard to the second capital increase, the Commission noted that in 2004, FFHG's existing shareholders increased its authorised capital by EUR 10,75 million, Fraport contributing a share of EUR 10,21 million and *Land* Rhineland-Palatinate a share of EUR 0,54 million. In addition, *Land* Hesse entered as new shareholder, contributing another EUR 8,75 million. Furthermore, both *Land* Rhineland-Palatinate and *Land* Hesse committed to contribute each EUR 11,25 million as capital reserve.

(103) The Commission adopted *mutatis mutandis* the same reasoning for this capital increase as for the one in 2001 (see Section 4.1.2) for the existence of aid and raised the same doubts as to its compatibility with the internal market.

#### 4.1.4. MEASURE 4: 2004 PLTA

(104) According to the 2008 opening decision, Fraport took over losses of FFHG amounting to at least EUR [...] million under the 2004 PLTA. The Commission applied *mutatis mutandis* the same reasoning as the one advanced in relation to the 2001 PLTA, see recital 91 and following. In relation to the MEOT submitted by PwC, the Commission doubted its reliability given that the assessment was largely qualitative. Hence, the Commission considered that the 2004 PLTA constitutes operating aid and expressed doubts as regards its compatibility with the internal market, in particular in light of the 2005 Aviation Guidelines.

<sup>(25)</sup> *Stardust Marine* judgment, paragraph 51 and following.

<sup>(26)</sup> See Commission Communication on State aid elements in sales of land and buildings by public authorities, point II.2.

#### 4.1.5. MEASURE 5: COMPENSATION OF FFHG FOR SECURITY CHECKS

(105) The Commission indicated in the 2008 opening decision that airport security services are not of an economic nature and do not fall within the scope of the rules on State aid (27).

(106) The Commission then observed that the economic analysis of PwC seemed to indicate that *Land Rhineland-Palatinate* over-compensated FFHG for carrying out security checks. In that regard the Commission pointed out that that advantage was financed through State resources and had the potential to distort competition and affect trade between Member States. Hence, the Commission considered that the overcompensation constituted State aid within the meaning of Article 107(1) of the Treaty.

(107) With regard to the compatibility assessment of that operating aid, the Commission applied *mutatis mutandis* the same reasoning as the one advanced in relation to the 2001 PLTA, see recital 95 and following. Another possible legal basis assessed for compatibility with the internal market was Article 106(2) of the Treaty. However, Germany did not provide any indication that a public service obligation had been imposed on FFHG. Therefore, the Commission did not find a legal basis to declare the overcompensation arising from the security charge compatible with the internal market.

#### 4.1.6. MEASURE 6: DIRECT GRANTS BY LAND RHINELAND-PALATINATE

(108) The Commission noted in its 2008 opening decision that the direct grants granted in the years 2001 to 2004 appear to have been granted without consideration, from State resources (namely the general budget of *Land Rhineland-Palatinate*) and in a selective manner (only to FFHG). The Commission considered that those grants have the potential to distort competition and affect trade between Member States. Hence, the Commission took the preliminary view that they constituted State aid within the meaning of Article 107(1) of the Treaty in the form of investment aid.

(109) The Commission also raised doubts as to the compatibility of the aid with the internal market, notably in view of Article 107(3)(c) of the Treaty and the 2005 Aviation Guidelines.

### 4.2. POSSIBLE STATE AID GRANTED BY FFHG TO RYANAIR AND ALL OTHER AIRLINES TRANSPORTING PASSENGERS

#### 4.2.1. MEASURE 7: 1999 RYANAIR AGREEMENT

(110) Concerning the 1999 Ryanair agreement, the Commission generally pointed out in the 2008 opening decision that a reduction or system of reductions granting preferential treatment to a specific business was likely to fall within the scope of Article 107 of the Treaty.

(111) The Commission considered that, as FFHG is a predominantly publicly owned undertaking, its resources constitute State resources. The Commission pointed out in relation to the 1999 Ryanair agreement that although the supervisory board did not vote on that agreement, neither did it pass any motion or take any action suggesting that it was opposed to it. Therefore, the Commission noted that it had no indications allowing it to conclude that the 1999 Ryanair agreement was not imputable to the State.

(112) Furthermore, the Commission raised doubts as to whether a private market investor would have concluded the 1999 Ryanair agreement. The Commission noted in this respect that the charges imposed by FFHG on Ryanair did not cover FFHG's full costs and therefore appeared to confer an advantage to Ryanair.

(27) Point 33 of the 2005 Aviation Guidelines.

(113) The Commission also pointed out that the costs of the new terminal of approximately EUR [...] million had not been taken into account in the MEOT submitted by Germany. As a preliminary observation, the Commission rejected Germany's argument that in 1999 HHN was anyway in need of a new passenger terminal, and that the capacity of 1,25 million passengers per year was far above the expected passenger volume to be generated by Ryanair, since Ryanair was the only major passenger air carrier at Frankfurt Hahn airport in 1999. For those reasons, the Commission raised doubts as to the MEOT handed in by Germany.

(114) The Commission also considered that the 1999 Ryanair agreement is a selective and specific measure as only Ryanair received such conditions in the negotiations with FFHG, and that the measure concerned distorts or threatens to distort competition within the market of airlines and affects trade between the Member States.

(115) Therefore, the Commission took the preliminary view that, since it appeared that it did not fulfil the MEOT and was imputable to the State, the 1999 Ryanair agreement would constitute State aid within the meaning of Article 107(1) of the Treaty. Furthermore, the Commission did not find legal grounds for declaring such a permanent operating aid for an airline compatible with the internal market.

#### 4.2.2. MEASURE 8: 2001 SCHEDULE OF AIRPORT CHARGES

(116) In the 2008 opening decision, the Commission also analysed whether the 2001 schedule of airport charges possibly constituted State aid to Ryanair. It considered in that respect that, as companies in which the public authorities have a predominant share, FFHG's and Fraport's resources constitute State resources and that their conduct would also be imputable to the State.

(117) The Commission expressed doubts as to whether the fee structure of the 2001 schedule of airport charges was set in a manner which would allow the airport to run profitably as Germany had not provided a MEOT for this schedule. As Ryanair seemed to have been the only passenger airline using the airport between 2001 and 2003, and retained more than 95 % of the passenger volume until 2006, the results of the MEOT for the 2002 Ryanair agreement, which was based on the 2001 schedule of airport charges and introduced an additional marketing support, served as a benchmark. Based on the information provided, the Commission doubted whether the MEOT for the 2001 schedule of airport charges was fulfilled.

(118) The Commission considered that the measure was selective as only airlines that use Frankfurt Hahn airport benefited from the 2001 schedule of airport charges and that it distorted or threatened to distort competition and affected trade between the Member States.

(119) Therefore, concerning the 2001 schedule of airport charges, the Commission took the preliminary view that it might constitute State aid within the meaning of Article 107(1) of the Treaty. Furthermore, the Commission did not find legal grounds for declaring such a permanent operating aid for an airline compatible with the internal market.

#### 4.2.3. MEASURE 9: 2002 RYANAIR AGREEMENT

(120) Regarding the question of State resources, the Commission applied the same reasoning *mutatis mutandis* as for the 1999 Ryanair agreement, discussed in Section 4.2.1 (recital 110 and following). Concerning imputability of the measure, the 2002 Ryanair agreement was formally approved by the Supervisory Board of FFHG, which is dominated by members nominated by the public authorities. Hence, the Commission took the preliminary view that the 2002 Ryanair agreement was imputable to Germany.

(121) Furthermore, the Commission expressed doubts as to whether a market economy investor would have concluded the 2002 Ryanair agreement. In this respect, the Commission doubted the calculation presented by Germany. Furthermore, the Commission raised doubts regarding the calculation of costs since the costs for general airport infrastructure and general airport administration handed in by Germany were based on marginal, rather than average costs. Also, the level of airport charges was frozen until 30 April 2004, and thereafter was to be adjusted corresponding to the German Consumer Price Index only if this index increased by more than [...] % compared to the previous year.

(122) Concerning selectivity, distortion of competition and effect on trade, the Commission applied the same reasoning *mutatis mutandis* as for the 1999 Ryanair agreement, see Section 4.2.1 (recital 110 and following).

(123) The Commission therefore took the preliminary view that the 2002 Ryanair agreement might constitute State aid within the meaning of Article 107(1) of the Treaty. Furthermore, the Commission did not see any legal grounds for declaring such a permanent operating aid for an airline compatible with the internal market.

#### 4.2.4. MEASURE 10: 2005 RYANAIR AGREEMENT

(124) Regarding the question of State resources, the Commission applied the same reasoning *mutatis mutandis* as for the 1999 Ryanair agreement discussed in Section 4.2.1 (recital 110 and following). On the question of whether there was an economic advantage, the Commission expressed doubts with regard to the MEOT presented by Germany since there was insufficient information for verifying the calculations and because the investments induced by increasing passenger numbers were not in any way taken into account or allocated to Ryanair.

(125) The Commission furthermore indicated that although the 2005 Ryanair agreement, differed from the 1999 and 2002 Ryanair agreements, by introducing a kind of contractual penalty system if Ryanair did not generate the contractually determined passenger volume, it doubted whether those sanctions were effective.

(126) Concerning selectivity, distortion of competition and effects on trade, the Commission applied the same reasoning *mutatis mutandis* as for the 1999 Ryanair agreement, see Section 4.2.1 (recital 110 and following).

(127) The Commission concluded that the 2005 Ryanair agreement would also constitute State aid within the meaning of Article 107(1) of the Treaty. The Commission did not find any legal grounds for declaring such a permanent operating aid for an airline compatible with the internal market.

#### 4.2.5. MEASURE 11: 2006 SCHEDULE OF AIRPORT CHARGES

(128) With regard to the 2006 schedule of airport charges, Germany had only partially provided an economic justification in the form of a MEOT to the Commission. The Commission indicated in its 2008 opening decision that with the incomplete information it was unable to verify whether, as Germany argued, economies of scale justified the differentiation in passenger charges. Furthermore, the economic justifications given for the 2006 schedule of airport charges left several questions open, such as which costs are included in the cost coverage and why the marketing support was not included in the economic justification of the schedule.

(129) The Commission considered that the measure was selective as only airlines using Frankfurt Hahn airport benefited from the 2006 schedule of airport charges and that the measure concerned distorted or threatened to distort competition and affected trade between the Member States.

(130) Therefore, concerning the 2006 schedule of airport charges, the Commission took the preliminary view that it might constitute State aid within the meaning of Article 107(1) of the Treaty. Furthermore, the Commission did not see any legal grounds for declaring such a permanent operating aid for an airline compatible with the internal market.

### 5. COMMENTS FROM GERMANY

(131) Germany submitted extensive observations and economic analysis in the course of this procedure.

#### 5.1. GENERAL REMARKS

(132) In its comments, Germany first of all provided some general background considerations concerning Frankfurt Hahn airport. Germany insisted that the Frankfurt Hahn airport project was meant to become a profitable private company from the moment of its conversion. Therefore, Fraport strategically got involved with a view to the

airport's long-term profitability. With its low-cost carrier business model, considerably simplified infrastructure and low capital costs, Frankfurt Hahn airport has been a pioneer in Europe, according to Germany. However, Germany argued that the necessary time framework for reaching positive operative results in that kind of infrastructure project would be approximately 20 years. Germany pointed out that Frankfurt Hahn airport has had a positive result in EBITDA for the first time in 2006, so already 8 years after its market entry, which would prove its economic viability. According to Germany, Frankfurt Hahn airport was the fastest growing airport in Germany.

(133) Furthermore, Germany is of the opinion that the measures concerning Frankfurt Hahn airport were taken exclusively according to the market economy investor principle. According to Germany, if a private undertaking of the same size and in a comparable situation would also have undertaken the financing based on a commercial logic, this would exclude any advantage. Germany argued that the Commission should only assess whether the respective measure is commercially defendable and not whether it will without reasonable doubt be successful. Also, Germany referred to the principle of equality of public and private undertakings under which funds that the State is offering to an undertaking in accordance with market conditions will not be considered State aid. All in all, according to Germany, the measures for Frankfurt Hahn airport had all been granted in line with market conditions; the MEOTs which Germany presented would prove this. Germany then elaborated on those general remarks with regard to the respective measures assessed in the 2008 opening decision.

## 5.2. ALLEGED STATE AID GRANTED TO FFHG

### 5.2.1. MEASURE 1: 2001 PLTA

(134) Germany argued that the State aid rules are not applicable to the 2001 PLTA since it was concluded in August 1999, i.e. before the judgment by the Court of Justice in the case *Aéroports de Paris* <sup>(28)</sup> on 24 October 2002. According to Germany, the judgment at first instance by the General Court became definitive only after the judgment of the Court of Justice was delivered and only when it was clarified that airports were considered as undertakings and therefore fell within the scope of application of the State aid rules. That approach would have been confirmed later on in the *Leipzig-Halle* judgment <sup>(29)</sup>.

(135) Germany stated furthermore that no State resources had been employed. In that regard, Germany elaborated that the losses taken over by Fraport did not burden the budget of the State. Furthermore, Germany argued that the decisions taken by Fraport were not imputable to Germany since the public shareholders were not able to exercise a determining influence. In this regard, Germany emphasised that it would have to be verified in each individual case whether resources of a company were actually controlled by the State. According to Germany, the fact that a majority of shareholders was public is not sufficient to assume that the 2001 PLTA involves State resources.

(136) According to Germany, the shareholders cannot determine the behaviour of the management board in the case of a German stock company, an *Aktiengesellschaft*, such as Fraport. In Germany's view, Fraport is an independent incorporated company listed at the stock exchange and the public regional bodies do not exercise continuing control over its funds. Germany explained that according to Section 76 of the *Aktiengesetz* (the German stock corporation act, 'AktG'), the management board has a far-reaching decision-making powers independently of the shareholders. Germany argued that in the cases *Stadtwerke Brixen AG* <sup>(30)</sup> and *Carbotermo* <sup>(31)</sup> cases, the Court of Justice already recognised the nature of the German listed company and the considerable independence enjoyed by their management board vis-a-vis its shareholders. In that respect, the public authorities could not control Fraport's day-to-day business.

(137) In that regard, Germany explained that Fraport was not in any way incorporated into the structures of public administration, that Fraport was not accountable to Germany for its actions and was in no way subordinated to

<sup>(28)</sup> Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by the judgment in case C-82/01P *Aéroports de Paris v Commission* [2002] ECR I-9297.

<sup>(29)</sup> Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* (hereinafter: 'Leipzig-Halle judgment') [2011] ECR II-1311, in particular paragraphs 93-94; confirmed by the judgment in case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v Commission* [2012] not yet reported.

<sup>(30)</sup> Case C-458/03 *Stadtwerke Brixen AG* [2005] ECR I-08585, paragraph 67.

<sup>(31)</sup> Case C-340/04 *Carbotermo* [2006] ECR I-04137, paragraph 36 and following.

the public administration. Even though Germany recognised that the public shareholders were involved in the decision-making at the general meeting of shareholders during which the 2001 PLTA was decided, Germany argued that this did not mean that the public shareholders had done anything more than exercise their lawful rights and obligations as shareholders.

(138) In addition, Germany stated that the 2001 PLTA did not confer any advantage on FFHG. It referred to the MEOT undertaken by PwC in that regard, which considered that any market economy investor would also have concluded that agreement. Furthermore, Germany stated that the risks and benefits of the 2001 PLTA were evenly distributed and that it also made sense from a tax law point of view. Overall, Germany depicted the 2001 PLTA as a perfectly normal measure in a corporate group to apply global or sectorial structural policy.

#### 5.2.2. MEASURE 2: 2001 CAPITAL INCREASE

(139) Germany explained that the 2001 capital increase was necessary since an external financing of the investments into its infrastructure would have strained the annual results of FFHG too much in the short-term.

(140) Germany stated that the 2001 capital increase was decided by the supervisory board of FFHG on 14 December 2001 and led to a change in the articles of association of FFHG on 9 January 2002. Therefore, Germany disputed that the rules of State aid are applicable to that measure and referred here also to its reasoning concerning the 2001 PLTA (see recital 134).

(141) Germany furthermore argued that the funds invested by Fraport (EUR 19,7 million out of EUR 27 million) were not State resources since the State had no control over Fraport. In that respect Germany referred to its argumentation on State resources concerning the 2001 PLTA (see recital 136). In addition, Germany stated that the capital increase could also not be imputable to Germany and referred to its explanations on imputability concerning the 2001 PLTA (see recital 134). Germany added that the approval by FFHG's shareholders of the 2001 capital increase could not be a determining factor for its imputability to the State. In Germany's opinion, the actions of the undertaking who handed out the possible aid must be imputable, not those of the undertaking benefitting from the aid. Since FFHG was the undertaking benefitting from the aid, its approval of the capital increase would not make the granting of aid imputable to Germany. According to Germany, nor could the approval of Fraport's supervisory board be taken as an indication for imputability since at that time the supervisory board was already constituted on par of representatives of the employees and the shareholders with a right of codetermination, meaning that there were 10 representatives of the employees and 10 representatives of the shareholders.

(142) Germany also argued that no advantage was conferred on FFHG by the 2001 capital increase. Fraport as well as the *Land* Rhineland-Palatinate had acted like any market economy investor would have in this matter.

(143) Germany disagreed with the doubts raised by the Commission in relation to the MEOT regarding Fraport's 2001 capital increase decision. Germany submitted all additionally demanded internal documents to the Commission. According to Germany, the decision taken by Fraport in 2001 for a capital increase was based furthermore on an assessment of the measure by the BCG and two general studies ordered by Fraport on the development of air traffic. Germany emphasised that Fraport had increased the capital since the assessment of BCG stated that reaching profitability would not be possible at Frankfurt Hahn airport without further construction and infrastructure measures. The MEOT had taken into account all those documents.

(144) Following the doubts raised by the Commission in relation to the MEOT carried out by PwC, Germany submitted a second, supplementary assessment from PwC to complement and refine the first MEOT. That refined assessment comes to the same conclusion as the first one, namely that the MEOT is fulfilled. Germany rejected Commission's doubts that PwC had not assessed a disengagement of Fraport and that therefore, without knowing the cost of disengagement, it would be impossible to verify whether Fraport had acted like a market economy investor. Germany argued that the cost of disengagement did not make a difference in the assessment. Moreover, Germany pointed out that Fraport had considered disengagement, but that it would not have been possible

during the next 5 years due to the 2001 PLTA. Furthermore, the PwC's assessment showed that the investment would have positive results for Fraport in the long run.

(145) Following the 2008 opening decision Germany also submitted a MEOT also in relation to the behaviour of *Land Rhineland-Palatinate* and its decision to contribute to the capital increase of FFHG with EUR 7,3 million. According to the assessment, also carried out by PwC, *Land Rhineland-Palatinate* had acted like a market economy operator since the investment measures decided in 2001 were necessary and therefore the capital increase was commercially defendable.

#### 5.2.3. MEASURE 3: 2004 CAPITAL INCREASE

(146) Germany argued that also after the *Aéroports de Paris* judgment the State aid rules would not be applicable to the 2004 capital increase. According to Germany, the 1994 Aviation Guidelines were in force at that moment and under those Guidelines infrastructure measures at airports were not relevant to the application of State aid rules.

(147) Germany argued that, in contrast to the Commission's description in the 2008 opening decision, the 2004 capital increase was agreed on 30 March 2005 and has been registered with the commercial registry on 19 May 2005. Furthermore, the basic agreement on this capital increase goes back to an agreement in the year 2002. Germany explained that this agreement foresaw the establishment of an airport system between Frankfurt-Main airport and Frankfurt Hahn airport under Council Regulation (EEC) No 2408/92<sup>(32)</sup>. According to Germany, the assessment of the 2004 capital increase would have to be assessed against this background.

(148) Germany pointed out that according to the MEOT submitted by PwC, supported by supplementary assessments after the 2008 opening decision, Fraport, *Land Rhineland-Palatinate* and *Land Hesse* have all acted like market economy investors concerning the 2004 capital increase. Concerning the argumentation for Fraport, Germany referred to its arguments made in relation to the 2001 capital increase (see recital 140 and following). In the first as well as in the supplementary MEOT PwC concluded, according to Germany, that the 2004 capital increase, as well as the conclusion of a new PLTA were to be seen as advantageous for Fraport at the time, qualitatively as well as quantitatively. This was according to Germany justified by the finding of PwC that Fraport's Return on invested capital (hereinafter: 'ROIC') when investing into FFHG was above an alternative return of an equivalent capital investment.

(149) In respect to *Land Rhineland-Palatinate*, Germany pointed to PwC's conclusion that also the *Land* acted like a market economy investor since the ROIC for the *Land* was, similarly as for Fraport, above a comparable alternative investment.

(150) In relation to the behaviour of *Land Hesse*, Germany argued that the restricted growth possibilities for Frankfurt Main airport deriving, *inter alia*, from the night flight curfew made further development of Frankfurt Hahn airport necessary in the eyes of *Land Hesse*. Otherwise Frankfurt Main airport would have faced severe economic consequences. Germany pointed out that this development was necessary in order to comprehensively exploit the existing growth opportunities in the framework of the 24 hours-flight permission for Frankfurt Hahn airport together with the envisaged introduction of the airport system Frankfurt Main airport — Frankfurt Hahn airport. Hence, the involvement of *Land Hesse* in the capital increase was unavoidable, according to Germany.

#### 5.2.4. MEASURE 4: 2004 PLTA

(151) Germany stated that the 2004 PLTA could only be seen in the light of the capital increase and the changes in the shareholder structure in 2004, especially since *Land Rhineland-Palatinate* and *Land Hesse* made the redistribution of FFHG shares subject to the conclusion of the 2004 PLTA between Fraport and FFHG until 2014.

<sup>(32)</sup> Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8).

(152) Germany referred to its arguments made in relation to the 2004 capital increase and argued that the State aid rules were also not applicable to the 2004 PLTA (see recital 146 and the following).

(153) Concerning the involvement of State resources, Germany referred to its explanations for the 2001 PLTA (see recital 134 and the following). Hence, in Germany's opinion the resources of Fraport were not State resources since Fraport was not subject to State control.

(154) Germany also argued that for the decision of the 2004 PLTA to be approved, a majority of 75 % was needed, whereas the public shareholders only held approximately 70 % of the shares and were therefore in fact not able to control the decisions of Fraport. Moreover, the remaining 30 % of Fraport's shares were dispersed shareholdings. The vote was taken with 99,992 % positive votes, so also the market economy investors did vote for the 2004 PLTA.

(155) As regards the existence of an economic advantage, Germany referred again to the explanations for the 2001 PLTA (see recital 137), according to which a distribution of profits and losses is an absolutely normal measure within a group of companies. Furthermore, according to PwC, any market economy investor would have taken the same decision of concluding the 2004 PLTA since at that moment a profit was to be expected from the year 2008/2009 onwards. Germany submitted further that on the basis of the doubts expressed by the Commission, PwC tested those measures again in the supplementary assessment according to qualitative calculations and came to the same conclusion.

(156) Germany asserted further that the 2004 PLTA was a condition for the 2004 capital increase and, given the expectation of a positive development as from 2008/2009, it was in the interest of Fraport to conclude the 2004 PLTA for at least 5 years. Also, Germany explained that Fraport would have been allowed to take all profits of FFHG until at least 31 December 2024 while being able, in the opposite scenario, to cancel the agreement by 31 December 2010. Therefore, Germany submitted that Fraport would have been able to benefit 100 % from the agreement and to steer FFHG's day-to-day business, while holding only 65 % of its shares. Germany also took the view that the MEOT is supported by the fact that the private investors, making up 30 % of the shareholders of Fraport at that moment, also approved the decision.

#### 5.2.5. MEASURE 5: COMPENSATION OF FFHG FOR SECURITY CHECKS

(157) In this regard, Germany declared that no State resources were involved in the measure. Germany referred to the *Preussen-Elektra* <sup>(33)</sup> judgment of the Court of Justice and stated that there can only be State aid where payments are being made by a public or private body designated or established by the State. Germany explained further that in the case of the fees for security checks, those were paid by the airlines to the *Land* Rhineland-Palatinate and only forwarded to FFHG by the *Land* as compensation for the security checks which FFHG conducted on behalf of the *Land*. Hence, according to Germany, in this sense, the fees never became part of the funds of the *Land*.

(158) Germany explained that according to §5 *Luftsicherheitsgesetz* (Air Security Law), it is the State that checks passengers and their luggage in order to protect the security of air traffic against terroristic attacks. Germany asserted further that the authorities charge fees per passenger for this activity to the airlines. Germany stated that the level of the security charge depends on the individual circumstances of the airport and range from EUR 2 up to EUR 10 per passenger. At Frankfurt Hahn, the fee amounts to EUR 4,35 and is therefore appropriate in comparison to other airports.

(159) This security task can also be transferred by the authorities to an airport operator, which is what happened in this case where the security checks are being performed by FFHG who in turn entrusted an external security company.

<sup>(33)</sup> Case C-379/98 *Preussen-Elektra* [2001] ECR I-02099, paragraph 58.

(160) In addition, Germany stated that the security checks fall within the scope of the public policy remit and do not constitute an economic activity.

(161) Germany shares the opinion of the Commission in this regard, that there should be no overcompensation for the services performed by FFHG. However, Germany emphasised that FFHG was not overcompensated since it has to bear all the costs for the security checks.

#### 5.2.6. MEASURE 6: DIRECT GRANTS BY LAND RHINELAND-PALATINATE

(162) Germany clarified that *Land Rhineland-Palatinate* has made the following payments to FFHG between 2001 and 2004. First, *Land Rhineland-Palatinate* supported FFHG in some of its infrastructure investments and granted EUR [...] to FFHG for this purpose in 2001. According to Germany, those grants were based on decisions taken already in the years 1999 and 2000. Germany argued that at the moment those decisions were taken, State aid rules did not apply to airports as undertakings within the meaning of Article 107(1) of the Treaty.

(163) Second, Germany stated that the financing of personnel costs for security checks was partially taken over by *Land Rhineland-Palatinate* for the years 2001 (60 % of total costs), 2002 (50 %), 2003 (40 %) and 2004 (30 %).

(164) Third, Germany admitted that *Land Rhineland-Palatinate* had co-financed two scientific studies which had been ordered by FFHG, but which were mainly in the general public interest according to Germany. Germany stated that *Land Rhineland-Palatinate* had subsidised the first study on the regional economic effects of Frankfurt Hahn airport at 90 % of total costs, and the second study on the development potentials of the freight carrier business at 70 % of the total costs. Germany argued that *Land Rhineland-Palatinate* had given those subsidies only because of its own interest in the studies and could just as well have ordered the studies itself. Germany did not see how any advantage was conferred on FFHG through this partial financing since the studies are in the public general interest, neither how this financing might distort competition. As far as those studies were of interest to FFHG, FFHG had also contributed to them financially.

#### 5.3. POSSIBLE STATE AID GRANTED BY FFHG TO RYANAIR AND ALL OTHER AIRLINES TRANSPORTING PASSENGERS

##### 5.3.1. MEASURE 7: 1999 RYANAIR AGREEMENT

(165) Concerning the 1999 Ryanair agreement, Germany generally remarked that from the beginning Frankfurt Hahn airport built only very basic infrastructure so that this airport could be a cost-efficient and innovative partner for low-cost airlines. According to Germany, also at other European airports the so-called 'anchor clients' are the natural drivers of the initial development of the airport. For Frankfurt Hahn, the anchor client, i.e. the client through whom a foothold in the market could be obtained, was Ryanair.

(166) Germany argued that when the first agreement with Ryanair was concluded, the concept of a low-cost carrier airport was still in its infancy. Therefore, through this agreement an incentive was given to Ryanair to start flying to the rarely frequented Frankfurt Hahn airport. Germany stated that committing such a big airline to Frankfurt Hahn airport led to the acquisition of more airline agreements for the airport ('follow-on principle'). Through the so-called 'domino-effect', this ultimately also led to an increase in the profits for the non-aviation sector.

(167) Germany argued that, given these dynamics, airlines such as Ryanair had a great bargaining power, since many other small regional airports tried to conclude agreements with Ryanair at that time.

(168) Furthermore, Germany stated that no State resources were granted through the 1999 Ryanair agreement. Moreover, Germany argued that the contractual relationship between the operator of the airport and the airline was conferring no advantage unto the airline. In Germany's view, the responsibility for the conclusion of this agreement must be attributed exclusively to the management board since the conclusion of the 1999 Ryanair agreement represented day-to-day business and the supervisory board had taken no decision in this matter. In

Germany's view, the Commission cannot consider the conclusion of the 1999 Ryanair agreement as imputable to Germany because the supervisory board did not do anything to prevent it. Such actions do not lie within the responsibilities and tasks of the supervisory board, according to Germany. Also, the criteria mentioned by the Court of Justice in *Stardust Marine* would be led *ad absurdum* if the fact that a supervisory body of a publicly held company did *not* act would be enough to conclude on the imputability of the measure to the State. Therefore, according to Germany the agreement was not imputable in any way to the State.

(169) Moreover, Germany argued that the 1999 Ryanair agreement did not confer any advantage on Ryanair since any market economy investor would have also concluded such agreement. Germany especially emphasised that this agreement did not induce any losses, contrary to what the Commission argued in its 2008 opening decision, but produced an enormous amount of revenues which by far surpassed the costs incurred.

(170) In this regard, Germany emphasised that Frankfurt Hahn airport used the 'single-till-approach', according to which the revenues of aviation and non-aviation flow into a single pool ('single till'). Therefore, according to Germany aeronautical and non-aeronautical revenues generated by the airlines and its passengers at the airport have to be taken into account. As Germany stated before, PwC concluded that a market economy investor with a long-term strategy would have signed the 1999 Ryanair agreement, in particular if one considered Frankfurt Hahn airport's situation in 1999. According to Germany, at that time Frankfurt Hahn airport was facing high fixed costs for maintenance of the air and ground infrastructure, whereas the capacity utilisation of the airport was low. Thus, Germany argued, the possibility to generate additional passenger volume was an opportunity to limit losses and acquire clients with growth potential.

(171) Germany is of the opinion that costs which were decided on before the conclusion of the agreement, such as the costs for the general airport infrastructure and general airport administration (in other words costs that arose irrespective of the 1999 Ryanair agreement), should not be included in the profitability analysis of the 1999 Ryanair agreement, and PwC supports Germany in this opinion. Germany argued especially that it would only be possible for an airport with an existing network of clients to have his clients partially bear the costs of infrastructure measures and that Frankfurt Hahn airport was not in such a position.

(172) Furthermore, Germany argued that if one were to consider the actual costs for building the new terminal, at most the envisaged passenger volume to be generated by Ryanair could be taken into account. Germany took the view that a depreciation period of 25 years would then be appropriate, which would mean a depreciation of EUR [...] per year. Even in case of a depreciation period of 15 years, as suggested by the Commission, Germany argued that this would mean a depreciation of EUR [...] per year, so that the overall break-even analysis would still be positive. Therefore, taking into account the time for initiation of Frankfurt Hahn airport, Germany took the view that this would have sufficed for a market economy investor to conclude the agreement.

### 5.3.2. MEASURE 8: 2001 SCHEDULE OF AIRPORT CHARGES

(173) The 2001 schedule of airport charges could not be seen as State aid according to Germany. Germany argued that there was no granting of State resources and refers in this regard to its explanations concerning the 1999 Ryanair agreement (see Section 5.3.1 and especially recital 167). Germany stated that the 2001 schedule of airport charges had generated revenues for FFHG and it was not necessary or possible that the schedule of airport charges would lead to coverage of all costs incurred by FFHG. For such a result, according to Germany, the revenues from the non-aviation sector needed be taken into account as well under the single-till-approach (see recital 169).

(174) Germany furthermore disputed that the measure was imputable to the State because of the approval of the airport charges by the Rhineland-Palatinate Transport department. This approval did not mean any economic or political dependence, but was simply a regulatory formality requested under German law which every airport, whether publicly owned or not, has to fulfil according to the law. The reason for this law is to protect the airlines from any possible abuse of the monopolistic power of the airport to set prices for its use.

(175) Moreover, Germany argued that no advantage was granted to Frankfurt Hahn airport through the 2001 schedule of airport charges. It agreed with the Commission that the results of the private market investor test for the 2002 Ryanair agreement, which is based on the 2001 schedule of airport charges and introduces an additional marketing support, can serve as a benchmark. On this basis, since the MEOT is positive for the 2002 Ryanair agreement, Germany argued that no other result can apply to the 2001 schedule of airport charges. Concerning the doubts raised by the Commission in relation to the MEOT, Germany referred to its argumentation in relation to MEOT for the 2002 Ryanair agreement (see recital 178 and following).

(176) Furthermore, Germany expressly disagreed with the Commission as to the assessment concerning the selectivity of the 2001 schedule of airport charges. Germany argued that the 2001 schedule of airport charges was of a general nature and applied to all airlines using the airport, and that hence it could not be selective or specific. According to Germany, the 2001 schedule of airport charges included no differentiations which would give an advantage to one airline over the other and they did not contain any kind of rebate system either. Therefore, Germany took the view that no airline was granted a selective advantage.

(177) Finally, Germany argued in relation to the 2001 schedule of airport charges that this schedule was in accordance with market conform behaviour and as such would not be able to distort competition between airports or the competition on the internal market.

### 5.3.3. MEASURE 9: 2002 RYANAIR AGREEMENT

(178) Germany considered, in contrast to the 2008 opening decision, that the 2002 Ryanair agreement did not generate any losses, but instead provided a source of income for FFHG. Concerning the question of imputability of the 2002 Ryanair agreement and the use of State resources, Germany referred to its explanations concerning the 1999 Ryanair agreement (see recital 167 and following). Furthermore, Germany added that in 2002, at the time of conclusion of the agreement, FFHG's shares were already being held mainly by Fraport, whose resources are not State resources and whose actions are not imputable to the State, as Germany already pointed out in relation to the 2001 PLTA (see recital 134 and following).

(179) According to Germany, the supervisory board of FFHG, who approved the conclusion of the 2002 Ryanair agreement, was not dominated by the State. In this regard, Germany contended that the presentation of FFHG's supervisory board members in recital 18 of the 2008 opening decision was erroneous. Germany stated that according to FFHG's articles of association, Fraport had six representatives and *Land* Rhineland-Palatinate had eight, out of which three were representatives of local authorities. According to Germany, the members had however different numbers of votes and the majority of votes was always with the private company Fraport. This was due to the fact that Fraport's representatives had 12 votes each, while the representatives of the *Land* only had 5 votes each and those of the local authorities even had only one vote. Therefore, according to Germany, Fraport had 72 votes while the representatives of the *Land* and local authorities only had 28 votes. Since the supervisory board decides by simple majority, Germany took the view that it would not have been possible to conclude the 2002 Ryanair agreement without the votes of Fraport and therefore the conclusion of the agreement is not imputable to the State.

(180) Furthermore, Germany rejected the doubts of the Commission concerning the conferral of an advantage and the MEOT submitted by PwC on this matter. Germany argued that the figure of [...] passengers per flight was not overestimated since already in 2002 [...] % of Ryanair flights were carried out by a Boeing 737-800 and the average load factor of those flights was [...] %, meaning that the number of passengers per plane was in fact on average [...] per Ryanair flight. Therefore, Germany took the view that the estimation of the number of passengers of [...] was reasonable and not too high, especially since FFHG had taken into account that the change by Ryanair from Boeing 737-200 to Boeing 737-800 would come very quickly.

(181) As regards the Commission's doubts relating to the cost for general airport infrastructure and general airport administration, Germany referred to its argumentation in relation to the 1999 Ryanair agreement (see recital 171 and following). It also referred to its statements for the 2001 schedule of airport charges (see recital 176) as regards the selectivity of the measure.

#### 5.3.4. MEASURE 10: 2005 RYANAIR AGREEMENT

- (182) In relation to the question of State resources and imputability, Germany referred to its statements for the 1999 and 2002 Ryanair agreements (see recitals 167 and following, and recitals 178 and following). Furthermore, Germany stated that, at the moment of conclusion of the 2005 Ryanair agreement, the supervisory board of FFHG was constituted in a way that the public authorities were not able to exercise a determining influence on the decision. At that moment Fraport held 156 votes while *Land* Rhineland-Palatinate and *Land* Hesse held 42 votes each. Therefore, Germany argued that the State could not have a determining influence as it only possessed 84 out of 240 votes.
- (183) Furthermore, Germany took the view that no advantage was conferred on Ryanair through this agreement. Germany stated that in contrast to the Commission's suggestion in the 2008 opening decision, PwC had been provided with all relevant figures since it could otherwise not have conducted this comprehensive, neutral and independent MEOT. Germany moreover rejected the doubts of the Commission that the investments induced by Ryanair were not allocated appropriately. Germany stated that PwC had made a second evaluation in its supplementary assessment where it explained that a major part of the costs related to investments of a general nature which the airport made independently of the services provided to Ryanair. As far as costs are induced by the handling of Ryanair passengers, these are according to Germany allocated to Ryanair.
- (184) Germany also rejected the doubts of the Commission concerning the effectiveness of the penalty system which was introduced in the 2005 Ryanair agreement. Germany stated that this penalty system reflects market conform behaviour. Germany argued that additional sanctions to the ones agreed upon would have been unnecessary and inappropriate since Ryanair had no exclusive rights to use the airport and was also assuming a risk.
- (185) Moreover, Germany stated that the agreement was not a selective measure since the agreed airport charges were based on the general 2006 schedule of airport charges. Germany also argued that any losses incurred by FFHG were not generated by the 2005 Ryanair agreement but by the necessary investments for Frankfurt Hahn airport, whereas the investments induced by Ryanair had been covered by the revenue generated by the 2005 Ryanair agreement.

#### 5.3.5. MEASURE 11: 2006 SCHEDULE OF AIRPORT CHARGES

- (186) In relation to the 2006 schedule of airport charges, Germany argued generally that these airport charges had been developed exclusively based on economic considerations taking into account the business model of Frankfurt Hahn airport as a low cost carrier airport, i.e. with the expectation that the costs of operation would be covered in the short term and in the long term a sustainable profit would be generated.
- (187) Concerning the questions of State resources and imputability, Germany referred to its argumentation made in relation to the 1999, 2002 and 2005 Ryanair agreements (see recitals 167 and following, 178 and following and 182 and following) and in relation to the 2001 schedule of airport charges (see recital 173 and following).
- (188) Germany argued that no advantage was conferred upon Ryanair through the 2006 schedule of airport charges. Firstly, Germany justified the different passenger charges which were created in order to provide an incentive to low cost carriers while covering the operational costs of the airport. A reduction of charges according to the volume of passengers, Germany argued, is a common approach at national and international airports, as was already accepted by the Court of Justice. When such volume based reductions are granted, these must be justified on the basis of objective and non-discriminatory criteria and this was the case at Frankfurt Hahn airport, according to Germany. Since the threshold for acquiring rebates was very low, namely 100 000 passengers per year, these rebates were also supporting smaller airlines.
- (189) Secondly, Germany argued that the economic justification of the airport charges relied on the single-till-approach, referring to its statements concerning the 1999 Ryanair agreement (see recital 169). Germany also justified the differentiation according to turn-around-times (hereinafter: TRT) of under or over 30 minutes by explaining that TRT of more than 30 minutes are in fact more cost-intensive. Germany also stated that even though the airport charges were not covering 100 % of the costs, a MEO would still have chosen this schedule of charges since cost-coverage of an infrastructure such as an airport could not be achieved in such a short time. However, FFHG was

expecting that through the 2006 schedule of airport charges more passengers would be generated and that by 2008 full cost coverage would be achieved. According to the assessment made by PwC for this schedule of airport charges, this was economically realistic at the moment of introduction of the airport charges, as was also confirmed by PwC's supplementary assessment.

- (190) In relation to the marketing support granted under the 2006 schedule of airport charges, Germany argued that this is in fact not an integral part of the schedule. Germany also argued that any market economy investor would have made the same marketing support available for airlines since there are high economic risks attached to the opening of a new route. This support is exclusively given for newly offered routes, meaning routes which have not been served at all or within the last 24 months. The amount of the support is based on the number of departing passengers served within 1 year. On the basis of criteria such as the temporary routes offered at Frankfurt Hahn airport, the weekly connections and the duration of continuous flight operation, it is ensured that support is in fact leading to an expansion of the network of flights offered by the airlines.
- (191) Germany argued that the marketing support cannot be seen as a one-sided performance by the airport. According to Germany, the promotion of new routes led to a higher profit for the airport since higher passenger numbers would create higher non-aeronautical revenues. Furthermore, Germany explained that the fixing of the amounts of support was based on reasonable considerations.
- (192) Germany also rejected the doubts of the Commission that the risk of marketing was higher for airlines which are not yet active at Frankfurt Hahn airport. For airlines with high passenger numbers servicing an attractive network, Germany argued, requires higher marketing costs which in turn justifies a higher marketing support from the airport, also given that higher passenger numbers increase the profits for the airport. In any case, the amount of support would be no more than one third of the real marketing costs, thereby ruling out any discrimination between airlines already serving Frankfurt Hahn airport and other airlines. Moreover, Germany reasoned that bigger airlines will generally have a larger marketing budget, so the support given will actually be lower in relation to the whole budget than in case of a smaller airline.
- (193) Finally, Germany submitted that the MEOT carried out by PwC established that this marketing support was given in a way that was conforming to the market.
- (194) As regards selectivity of the measure and distortion of competition on the internal market, Germany referred to its statements concerning the 2001 schedule of airport charges (see recitals 176 and following).
- (195) Germany thus argued that the 2006 schedule of airport charges did not involve State aid. Should the Commission establish that the airport charges did constitute State aid, Germany argued in the alternative that the aid was compatible with the internal market.

#### 5.4. COMPATIBILITY OF THE MEASURES WITH THE INTERNAL MARKET

##### 5.4.1. COMPATIBILITY OF INVESTMENT AID TO FINANCE AIRPORT INFRASTRUCTURE

- (196) According to Germany, if it would be considered that measures 1 to 6 involved State aid within the meaning of Article 107(1) of the Treaty, insofar as they were aimed at financing airport infrastructure at Frankfurt Hahn airport this aid could be deemed compatible on the basis of Article 107(3) of the Treaty and the 2005 Aviation Guidelines.

###### 5.4.1.1. **Contribution to a well-defined objective of common interest**

- (197) Concerning the well-defined objective of common interest, Germany submitted that the financing of airport infrastructure at Frankfurt Hahn airport was always aimed at the objective of improving the regional economic structure of the economically underdeveloped and scarcely populated Hunsrück region.

(198) In this regard, Germany stated that, firstly, the objective of supporting FFHG was to help overcome the weak structural economy of the Hunsrück region. Germany asserted that Frankfurt Hahn airport is surrounded by a number of areas considered as regions in need of support within the framework of the *Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur'*<sup>(34)</sup>, a task shared by the federal and local governments. In this regard, Germany submitted that the four regions around the airport, namely Landkreis Bernkastel-Wittlich, Birkenfeld, Cochem-Zell and Rhein-Hunsrück-Kreis, are on average only half as densely populated as the rest of Land Rhineland-Palatinate. Germany pointed out that for those districts whose economy is shaped by small and medium sized enterprises, employment is the main anchor against a further decrease of the regional economy and Frankfurt Hahn airport plays an important role as an employer and client.

(199) Secondly, Germany argued that Frankfurt Hahn airport plays an important role in the strategic development of incoming (~ 33 % of passengers corresponding to approximately 1 million passengers in 2005) and outgoing tourism (~ 67 % of passengers) for the Land Rhineland-Palatinate. Germany stated that 88 % of the incoming passengers are staying several nights in the region. Germany submitted that the Frankfurt Hahn airport's incoming tourists generated approximately 5,7 million overnight stays in 2005<sup>(35)</sup>. According to Germany the number of overnight stays further increased, with Land Rhineland-Palatinate welcoming 8,2 million guests in 2011 which generated 21,5 million overnight stays. Germany pointed out that the number of guests from Eastern and Southern European countries, in particular, has increased and that a large number of flights are operated from those countries to Frankfurt-Hahn. This has resulted in about 198 000 jobs being generated by tourism in Rhineland-Palatinate, according to Germany. The catalysed income and employment effects stem especially from incoming tourism, in which Frankfurt Hahn airport plays a central role as the gateway for tourists into the Hunsrück region, but also into Rhineland-Palatinate more generally, as Germany explained. Germany stated that between 1990 and 2001 the number of tourists has increased by 70 % for the Hunsrück region and by 35 % for Rhineland-Palatinate. According to Germany, during the same period, the number of tourists coming from abroad has increased by 163 % in the Hunsrück region. Since 88 % of incoming tourists from Frankfurt Hahn stay at least one night and more than 80 % of those even stay two to 10 days, they generate a total benefit of about EUR 133,7 million per year. Furthermore, Germany argued that outgoing tourism (67 %) also generates income for Frankfurt Hahn airport through non-aeronautical revenues.

(200) Thirdly, Germany stated that, taking into account all parts of the airport activities, Frankfurt Hahn airport created 3 063 jobs in the region Hunsrück in 2012 out of which 74 % were full-time positions. According to Germany, 90 % of those employees also live in this region. Germany argued furthermore that through Frankfurt Hahn airport, a movement of young, qualified employees towards other regions is being prevented as well as an economic and social decline of the regional communities and their infrastructure. Furthermore, Germany pointed out that the presence of Frankfurt Hahn airport does not only produce the mentioned direct effects for the labour market, but also substantial indirect effects through an increasing number of economic and touristic activities. In this respect, Germany referred to the positive secondary effects for the region, namely less unemployment and more tax payers, helps to ensure that the municipalities in the region have the financial means to support the local economy. In total, this generated around 11 000 jobs through incoming tourism for all of Rhineland-Palatinate.

(201) Germany argued that the financing of infrastructure at Frankfurt Hahn airport has also helped reaching the well-defined objective of common interest of combatting air traffic congestion at major EU hubs. In this regard, Germany pointed to the fact that in the past the capacity limits of Frankfurt Main airport have constantly been exceeded. Germany submitted that Frankfurt Hahn airport, especially in the light of its 24 hours operating licence, was therefore serving the goal to provide additional capacities in order to relieve the congestion at Frankfurt Main airport.

(202) Furthermore, Germany submitted that supporting Frankfurt Hahn airport also serves the objective of common interest to increase the mobility of Union citizens. In this regard, Germany pointed out that Frankfurt Hahn airport is the only German airport offering direct flights to Kaunas (Latvia), Kerry (Ireland), Kos (Greece), Montpellier (France), Nador (Morocco), Plovdiv (Bulgaria), Pula (Croatia), Rhodes (Greece), Santiago de Compostela (Spain) and Volos (Greece). Also, according to Germany, Frankfurt Hahn airport contributes to the job mobility of young people, who can reach the region Hunsrück and Rhineland-Palatinate at low prices.

<sup>(34)</sup> *Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur (GRW) Gesetz'* of 6 October 1969 (BGBl. I S. 1861), which was last amended by Article 8 of the Act of 7 September 2007 (BGBl. I, p. 2,246).

<sup>(35)</sup> Flughafen Frankfurt Hahn — Regionalekonomische Effekte, ZFL Studie, 03/2007.

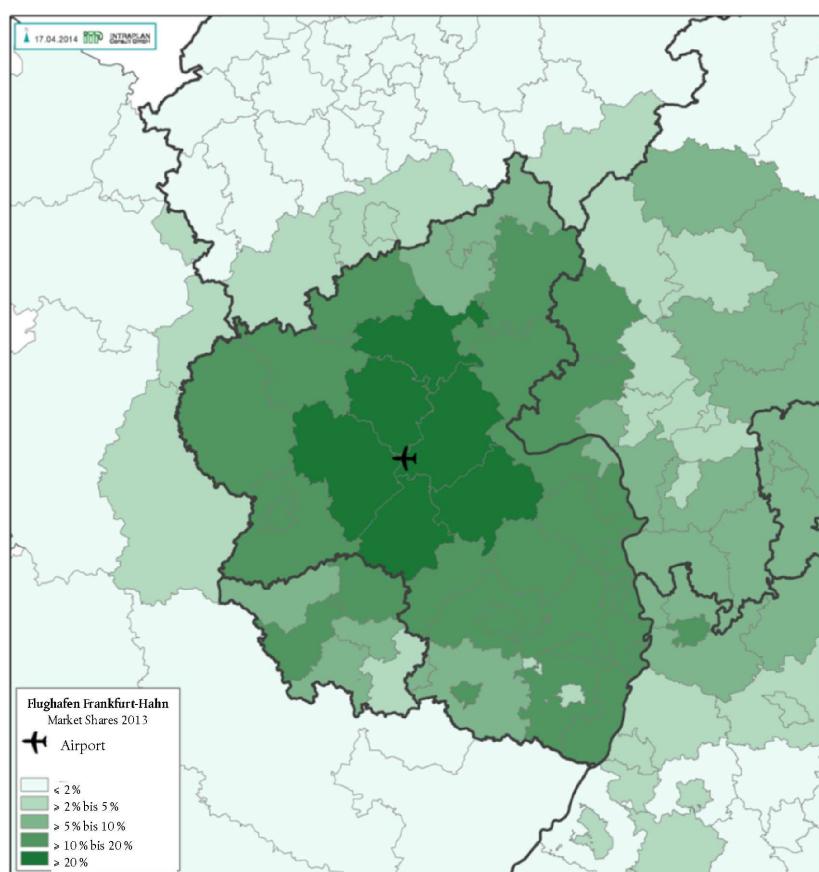
Similarly, Germany pointed out that the high-quality universities and institutions of higher education in Koblenz, Mainz, Kaiserslautern, Trier, Wiesbaden, Mannheim, Bonn, etc., where for the most part no tuition fees are demanded, are now easily accessible to students from all over Europe.

(203) Germany argued, moreover, that it is also of common interest that the Hunsrück and the surrounding regions of Rhineland-Palatinate are connected to other peripheral regions, for example Limerick, which has already manifested itself through city partnerships. Germany stated that, as the fourth biggest national economy in the world, it is focussing not only on connecting to the major European hubs, but also on connecting the regions with each other. According to Germany, becoming more independent from the major hubs such as Heathrow, Charles de Gaulle, Schiphol or Frankfurt/Main is important for Europe since it will mean not only more direct connections, but also more security especially for the freight business as regional airports are less prone to cancellations due to weather, strikes, terrorism or other cancellation risks.

(204) Lastly, Germany generally emphasised that the proximity of Zweibrücken airport does not lead to a duplication of airports for the same catchment area, due to the distance of 127 km between Frankfurt Hahn airport and Zweibrücken airport. According to Germany, this distance translates into a travelling time of 1 hour and 27 minutes by car or around 4 hours by train. Therefore, Germany argued that no reasonable worker, freight carrier or tourist whose point of departure lies in the Hunsrück region would go to Zweibrücken airport instead of Frankfurt Hahn airport in order to reach his final destination. Furthermore, Germany submitted that, looking at passenger and air freight traffic between 2005 and 2012, no relationship of substitution between the airports can be deduced. According to Germany, the largest share of passengers of Frankfurt Hahn airport comes from the Hunsrück-Mosel-Nahe region (see Figure 5).

Figure 2

**Market shares in passenger air transport of Frankfurt Hahn airport in 2013<sup>(36)</sup>**



<sup>(36)</sup> Submission of Germany, September 2014.

#### 5.4.1.2. *The infrastructure is necessary and proportionate to the objective*

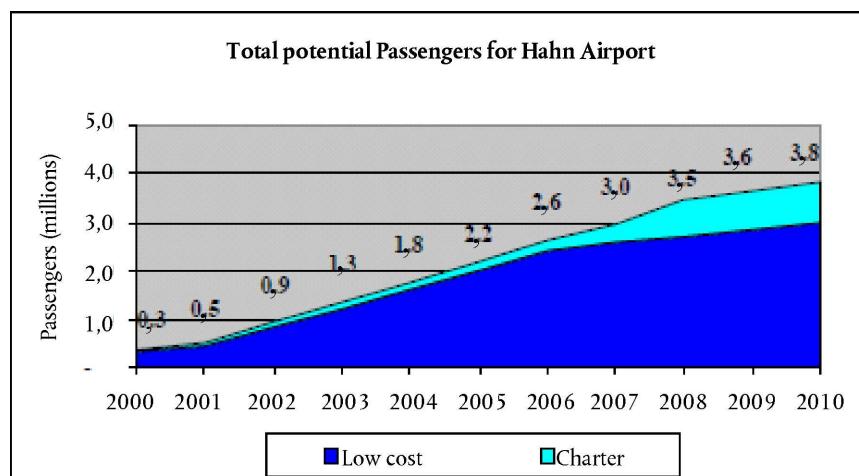
(205) Germany emphasised that the financed investments were necessary and proportionate to the objective of common interest (see recital 197 and the following). According to Germany, the investments were undertaken according to the needs and the constructed infrastructure was necessary for the airport in order to guarantee the connectivity and serve the development of the region and to decongest Frankfurt Main airport. Germany pointed out that the infrastructure was not disproportionate or too large for the needs of users of the airport. Hence, Germany considered that this compatibility condition was met.

#### 5.4.1.3. *The infrastructure has satisfactory medium-term prospects for use*

(206) Germany submitted that before the decision to extend the airport infrastructure was taken, Fraport commissioned traffic forecast studies in order to identify the traffic potential for Frankfurt Hahn airport. Germany provided these studies conducted by aviation experts on behalf of Fraport. Figures 3, 4 and 5 summarise the results of one of these studies regarding the expected passenger and freight traffic development at Frankfurt Hahn airport between 2000 and 2011.

Figure 3

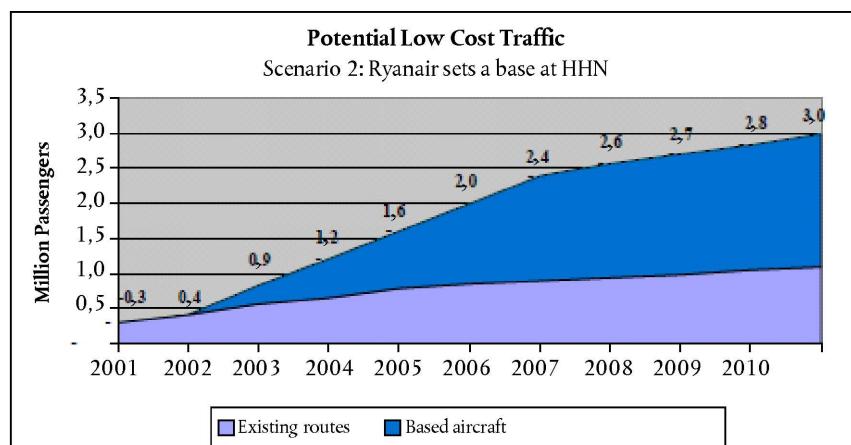
#### Total potential passengers at Frankfurt Hahn airport in 2000-2010



Source: SH&E

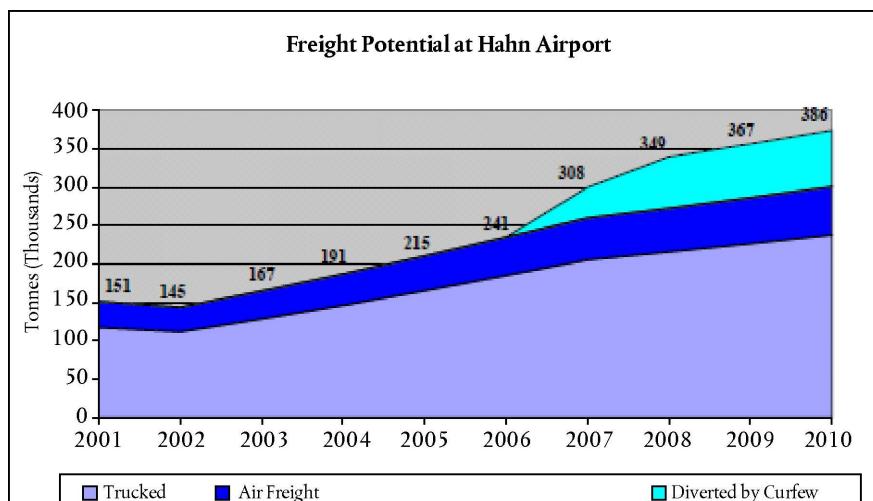
Figure 4

#### Potential low-cost passenger traffic (under the assumption that Ryanair sets a base) at Frankfurt Hahn airport in 2001-2011



Source: SH&E

Figure 5

**Total potential freight traffic at Frankfurt Hahn airport in 2001-2010**

Source: SH&amp;E

**5.4.1.4. Access to the infrastructure in an equal and non-discriminatory manner**

(207) According to the information provided by Germany, all potential users of the infrastructure have access to the airport on equal and non-discriminatory terms. Germany submitted that the airport charges paid for the use of the infrastructure were based on commercially justified differentiation and that the schedule of airport charges is available to all potential users in a transparent and non-discriminatory manner.

**5.4.1.5. Trade is not affected contrary to common interest**

(208) Firstly, Germany stated that there are no substitution effects between Frankfurt Hahn airport and other airports in the catchment area, such as Zweibrücken airport and Frankfurt Main airport. According to Germany, undue negative effects on competition with these airports because of the aid granted to FFHG cannot be shown, be it in passenger or in freight traffic. Indeed, Germany argued that in recent years, low cost carriers increasingly had to offer flights to the major hubs since traditional airlines have lowered their prices and started to enter the market of low cost flights. In this regard, Germany stated that regional airports, such as Frankfurt Hahn, are now under a bigger pressure to compete with the hub airports for leisure passengers. Therefore, Germany concluded that the financial support provided has not led to any undue negative effects on competition, but has on the contrary proven appropriate in helping the adaption process towards a stable business model in the future.

(209) Secondly, Germany argued that the fact that Fraport, before getting involved in Frankfurt Hahn airport, was already the operator of Frankfurt Main airport, shows that no substitution movements from Frankfurt Main towards Frankfurt Hahn airport were to be expected. Instead, Fraport was investing into the possibility to de-congest Frankfurt Main airport and to use the additional, complimentary function of Frankfurt Hahn airport, as a future capacity overload was foreseeable for Frankfurt Main hub. According to Germany, the ban on night flights at Frankfurt Main airport was one of the main factors in this reasoning as Frankfurt Hahn airport had a 24 hours operating license.

(210) In conclusion, Germany argued that the effects of any aid in favour of FFHG have been limited to positive regional effects for the Hunsrück region, whilst creating no undue negative effects in the relationship to other airports given that Frankfurt Hahn airport is simply used to de-congest Frankfurt Main. Furthermore, Germany stated that, apart from Luxembourg airport, which is already 1 hour and 30 travelling time (111 km) from

Frankfurt Hahn airport, there are no other foreign competing airports in the same catchment area. Even in relation to Luxembourg, no negative distortive effect on competition due to the aid granted can be observed according to Germany.

#### 5.4.1.6. *Incentive effect, necessity and proportionality*

(211) Germany stated that in the absence of investment aid, the level of economic activity of the airport would be significantly reduced. Germany submitted that the aid was necessary as it compensated only the costs of financing and a lower amount would lead to lower levels of investment.

#### 5.4.2. COMPATIBILITY OF OPERATING AID TO FINANCE THE AIRPORT'S OPERATION

(212) The 2014 Aviation Guidelines provide conditions under which operating and investment aids to airports may be declared compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty. On 17 April 2014, Germany provided its views on the compatibility of the measures under the 2014 Aviation Guidelines. Germany argued that, even if the measures under investigation would constitute operating aid to FFHG, they would be compatible with the internal market according to Article 107(3)(c) of the Treaty and Section 5.1.2 of the 2014 Aviation Guidelines.

##### 5.4.2.1. *Contribution to a well-defined objective of common interest*

(213) Concerning the well-defined objective of common interest, Germany submitted that the coverage of operating costs of FFHG was always aimed at the objective of improving the regional economic structure of the economically underdeveloped and scarcely populated Hunsrück region. In this regard the Germany presented the same reasoning as for the compatibility assessed of investment aid to finance the airport infrastructure (see Section 5.4.1.1).

##### 5.4.2.2. *Need for State intervention*

(214) As regards the need for State intervention, Germany explained why Frankfurt Hahn is making operational losses which need to be covered. In its view, it is a rather ambitious objective for an airport such as Frankfurt Hahn airport with 1-3 million passengers to become profitable and be able to cover its operating costs. According to Germany, it was not possible to realise this ambitious objective in the start-up years since the airport was burdened by very high infrastructure investments which it financed itself on the capital market and for which it had to pay high interest. In addition, Germany stated that since the beginning of the world economic and financial crisis, a stagnation of passenger and especially of freight traffic could be registered.

(215) Germany submitted that in light of these circumstances, there was a need for State intervention to cover the operating losses since FFHG would otherwise have gone insolvent. This would also have resulted, according to Germany, in the withdrawal of the 24 hours operating licence, meaning that during the insolvency FFHG would have had to stop operating all flights, which in turn would have resulted in the loss of clients such as airlines and freight carriers. Germany pointed out that it would then also have become very difficult to find a new operator for the airport.

##### 5.4.2.3. *Appropriateness of the aid measures as policy instruments*

(216) Germany submitted that covering the operating costs was an appropriate measure to achieve the intended objective. Germany argued in this respect that, if Frankfurt Hahn airport would have had to stop operating and would have disappeared from the relevant markets, it would no longer have been possible to achieve the objectives of common interest pursued by the conversion of a former US air base into a full functioning civil aviation airport and developing the Hunsrück region. In this regard, Germany emphasised that in contrast to a market economy investor, a public investor will have to take into account these objectives when considering the alternative of a closure of the airport.

#### 5.4.2.4. *Existence of an incentive effect*

(217) Germany argued that in order to maintain Frankfurt Hahn airport in operation, it was a necessary *conditio sine qua non* to cover its operating costs as FFHG would otherwise have gone insolvent. A successful operation of the airport was in turn the basis for realising the objectives of common interest as stated in recitals 213 and following. Furthermore, Germany argued that without operating aid, the financial consolidation of the airport would have been unthinkable, given that the airport would have accrued more and more debt instead of making it out of its debts as foreseen in the current austerity programme.

#### 5.4.2.5. *Proportionality of the aid amount (aid limited to the minimum)*

(218) Germany argued that any aid element contained in the loans was limited to the operating losses of and represented the absolute minimum necessary in order to maintain Frankfurt Hahn airport in operation and prevent it from becoming insolvent.

#### 5.4.2.6. *Avoidance of undue negative effects on competition and trade between Member States*

(219) Firstly, Germany stated that there are no substitution effects between Frankfurt Hahn airport and other airports in the catchment area, such as Zweibrücken airport and Frankfurt Main airport. Undue negative effects on competition with these airports because of the operating aid granted to FFHG cannot be shown according to Germany, be it in passenger or in freight traffic. Germany submitted that, on the contrary, Frankfurt Hahn has experienced significant substitution effects of passengers choosing the hubs, such as Köln/Bonn or Frankfurt Main, for flying with low cost carriers rather than from Frankfurt Hahn airport. Indeed, Germany argued that in recent years low cost carriers increasingly had to provide flights to the major hubs since traditional airlines have lowered their prices and started to enter the market of low cost flights. In this regard, Germany stated that regional airports, such as Frankfurt Hahn, are now under a bigger pressure to compete with the hub airports for leisure passengers. Therefore, Germany concluded that the coverage of operating costs has not led to any undue negative effects on competition, but has on the contrary proven appropriate in supporting the adaption process towards a stable business model in the future.

(220) Secondly, Germany argued that the fact that Fraport, before getting involved in Frankfurt Hahn airport, was already the operator of Frankfurt Main airport, shows that no substitution movements from Frankfurt Main towards Frankfurt Hahn airport were to be expected. Instead, Fraport was investing into the possibility to de-congest Frankfurt Main airport and to use the additional, complimentary function of Frankfurt Hahn airport, given that a future capacity overload was foreseeable for the Frankfurt Main hub. According to Germany, the ban on night flights at Frankfurt Main airport was one of the main factors in this reasoning as Frankfurt Hahn airport had a 24 hours operating license.

(221) In conclusion, Germany argued that the effects of any in favour of FFHG were limited to the positive regional effects for the Hunsrück region, while creating no undue negative effects in the relationship to other airports as Frankfurt Hahn airport is used to de-congest Frankfurt Main. Furthermore, Germany stated that apart from Luxembourg airport, which is already 1 hour and 30 travelling time (111 km) from Frankfurt Hahn airport, there are no other foreign competing airports in the same catchment area. Even in relation to Luxembourg, no negative distortive effect on competition due to the aid granted can be observed according to Germany.

## 6. COMMENTS FROM INTERESTED PARTIES

### 6.1. RYANAIR

(222) Ryanair objects against the decision of the Commission to initiate the formal investigation procedure as regards the 1999, 2002 and 2005 Ryanair agreements with Frankfurt Hahn airport. Ryanair stated that these agreements complied with the market economy investor principle, and hence did not involve State aid.

(223) Ryanair essentially argues that no advantage has been conferred to it since the agreements reflect normal market conditions. In this respect, Ryanair claimed that the contractual conditions must not be compared to those at other German airports, but those which Ryanair was agreeing with other airports hosting low-cost carriers, such as Blackpool airport and Charleroi airport.

(224) Concerning the issue of marketing support, Ryanair argued that the charge for new destinations rewards flight frequencies and that the discounts granted by Frankfurt Hahn airport were in line with industry practice as many privately or publicly held airports applied the same or greater level of discounts for new destinations.

(225) Concerning the application of airport charges, Ryanair argued that normal market charges, i.e. charges which were not abnormally low, satisfy the market economy investor principle. According to Ryanair, the prospect of an immediate profitability was not needed in order to fulfil this principle. The prospect of achieving profitability in the medium- to long-term would be sufficient in Ryanair's opinion. Furthermore, Ryanair contests the Commission's argument that Frankfurt Hahn airport had taken into account only the specific costs of the Ryanair contract as regards the coverage of its costs from the charges paid to Ryanair, and not the costs of the common airport infrastructure and general administration. As concerns the coverage of costs, Ryanair stated that there was never a plan to reserve the use of Frankfurt Hahn airport exclusively to Ryanair. In this regard, Ryanair pointed to the fact that Frankfurt Hahn airport was also used to a significant extent as a freight airport. Furthermore, Ryanair was pointing out that it should pay a lower level of charges compared to other airlines, given that its handling requirements and operations minimise the costs for the airport.

(226) Ryanair furthermore argued that the conduct of Frankfurt Hahn airport was guided by foreseeable prospects of profitability. According to Ryanair, Frankfurt Hahn airport had performed a financial and strategic analysis prior to concluding the agreements, consistent with what is expected of a market economy investor. Ryanair stated that its commitment to deliver a high passenger volume was since 2005 also secured by a contractual penalty, and that this contract was allocating the bulk of the risk to Ryanair, thus providing for an exceptionally generous deal for Frankfurt Hahn airport. Furthermore, the agreements have allowed Frankfurt Hahn airport to improve its financial situation. At the conclusion of the contract, Frankfurt Hahn Airport was aware that similar agreements of Ryanair with airports throughout Europe had proven to be profitable.

(227) Lastly, Ryanair points out that its agreements with Frankfurt Hahn did not contain any exclusivity clause, so other airlines could and do avail of the same terms and conditions as Ryanair, provided they were ready to offer the same commitment to the airport as Ryanair.

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

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

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

(230) Oxera also argues that market benchmark prices obtained from comparator airports are not tainted by State aid given to surrounding airports. Therefore, it is possible to robustly estimate a market benchmark for the MEOTs.

(231) This is because:

- comparator analyses are widely used for MEOTs outside of the field of State aid;
- companies affect each other's pricing decisions only to the extent that their products are substitutes or complements;

- (c) airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the submitted reports face only limited competition from State-owned airports within their respective catchment areas (less than 1/3 of commercial airports within the catchment areas of the comparator airports are fully State owned, and none of them were subject to State aid investigations (as of April 2013));
- (d) even where comparator airports face competition from State-owned airports within the same catchment area, there may be reasons to believe their behaviour is in line with the MEO principle (for example, where there is a large private ownership stake or where the airport is privately managed);
- (e) MEO airports will not set prices below incremental cost.

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

- (232) Oxera argues that the profitability analysis undertaken by Oxera in its reports submitted to the Commission follows the principles that would be adopted by a rational private sector investor and reflects the approach apparent from Commission precedents.
- (233) The principles underlying the profitability analysis are:
  - (a) the assessment is undertaken on an incremental basis;
  - (b) an *ex ante* business plan is not necessarily required;
  - (c) for an uncongested airport, the single till approach is the appropriate pricing methodology;
  - (d) only those revenues associated with the economic activity of the operating airport should be considered;
  - (e) the entire duration of the agreement, including any extensions, should be considered;
  - (f) future financial flows should be discounted in order to assess profitability of the agreements;
  - (g) incremental profitability of Ryanair agreements to the airports should be assessed on the basis of estimates of the internal rate of return or net present value (NPV) measures.

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

- (234) The paper aims to set out the commercial logic underlying regional airports' decisions to buy advertising on Ryanair.com from AMS.
- (235) The paper argues that there are a large number of very strong, well known, and habitually used airports. Weaker competitors must overcome static buying behaviour of consumers to expand their business. Smaller regional airports need to find a way to consistently communicate their brand message to as wide an audience as possible. Traditional forms of marketing communication require expenditure beyond their resources.

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

- (236) Ryanair submitted further reports by its consultant Oxera. In these reports, Oxera discusses the principles which, according to the airline, should be taken into account as part of the MEOT in the profitability analysis of, on the

one hand, airport services agreements between Ryanair and airports and, on the other hand, the marketing agreements between AMS and the same airports. Ryanair emphasised that those reports do not in any way change its position presented earlier that the airport service agreements and the marketing agreements should be analysed under separate MEOTs.

- (237) The reports indicate that the profits generated by AMS should be included as revenues in a joint analysis regarding profitability while the expenses of AMS would have to be incorporated in the costs. To do this, the reports suggest the application of a cash-flow-based methodology to the joint profitability analysis, meaning that the expenditure by airports on AMS could be treated as incremental operating expenses.
- (238) The reports emphasise that marketing activities contribute to the creation and support of the brand's value, which helps to generate effects and benefits not only for the duration of the contract, but also after its termination. This would especially be the case if, due to the fact that Ryanair has concluded an agreement with an airport, other airlines establish themselves at the airport, which will in turn attract more shops to install themselves there and therefore bring in more non aeronautical revenues for the airport. According to Ryanair, if the Commission proceeds to undertake a joint analysis of profitability, those benefits have to be taken into account by treating the expenses of AMS as incremental operating costs, net of AMS payments.
- (239) Furthermore, Ryanair considers that a terminal value (reflecting the value generated after the termination of the agreement) would have to be included in the projected incremental profits at the end of the airport services agreement. The terminal value could be adapted on the basis of a 'renewal'-probability, measuring the expectation that profits will persist after the termination of the agreement with Ryanair or if similar conditions are agreed with other airlines. Ryanair considers that it would then be possible to calculate a lower limit for benefits generated jointly by the agreement with AMS and the airport service agreement, reflecting the uncertainties of incremental profits after the termination of the airport services agreement.
- (240) To supplement this approach, the reports present a synthesis of the results of studies on the effects of marketing on the value of a brand. Those studies consider that marketing can support the value of a brand and can help to build a customer base. According to the reports, in the case of an airport, marketing on Ryanair.com significantly increases the visibility of the brand. The reports moreover state that smaller regional airports wishing to increase their air traffic can therefore especially increase the value of their brand by concluding marketing agreements with AMS.
- (241) The reports lastly indicate that a cash-flow-based approach is to be preferred over a capitalisation approach in which the costs of marketing services provided by AMS would be treated as capital expenditure on an intangible asset (that is, the value of the brand) <sup>(37)</sup>. The capitalisation approach would only take into account the proportion of marketing expenditure that is attributable to the intangible assets of an airport. The marketing expenses would be treated as capital expenditure in an intangible asset, and then depreciated for the duration of the contract, taking into consideration a residual value at the foreseen termination of the airport services agreement. This approach would not take into account the incremental profits which the conclusion of the airport services agreement with Ryanair would bring about and it is also difficult to calculate the value of the intangible asset due to the expenses of the brand and the time period of use of the asset. According to the reports, the cash-flow method is also more appropriate than a capitalisation approach since the latter would not capture the positive benefits to the airport that are expected to arise as a result of signing the airport services agreement with Ryanair.

**Oxera — Economic MEOP assessment: Frankfurt Hahn Airport, 11 August 2014:**

- (242) Ryanair submitted a further report prepared by Oxera regarding the agreements between Frankfurt Hahn airport and Ryanair of 1999, 2002, 2005. The assessment of the 2005 Ryanair agreement takes also into account the marketing agreement concluded directly with *Land Rhineland-Palatinate*. Oxera's assessment of the Ryanair agreements is based on the information available to the airport around the time of signing the agreement.

<sup>(37)</sup> Oxera, 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test? — Practical application', 31 January 2014, prepared for Ryanair.

### The 1999 Ryanair agreement:

(243) According to the report, the analysis of the 1999 Ryanair agreement has been based on the business plan document produced by FFHG on 25 May 1999, a document which has been drawn up before signing the agreement. The report states that the aeronautical revenues have been calculated based on the charges specified in the 1999 Ryanair agreement. The estimates of incremental operating costs have been based on FFHG's own estimates. The report points out that the costs of fire fighting, which are usually considered as falling within the public policy remit, were not taken into account. The same applies to infrastructure investments.

Table 16

### Oxera's incremental profitability assessment of the 1999 Ryanair agreement (38)

[...]

### The 2002 Ryanair agreement:

(244) The report explains that the forecasts of total passenger numbers have been obtained from FFHG's business plan drawn up in November 2002, as it is the only document available that contains traffic forecasts over the relevant period. According to the report, the aeronautical revenues have been calculated based on the charges specified in the 2002 Ryanair agreement. Non-aeronautical revenues have been obtained from FFHG's business plan drawn up in November 2002, as it is the only document that contains projections of non-aeronautical revenues that was drawn up around the time of the 2002 Ryanair agreement.

(245) The estimates of operating costs per passenger have been based on FFHG's own analysis of incremental operating costs per Ryanair departing passenger. The schedule of investments has been drawn up in November 2000.

Table 17

### Oxera's incremental profitability assessment of the 2002 Ryanair agreement (39)

[...]

## 6.2. LUFTHANSA AND BDF

(246) Lufthansa and the *Bundesverband der Deutschen Fluggesellschaften e.V.* (Federal Association of German Air Carriers, hereinafter: BDF) have submitted comprehensive information and comments on the 2008 opening decision which shall be summarised below.

(247) Lufthansa and BDF stated that the losses of FFHG and its predecessors since 1998 and until 2009 amount to EUR 161 million and that FFHG did not, contrary to what it claims, reach a positive EBITDA in 2006 either. In this respect, Lufthansa and BDF claim that the slightly positive EBITDA was only possible after the release of legacy liabilities, which reduced the operational losses. Hence, Lufthansa and BDF suggest that the Commission should seek to get access to all of FFHG's annual balance sheets. In this regard Lufthansa argued, that in contrast to what Germany has stated, the depreciation of investments did not increase much during the years and cannot

<sup>(38)</sup> According to Oxera, depreciation charges are not incorporated as the 1999 Ryanair agreement was signed prior to the Aerports de Paris Judgment of 12 December 2000. Oxera also stated that the data is presented in nominal terms. Oxera clarified that the estimates presented for 1999 and 2004 have been adjusted to reflect the start and end dates of the 1999 Agreement in April 1999 and March 2004, respectively.

<sup>(39)</sup> Oxera clarified that depreciation is modelled in an NPV-neutral manner. According to Oxera, this approach ensured that the sum of the discounted present value of depreciation over the asset's life equates the original amount of capital expenditures. Oxera stated that the data is presented in normal terms. Oxera clarified that the estimates presented for 2002 and 2017 have been adjusted to reflect the start and end dates of the 2002 Ryanair Agreement in February 2002 and February 2017, respectively.

be considered very high in comparison to the costs related to marketing support for Ryanair, which are included in 'other operating costs', as Table 18 shows. Lufthansa and BDF also suggest that the Commission should request the full, non-publicised annual balance sheets of FFHG.

Table 18

**Relationship of depreciation and other operating costs**

In EUR	2000	2001	2002	2003	2004
Depreciations	4 477 257	5 325 627	5 423 627	6 045 387	7 699 330
Losses	8 217 199	13 355 347	19 993 895	17 832 868	16 797 889
Other operational costs	[...]	5 692 808	11 434 306	10 521 273	11 454 363

(248) Lufthansa and BDF also claimed that a study submitted by Germany containing statistics on the effects of FFHG on tourism in *Hunsrück* and *Land Rhineland-Palatinate* should not be taken into account as the numbers on passenger growth and job growth around the airport were provided by FFHG and remained unchecked by the authors of the study. Lufthansa and BDF claimed furthermore that it was known, even when the study was conducted, that the numbers given were not realistic.

(249) Furthermore, Lufthansa and BDF submitted that FFHG did not have a clear business model, which could be shown by the changing plans for additions to the airport, such as malls or places for excursions, which did not have anything to do with the operation of the airport. Furthermore, according to Lufthansa and BDF, the conflicting declarations by FFHG that Frankfurt Hahn airport should have been profitable first by 2005, then by 2008 and then 2013, point in the same direction that no consistent business plan was being followed. The last prognosis made, namely that Frankfurt Hahn airport should become profitable from 2016 onwards, would therefore also seem doubtful and this prognosis was apparently even based on the assumption that further, substantial investments would be made. The origin of such investments was, however, completely unclear according to Lufthansa and BDF.

(250) Moreover, Lufthansa and BDF stated that, in contrast to what Germany is claiming, PwC has not provided a proper MEOT since its assessment does not take into account the case law of the Court of Justice on at least two points.

(251) Firstly, Lufthansa and BDF referred to the argumentation of Germany that the accumulated losses of FFHG could be compensated by Fraport as its shareholder. In this regard, Lufthansa and BDF argued that it is not important whether losses can be compensated within a group of companies, but whether the individual measures taken as such are measures which a market economy investor would have taken as well (or not) and that this argumentation was therefore unacceptable.

(252) Secondly, Lufthansa and BDF submitted that the argumentation in the assessment by PwC was not sufficient to prove that a market economy investor would have taken the same decision since PwC argued, for example concerning the 1999 Ryanair contract, that a reduction of losses by increasing the passenger volume could be achieved. Lufthansa and BDF referred to the case WestLB, according to which a market economy investor would normally 'seek to achieve the maximum reasonable return on his investment, according to the particular circumstances and the satisfaction of his short-, medium- and long-term interests, even where he is investing in an undertaking of which he is already a shareholder' <sup>(40)</sup>. Hence a reduction of losses would not suffice for a measure to pass the MEOT and therefore PwC already disregarded the case law of the Court of Justice in this

<sup>(40)</sup> Case T-228 and 233/99 DEP — Westdeutsche Landesbank Girozentrale v Commission [2003] ECR II-00435, paragraph 314.

respect, Lufthansa and BDF argued. Also, Lufthansa and BDG pointed out that the assessment submitted on behalf of FFHG did not include any own MEOT as it only referred to the test made by PwC.

(253) In addition, Lufthansa and BDF contested the argument made by PwC in relation to the capital increases that long planning horizons of more than 30 years and amortisation of investments over 20 years are normal business practice for infrastructure investments (see recital 103 of the 2008 opening decision). In this respect, Lufthansa and BDF claimed that the comparisons made by PwC to concession contracts at Budapest airport, Da Vinci and Campiano airports, Sparta airport and Belfast City airport were completely indefensible since the situation of none of these airports is even remotely comparable to the situation of FFHG and Frankfurt Hahn airport. Lufthansa and BDF argued that unlike all of the airports mentioned by PwC, Frankfurt Hahn was a military airport at which the major part of the civil use started only in 1999 and was then supported by infrastructure developments exactly matching Ryanair's needs. This is why, according to Lufthansa and BDF, the break-even analysis is not accurate since the costs for the terminal were not taken into account.

(254) Lufthansa and BDF also argued on the basis of the 2008 opening decision that the overcompensation of security fees clearly constituted State aid. In this regard Lufthansa and BDF advanced the argument, firstly, that the security checks had not been publicly procured. In the opinion of Lufthansa and BDF, the rules of public procurement have not been followed and therefore, by default, the service has not been procured at the most advantageous price. Secondly, Lufthansa and BDF argued that, according to German law, these security fees must be oriented towards the actual and necessary costs. However, Lufthansa and BDF pointed out that the fees at Frankfurt Hahn airport have remained at the same level between 2003 and 2008, whereas at other airports traffic fluctuations could be observed.

(255) In contrast to the comments from Germany concerning the legal assessment, Lufthansa and BDF were of the opinion that the aid granted by Fraport to FFHG originated from State resources. According to Lufthansa and BDF, Fraport had expressly admitted in all of its annual balance sheets between 2001 and 2006 that because of a consortium agreement between the public shareholders, it is a 'dependent, publicly held undertaking'. In this regard, Lufthansa and BDF point to a number of indications that the funds of Fraport were State resources according to the judgment in case *Stardust Marine*<sup>(41)</sup> and Article 2(1)(b) of Commission Directive 2006/111/EC<sup>(42)</sup>.

(256) Furthermore, Lufthansa and BDF considered that the actions of Fraport are also imputable to the State. In this regard, Lufthansa and BDF referred to indications for imputability such as the fact that FFHG's meeting of shareholders, meaning *Land Rhineland-Palatinate* and Fraport, agreed to the conclusion of the Ryanair agreements. Furthermore, Lufthansa and BDG claimed that there is a remarkable temporal relationship between the second capital increase and the application for recognition of a common airport system in 2005. According to Lufthansa and BDF, within two weeks the shareholders of FFHG decided on the capital increase, which resolved FFHG's financial difficulties, and subsequently the application for a common airport was made by Germany. Lufthansa and BDF therefore claimed that the public shareholders made this application possible through the new capital increase.

(257) Lufthansa and BDF moreover claimed that no market economy investor would have undertaken to finance and invest into FFHG, since according to the case law of the Court of Justice, a market economy investor is always profit oriented. A mere reduction of losses would not be enough to convince a market economy investor and he would not take social or local political considerations into account.

(258) Lastly, Lufthansa and BDF claimed that the aid granted to FFHG for new infrastructure, as well as the aid granted to Ryanair are incompatible with the internal market under the 2005 Aviation Guidelines as well as under the 2014 Aviation Guidelines. In this regard, Lufthansa and BDF claimed that in this case there was no conversion of a military airport, given that the airport had been built 6 years after the end of military use. Furthermore, they argued that Frankfurt Hahn airport did not decongest Frankfurt Main airport and especially that it was doubtful whether the airport helped the development in the region and created jobs there. According to Lufthansa and

<sup>(41)</sup> *Stardust Marine* judgment, paragraph 33-34.

<sup>(42)</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

BDF, this argument could in any case not justify the aid since the job generation started only in 1999, six years after the military use of the airport had ended. Even if one would accept this as a justification, the numbers given by FFHG in its studies would be completely overestimating the effects on the economy and job creation.

- (259) Furthermore, Lufthansa and BDF claimed that the rebates granted through the airport charges for passenger numbers of 1 to 3 million or more were discriminatory. Lufthansa and BDF argued that only Ryanair was eligible for these rebates as it was the only airline generating that many passengers and Frankfurt Hahn airport did not even have the capacity to host another airline which could have provided such passenger numbers. The granting of marketing support was also discriminatory in the opinion of Lufthansa and BDF as the proportion of the marketing support is dependent on the number of passengers the airline has already brought to the airport and the number of destinations already offered by the airline at the airport. Since these factors do not have any relation to the amount of marketing support for new destinations, this system will provide Ryanair with a much higher amount of marketing support, which according to Lufthansa and BDF is unjustifiable.
- (260) As far as operating aid for the airport is concerned, according to Lufthansa and BDF emphasised it is obvious that the single-till-approach applied at Frankfurt Hahn airport does not work since overall the revenues are not able to cover the losses. Therefore, the compensation of these losses through the financing of FFHG constitutes operating aid.
- (261) As concerns aid to Ryanair, Lufthansa and BDF stated that Ryanair has received advantages through the airport charges and the agreements with Frankfurt Hahn airport. Lufthansa and BDF claimed that no market economy investor would have taken these measures since Frankfurt Hahn airport is obviously unable to operate profitably on this basis. Lufthansa and BDF claimed that through the 2001 and 2006 schedule of airport charges, Ryanair had been given an additional advantage in form of the additional reductions granted in relation to the total volume of passengers departing with the airline.
- (262) Lufthansa and BDF argued that, as Fraport has to be considered as a publicly held undertaking, FFHG is a publicly owned undertaking and therefore its resources have to be considered as State resources. The advantages granted by FFHG to Ryanair are also imputable to the State, according to Lufthansa and BDF, since the PLTA also comprises a control agreement ('Beherrschungsvertrag') and the public shareholders can steer the behaviour of FFHG. In this regard, Lufthansa and BDF argued that it should also be taken into account that the manager of FFHG is always an employee of Fraport.
- (263) Lufthansa and BDF argued that none of the aid to Ryanair is compatible with the internal market. The Ryanair agreements and the 2001 schedule of airport charges should be assessed directly under Article 107(3)(c) of the Treaty. In this regard, the Commission decision in *Charleroi* <sup>(43)</sup> should also be taken into account. On this basis Lufthansa and BDF stated that the aid to Ryanair could not be justified since it constituted partly operating aid, which could not be justified at all, and partly start-up aid, which pursued no legitimate goal and was not granted in a transparent and non-discriminatory manner. Lufthansa and BDF furthermore stated that the 2006 schedule of airport charges is not compatible with the 2005 Aviation Guidelines, since the conditions for compatibility in point 79 of the guidelines are not fulfilled in relation to the marketing support and the operating aid granted through the passenger fees. This is due to the fact that the marketing support is discriminatory, Lufthansa and BDF explained, and that the passenger fees do not have a limited duration and have no incentive effect. Furthermore, in Lufthansa's and BDF's opinion all of the aid granted to Ryanair is of a cumulative nature and hence is not in line with the compatibility conditions. Therefore, in their view, it should be considered incompatible with the internal market.

### 6.3. ASSOCIATION OF EUROPEAN AIRLINES (AEA)

- (264) The AEA stated that the fact that FFHG has been loss making since its opening and that the announced date for break-even has been constantly postponed shows that the business model is at best questionable and that there is a blatant disrespect of the market economy investor principle.

<sup>(43)</sup> Case T-196/04 Ryanair v Commission (hereinafter: 'Charleroi judgment') [2008] ECR II-3643.

(265) Concerning the possible aid to Ryanair, AEA was of the opinion that this aid has had negative effects for competing airlines and that the agreements with Ryanair constituted discriminatory measures. According to AEA, these agreements are discriminatory as their conclusion coincides with the beginning of any commercial use of the airport, meaning that the airport was tailor-made for Ryanair's needs.

#### 6.4. AIR FRANCE

(266) Air France remarked generally that it strongly supported the Commission's action in State aid matters in the aviation sector. More specifically in relation to the situation at Frankfurt Hahn airport, Air France concurred with the Commission's preliminary assessment that the measures in favour of FFHG and Ryanair constituted State aid. Air France believes in particular that the three commercial agreements with Ryanair constitute a clear-cut discriminatory measure as no other airlines operating in the same airport system have ever been offered the same conditions. Therefore, Air France concluded that such measures have inevitably been contributing to a significant distortion of competition between intra-EU carriers within the internal market.

#### 6.5. COMMENTS SUBMITTED ON THE IMPLEMENTATION OF THE 2014 AVIATION GUIDELINES TO THE PENDING CASE

##### 6.5.1.1. *Lufthansa*

(267) Lufthansa stated that the 1999, 2002 and 2005 Ryanair agreements constitute incompatible State aid and provides further comments on the respective agreements.

(268) With regard to the 1999 Ryanair agreement, Lufthansa submitted that the costs for Terminal 1 at the airport are to be fully taken into account when applying the MEOT. To support this, Lufthansa refers to the statement of Ryanair in a parliamentary hearing. According to Lufthansa, Ryanair stated that the airport was built for them. Lufthansa disputed that a proportion of the cost of the terminal could be attributed also to other airlines.

(269) In the opinion of Lufthansa, the MEOT carried out by PwC for the 2002 Ryanair agreement underestimates the marketing costs for the opening of new routes in 2002. According to Lufthansa it was publicly known that at least 7 new routes would be opened in 2002. Hence, Lufthansa stated that the marketing support was underestimated by at least EUR [...] in 2002.

(270) With regard to the 2005 Ryanair agreement, Lufthansa stated that the passenger volume forecasts underlying the MEOT of the 2005 Ryanair agreement appear to be overestimated. Lufthansa stated that in the worst case the airport expected that Ryanair would bring 3 million passengers between 2006 to 2012. However, according to Lufthansa this expectations were not based on a real commitment by Ryanair.

(271) Moreover Lufthansa stated that the *Land* Rheinland-Palatinate and Ryanair concluded a marketing agreement in 2005, which is not part of the 2008 opening decision <sup>(44)</sup>. According to Lufthansa, the agreement grants Ryanair marketing support of least EUR [...] million per year.

(272) With regard to aid to the airport for the financing of infrastructure, Lufthansa is of the opinion that the infrastructure is dedicated to Ryanair and hence the compatibility criteria in the guidelines do not apply.

<sup>(44)</sup> Neither was the 2005 marketing agreement subject of the 2011 opening decision.

#### 6.5.1.2. *Transport & Environment*

(273) This non-governmental organization made comments criticizing the 2014 Aviation Guidelines and decisions of the Commission regarding the aviation industry so far, for their allegedly negative effects on the environment.

### 7. COMMENTS FROM GERMANY ON THIRD PARTY SUBMISSION

#### 7.1. ON THE COMMENTS FROM RYANAIR

(274) Concerning the comments from Ryanair, Germany stated that these comprehensively supported its observations and supplemented these from the side of the airline. Ryanair's comments especially underline, according to Germany, that the contracts with Ryanair are such as any market economy investor would have concluded and that in fact many other European airports have concluded similar agreements with Ryanair.

(275) Furthermore, Germany emphasised that the airport charges as established by FFHG were according to Ryanair absolutely normal in the low-cost carrier sector and were not especially advantageous for Ryanair.

#### 7.2. ON THE COMMENTS FROM LUFTHANSA AND BDF

(276) Concerning the comments from Lufthansa, Germany rejected the argument that the results of the study submitted on the effects of Frankfurt Hahn airport on the regional economy and the number of jobs created would be questionable and emphasised instead that the study is based on the well-founded economic research conducted by the expert authors. Germany submitted that of course the numbers in the study are a forecast and would not necessarily always correspond to the numbers actually realised, especially in the context of the world economic crisis. According to Germany, the forecast was realistic at the moment of publication and led to the conclusion by PwC, from an *ex ante* perspective, that FFHG has acted as a market economy investor.

(277) Germany also rejected the doubts of Lufthansa and BDF that profitability will not be reached at Frankfurt Hahn airport. Germany stated that the forecast when profitability will be achieved may have to be adapted with time due to multiple factors, such as the investment and expansion decisions of the undertaking. In any case, PwC has put forward reliable evaluations that all the measures under investigation were economically reasonable.

(278) The claim by Lufthansa and BDF that no real MEOT justification exists are therefore unfounded according to Germany, especially since Lufthansa did not have access to the MEOT of PwC.

(279) Concerning the capital increases, Germany stated that there was no closure of Frankfurt Hahn airport; rather, the airport was has been used for civil aviation since 1993 and up until the moment that Fraport got involved. Germany explains that Frankfurt Hahn airport was therefore not a project to provide an airport for Ryanair, as Lufthansa claimed, but was designed as a low-cost airport to be used according to equal, non-discriminatory conditions by any airline. That some airports are being used more by certain airlines than by others is normal, Germany claimed. In fact, Lufthansa itself has for example an exclusive terminal at Munich airport.

(280) Furthermore, Germany stated that there was no discrimination concerning the marketing support scheme. The levels of marketing support granted have been set up in a reasonable, non-discriminatory manner. The payment of marketing support in instalments, as criticised by Lufthansa and BDF, only served the purpose of minimising the risks in case a route would be closed again soon after its opening. This danger, Germany argued, was not present to the same extent if an airline was already present at Frankfurt Hahn airport and already served more than 1 million passengers. According to Germany, Ryanair has furthermore not received any secret or unjustified marketing support from FFHG.

(281) In relation to the question of whether there was any aid coming from State resources, Germany argued that in contrast to what Lufthansa and BDF claimed, no conclusions could be drawn from the annual balance sheets of Fraport in which the undertaking stated that it is a 'dependent, publicly held undertaking'. This statement was only included in the annual financial report in order to present the relationship to undertakings and persons close to Fraport, but does not have any implications for the State aid assessment. In any case, no imputability of the capital increases to the State could be derived from this application.

(282) Concerning the question whether the aid granted to FFHG would be compatible with the internal market, Germany stated that Lufthansa's and BDF's argument that civil use began only six years after the termination of military use would be incorrect as well as irrelevant. Civil use had started directly in 1993 and the infrastructure for civil use was already there. The expansion of the infrastructure in order to make the airport ready for commercial passenger traffic was inevitable.

(283) Germany rejected Lufthansa's and BDF's argument that Frankfurt Hahn airport did not help to decongest Frankfurt Main airport and pointed out that Lufthansa and BDF had not substantiated their claim with any evidence.

(284) Germany especially opposed the argument of Lufthansa and BDF that it was doubtful whether Frankfurt Hahn airport generated a great number of jobs. In this regard Germany argued that it could not be doubted that Frankfurt Hahn airport had had considerable influence on the economic and social development of the structurally weak region around it.

(285) Furthermore, Germany dismissed the discriminatory effects which Lufthansa and BDF claimed the passenger fees and marketing support to have. Germany ensured that these had been established on the basis of economic considerations and calculations and were available to airlines in a uniform and non-discriminatory way.

(286) Germany lastly rejected the doubts raised by Lufthansa and BDF with regard to the single-till-approach at Frankfurt Hahn airport. Germany stated that this approach was economically justified, as the MEOT by PwC had shown, and that it would not have been possible to attract airlines to Frankfurt Hahn airport if the passenger fees would have been so high as to guarantee a profitable operation of the airport from the beginning.

(287) Concerning the claims that Lufthansa and BDF advance in relation to aid granted to Ryanair through the 1999, 2002 and 2005 Ryanair agreements, Germany referred to the detailed MEOTs carried out by PwC and stated that these agreements cannot constitute State aid as they are complying with the market economy investor principle. According to Germany, the calculations presented by Lufthansa and BDF are implausible and based on wrong passenger numbers. Germany again pointed out that it was not possible to operate an airport like Frankfurt Hahn profitably from the very beginning, but only on a medium- to long-term basis.

(288) Germany also stated that the doubts which Lufthansa and BDF raised in relation to the question whether the aid to Ryanair could be justified were unfounded. Germany moreover argued that even if the marketing support would constitute an advantage to Ryanair, which it did not, according to Germany, even in that case such aid would be compatible with the internal market on the basis of the criteria set out in recital 79 of the 2005 Aviation Guidelines.

### 7.3. ON THE COMMENTS FROM AIR FRANCE AND THE AEA

(289) Germany pointed out in relation to the comments from AEA that these were not substantiated with any evidence. Furthermore, Germany argued that even if, as AEA stated, there were negative effects for competing airports, then these airports had not complained about this and had not even commented on the 2008 opening decision.

## 8. ASSESSMENT — EXISTENCE OF AID

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

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

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

### 8.1. AID NATURE OF THE MEASURES GRANTED TO THE AIRPORT

#### 8.1.1. MEASURE 1: 2001 PLTA

##### APPLICABILITY OF STATE AID RULES TO AIRPORTS

(292) Germany submits that the 2001 PLTA was put into place before the public funding of airports was considered to constitute State aid and was not altered until it was replaced by the 2004 PLTA.

(293) Hence, the Commission must first establish whether the State aid rules were applicable to the 2001 PLTA at the time it was concluded. In that context, the Commission recalls that an aid measure constitutes existing aid pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999 where it can be established that at the time the aid measure was put into effect, it did not constitute State aid, and subsequently became aid due to the evolution of the common market and without having been altered by the Member State.

(294) Indeed, in the past, the development of airports was often determined by purely territorial considerations or, in some cases, military requirements. The operation of airports was organised as part of the administration rather than as a commercial undertaking. Competition between airports and airport operators was also limited and developed gradually. Taking into account those conditions, the financing of airports and airport infrastructure by the State was for some time considered by the Commission as a general measure of economic policy which could not be controlled under the State aid rules of the Treaty.

(295) However, the market environment has changed. In the *Aéroports de Paris* judgment, the General Court stated that the operation of an airport, including the provision of airport services to airlines and to the various service providers within airports, is an economic activity<sup>(45)</sup>. Consequently, since the adoption of that judgment (12 December 2000) it is no longer possible to consider the operation and construction of airports as a task carried out by the administration within the public policy remit, outside the ambit of State aid control.

<sup>(45)</sup> Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929 (confirmed by Court of Justice in Case C-82/01 P [2002] ECR I-9297, paragraph 75 with further references).

(296) In its *Leipzig/Halle Airport* judgment, the General Court confirmed that it is *a priori* not possible to exclude the application of State aid rules to airports as the operation of an airport and the construction of airport infrastructure is an economic activity<sup>(46)</sup>. Once an airport operator engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107 (1) of the Treaty, and the Treaty rules on State aid therefore apply<sup>(47)</sup>.

(297) FFHG has been engaged in constructing, maintaining and operating Frankfurt Hahn airport. In this context, it has offered airport services and charged users — commercial aviation operators as well as non-commercial general aviation users — for the use of the airport infrastructure, thereby commercially exploiting the infrastructure. Therefore, it must be concluded that FFHG has been engaged in an economic activity as from the date of the *Aéroports de Paris* judgment (that is to say 12 December 2000) onward.

(298) However, in the light of the developments (as set out in recitals 294 to 296) the Commission considers that, prior to the judgment of the General Court in *Aéroports de Paris*, public authorities could legitimately consider that financing measures with regard to airports did not constitute State aid and accordingly did not need to be notified to the Commission. Hence, the Commission cannot put into question individual financing measures (not awarded on the basis of an aid scheme<sup>(48)</sup>) which were definitively adopted before judgment in *Aéroports de Paris* under State aid rules.

(299) Accordingly, the Commission has to assess first, whether the 2001 PLTA was put into place before the judgment in *Aéroports de Paris* (12 December 2000) and second whether that measure was later amended.

(300) The 2001 PLTA was irrevocably agreed on 31 August 1999 and confirmed in a notarial deed of 24 November 2000. Therefore, the Commission considers that the 2001 PLTA was irrevocably put in place before the *Aéroports de Paris* judgment. Moreover, the 2001 PLTA was not amended until it was replaced by the 2004 PLTA.

(301) Hence, at that time the public authorities could legitimately consider that a PLTA to cover annual losses of FFHG did not constitute State aid.

## CONCLUSION

(302) In the light of the considerations in recitals 292 and following, the Commission concludes that, at the time the 2001 PLTA, was put into place public authorities could legitimately consider that a PLTA to cover annual losses of FFHG did not constitute State aid.

### 8.1.2. MEASURE 2: 2001 CAPITAL INCREASE

(303) In 2001, Fraport and *Land Rhineland-Palatinate* increased FFHG's capital by EUR 27 million. Fraport contributed EUR 19,7 million; *Land Rhineland-Palatinate* contributed EUR 7,3 million. The capital increase was approved first by the supervisory board of Fraport (as regards its contribution) on 14 December 2001 and subsequently by a resolution of the shareholders of FFHG dated 9 January 2002<sup>(49)</sup>. The capital increase by Fraport and the *Land* became effective on 9 January 2002.

<sup>(46)</sup> Case T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v Commission*, [2011] ECR II-01311, in particular paragraphs 105 and 106.

<sup>(47)</sup> See in particular Commission Decision of 17 June 2008 in case C-29/08 *Frankfurt-Hahn airport — Alleged State aid to the airport and the agreement with Ryanair* (OJ C 12, 17.1.2009, p. 6), paragraphs 204 — 208; Commission Decision of 21 March 2012 in case C76/02 *Charleroi airport — Alleged State aid to the airport and Ryanair* (OJ C 248, 17.8.2012, p. 1).

<sup>(48)</sup> Article 1(d) of Regulation (EC) No 659/1999 stipulates that "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.'

<sup>(49)</sup> Status report of FFHG of 2002, page 5.

#### 8.1.2.1. **Notion of undertaking and economic activity**

(304) As was analysed in recitals 293 and following, since 12 December 2000 FFHG has to be considered as an undertaking exercising an economic activity for the purposes of Article 107(1) of the Treaty.

#### 8.1.2.2. **State resources and imputability**

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

(306) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it <sup>(50)</sup>. Resources of local authorities are, for the application of Article 107(1) of the Treaty, State resources <sup>(51)</sup>. In that respect, it is constant Commission practice to consider that irrespective of whether a public undertaking is loss-making or profit-making, all its resources are to be considered as State resources <sup>(52)</sup>.

#### **Land Rhineland-Palatinate's share in the 2001 capital increase**

(307) *Land Rhineland-Palatinate* has financed its share of the 2001 capital increase directly from its general budget. Thus, it can be concluded that that measure is financed through State resources and also imputable to the State.

#### **Fraport's share in the 2001 capital increase**

##### *State resources*

(308) In Germany's opinion, Fraport's share in the 2001 capital increase does not qualify as funding from State resources as at the time Fraport was an independent incorporated company under private law noted at the stock exchange and the public authorities were exercising no continuing control over its funds.

(309) According to the case law, resources of an undertaking are to be considered State resources if the State is capable, by exercising control over such undertakings, to direct the use of their resources <sup>(53)</sup>.

(310) The Commission considers that in the present case, the State at all material times exercised direct or indirect control over the resources under consideration. The Commission notes that, at the moment the 2001 capital increase was irrevocably decided, Fraport was a company that was in majority publicly owned. Before 11 June 2001, public shareholders held 100 % of Fraport's shares <sup>(54)</sup>. On 11 June 2001, Fraport was listed on the stock exchange and 29,71 % of its shares were sold to private shareholders. Afterwards, *Land Hesse* held 32,04 % of the shares, *Stadtwerke Frankfurt am Main GmbH* (100 % owned by the municipality Frankfurt am Main) held 20,47 % of the shares and the Federal Republic of Germany held 18,32 % of the shares.

(311) Hence, between 11 June 2001 and 26 October 2005, 70,29 % of Fraport's shares were held by public shareholders and as such would qualify as a public undertaking within the meaning of Article 2(b) of Directive 2006/111/EC. Also, the majority of Fraport shares held by public bodies meant that these were in a position to exercise a dominant influence over Fraport.

(312) Thus, the Commission considers that any capital injection granted from Fraport's resources would signify a loss of State resources, thus constituting a transfer of State resources.

<sup>(50)</sup> Case C-482/99 *France v Commission ('Stardust Marine')* [2002] ECR I-4397.

<sup>(51)</sup> Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais* [2011], not yet published, paragraph 108.

<sup>(52)</sup> See for example Commission decision C41/05, *Hungarian Stranded Costs* (OJ C 324, 21.12.2005, p. 12), with further references.

<sup>(53)</sup> *Stardust Marine*, paragraphs 52 and 57.

<sup>(54)</sup> *Land Hesse* held 45,24 % of Fraport's shares, *Stadtwerke Frankfurt am Main Holding GmbH* (owned for 100 % by the municipality Frankfurt am Main) held 28,89 % and the Federal Republic Germany held 25,87 %.

### Imputability to the State

(313) However, the Court has also ruled that, even if the State is in a position to exercise control over a public undertaking and its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State.

(314) Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the funding provided to FFHG through the 2001 capital increase, to be considered as imputable to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of this measure. On that point, the Court indicated that the imputability to the State of a measure taken by a public undertaking might be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken (55).

(315) Such indicators can be the integration of the undertaking into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of it being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains (56).

(316) As stated in recital 135 and the following, Germany submitted that the measures taken by Fraport in relation to Frankfurt Hahn airport were not imputable to the State. In this regard, Germany referred especially to §76 of the AktG and to judgments under German law according to which the management board of an *Aktiengesellschaft* has a large discretion to act with regard to the day-to-day business of the company and insofar acts independently of its shareholders.

(317) Germany also referred to a judgment of the German Federal Court, the *Bundesgerichtshof*, in which that court noted that the public shareholders were not able to have an influence on individual decisions taken in day-to-day business, but could only provide the general framework and guiding supervision of Fraport. According to Germany, this special nature of the *Aktiengesellschaft* was also recognised in relation to EU public procurement law in the Court's judgment in case *Stadtwerke Brixen AG* (57).

(318) Therefore, as regards the involvement of the public shareholders in the decision-making at the general meeting of shareholders, Germany argued that a vote by the meeting of shareholders did not constitute anything more than a mere exercise of their lawful rights and obligations as shareholders. Germany also rejected the notion that any of the other indications from the *Stardust Marine* judgment, mentioned in recital 315, were present.

(319) As a preliminary remark, the Commission points out that the fact that a State owned company is a company incorporated under private law alone cannot — having regard to the autonomy which that legal form is capable of conferring upon it — be regarded as sufficient to exclude imputability of its actions to the State (58). No distinction should be drawn between cases where aid is granted directly by the State and cases where it is granted by public or private bodies established or appointed by the State to administer the aid (59).

(320) In addition, the Commission notes that the judgment rendered by the German *Bundesgerichtshof* in 1999 (60) concerns criminal proceedings. In those proceedings, the question at last instance was whether a former

(55) *Stardust Marine*, paragraphs 52 and 57.

(56) *Stardust Marine*, paragraph 55-56.

(57) Case C-458/03 *Stadtwerke Brixen AG* [2005] ECR I-08585, paragraph 67.

(58) Case T-442/03 SIC — *Sociedade Independente de Comunicação v Commission* [2008] ECR II-01161, paragraph 100.

(59) Commission Decision 2014/273/EU of 19 September 2012 on the measures in favour of ELAN d.o.o. SA.26379 (C 13/10) (ex NN 17/10) implemented by Slovenia (OJ L 144, 15.5.2014, p. 1), recital 99.

(60) Urteil vom 3.1.1999, Az. 2StR 437-98, NJW 1999, 2378.

employee of Fraport could be charged with the offence of 'corruption of an employee' or 'corruption of a public official', so the question arose whether Fraport was to be viewed as an 'other administration' according to the German criminal code<sup>(61)</sup>. Therefore, the case is in no way connected to the question whether an action of Fraport can be seen as imputable to the State under State aid rules, but only clarifies that an employee by Fraport is not a public official and Fraport cannot be considered as part of the public administration in the meaning of the German criminal code.

- (321) Also as concerns the other judgment of the Bundesgerichtshof presented by Germany<sup>(62)</sup>, the Commission notes that that judgment, as the case of *Parking Brixen*<sup>(63)</sup>, concerned the criterion of public control over an undertaking in the sense of Union public procurement rules. It does not concern the question of imputability under State aid law.
- (322) Furthermore, while it may be that the management board of an *Aktiengesellschaft* can act independently of its public shareholders when day-to-day business decisions are taken, because of its shareholder structure (with 70 % of its shareholders being public) and the consortium agreement between its public shareholders Fraport nevertheless considers itself as a 'dependent, publicly held undertaking'<sup>(64)</sup> (as reported in each annual financial report between 2001 and 2006).
- (323) Moreover, several factors indicate that the 2001 capital increase is in fact imputable to the State.
- (324) First of all, the Commission considers that the 2001 capital increase cannot be considered out of context, but must be viewed in the light of the political and legal situation of Fraport at that time. Those circumstances and facts clearly indicate that the measure would not have been adopted but for the involvement of the State.
- (325) According to the minutes of Fraport's supervisory board meeting on 26 September 1997, the authorities of *Land Rhineland-Palatinate* offered Fraport to become involved in Frankfurt Hahn airport, since 'Land Rhineland-Palatinate wished, through the involvement of [Fraport] in [FFHG] to strengthen the development of employment opportunities, and since it expected an increase in air traffic'. After Fraport had become a shareholder in FFHG with a share of 64 % on 1 January 1998, according to the minutes of the supervisory board meeting of 10 May 1999, 'the government of Land Rhineland-Palatinate [has] turned to the prime minister of Land Hesse with the request for a stronger commitment of [Fraport] at Hahn [airport]'. For this purpose, Fraport was to take over the shares which Holding Hahn and Weiss and Freytag still held in the airport (see recital 17). The minutes state furthermore that Fraport should not be penalised 'if it does not reach regional political goals, e.g. number of employment opportunities' and that 'the negotiations between Fraport and the Land about points of discussion have begun'. Finally, the minutes express that 'public funds should be used as much as possible' for the development of the airport and that, in order to speed up the process of collecting these funds, 'Land Rhineland-Palatinate has already established a working group in the Ministry of Economy, of which Fraport is also a member'.
- (326) Those minutes show that Fraport was being used as a vehicle by *Land Rhineland-Palatinate* and *Land Hessen* in order to pursue regional and structural political goals, such as creating more jobs in the region.
- (327) Since Fraport was still a publicly held undertaking at that time, its supervisory board, whose members were nominated to a large extent (at least half of the supervisory board) by the public shareholders, had the power to approve the basic agreement of 31 August 1999 ('Grundlagenvereinbarung')<sup>(65)</sup> and to authorise the management board to conclude the 2001 PLTA<sup>(66)</sup>. Furthermore, Fraport's shareholder meeting then adopted a resolution dated 3 May 2000 authorising the management board to conclude the 2001 PLTA with FFHG and therefore to bind Fraport to the FFHG project until at least 2005. Since that resolution required a majority of

<sup>(61)</sup> According to §11 I No 2 lit. c *Strafgesetzbuch*.

<sup>(62)</sup> Urteil vom 3.7.2008, Az. I ZR 145/05, WRP 2008, 1182, 1186.

<sup>(63)</sup> Case C-458/03 *Stadtwerke Brixen AG* [2005] ECR I-08585, paragraph 67.

<sup>(64)</sup> See annual financial reports (*Geschäftsbericht*) of Fraport of 2001-2006, published at <http://www.fraport.de/de/investor-relations/termine-und-publikationen/publikationen.html> See in particular *Geschäftsbericht* 2001, p. 46; *Geschäftsbericht* 2002, p. 66; *Geschäftsbericht* 2003, p. 54; *Geschäftsbericht* 2004, p. 80; *Geschäftsbericht* 2005, p. 64; *Geschäftsbericht* 2006, p. 72.

<sup>(65)</sup> Basic agreement between Fraport and *Land Rhineland-Palatinate* of 31 August 1999.

<sup>(66)</sup> Approval for the conclusion of the basic agreement was given by the supervisory board in its meeting on 1 October 1999.

votes representing at least three quarters of the authorised capital taking part in the vote, and the public authorities held 100 % of the shares at the time (see recital 305), that resolution was effectively taken by the public authorities.

- (328) *Land* Rhineland-Palatinate also made its support and public funding conditional upon the conclusion of the 2001 PLTA, as can be seen from the basic agreement of 31 August 1999 (67).
- (329) Therefore, through the political involvement of the two *Länder*, directly on a political level and indirectly through the supervisory board and as the public shareholders of Fraport, Fraport was involved with FFHG and signed the 2001 PLTA for taking over the losses of FFHG until at least 2005.
- (330) Furthermore, §13 of FFHG's articles of association (68) stated that until 31 December 2027 any sale of shares by one of the shareholders would have to be authorised in writing by the other shareholders. Since FFHG only had two shareholders at that time, Fraport and *Land* Rhineland-Palatinate, this meant that Fraport needed the agreement in writing from *Land* Rhineland-Palatinate in order to sell its shares. This effectively meant that the *Land* could hinder Fraport from leaving the FFHG project.
- (331) Already in 2001, when the 2001 capital increase was discussed, it appeared that the management of FFHG was in direct negotiations with *Land* Hesse and *Land* Rhineland-Palatinate (69). It should be noted that *Land* Hesse was at that point in time not yet FFHG's shareholder, but a shareholder of Fraport (with a 45,2 % shareholding).
- (332) Against that political and legal background, it then became evident in January 2001 (70) that further investments into FFHG were urgently needed in order to allow FFHG to become profitable.
- (333) Moreover, *Land* Rhineland-Palatinate directly induced Fraport to adopt the 2001 capital increase. In a proposal for the supervisory board's meeting from 20 June 2001, it is noted that, in view of the capital increase of EUR 27 million in connection with the development of Frankfurt Hahn airport, the shareholder *Land* Rhineland-Palatinate had insisted that the investments to be financed by the 2001 capital increase were the condition for the continuation of the public infrastructure investments, such as for the construction of the road leading towards Frankfurt Hahn airport amounting to approximately EUR [...] million.
- (334) In that regard, the committee on the acquisitions of Fraport's supervisory board noted in a meeting on the 2001 capital increase, dating from 23 November 2001, so less than a month before the supervisory board approved the 2001 capital increase, that Fraport could not disengage itself from FFHG at that time, since it was 'not to be expected that *Land* Rhineland-Palatinate would agree to that' (71).
- (335) Consequently, the Commission considers that the 2001 capital increase is imputable to the State.

#### 8.1.2.3. *Economic advantage*

- (336) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say, in the absence of State intervention (72). Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention (73). Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.

(67) Basic agreement between Fraport and *Land* Rhineland-Palatinate of 31 August 1999, see points 4 and 5.

(68) §13 of the articles of association of FFHG of 29 November 2001, termed 'Verfügung über Geschäftsanteile' (i.e. disposition of shares).

(69) Minutes of the meeting of the committee for acquisitions of the supervisory board on 30 May 2001.

(70) Documents submitted to the management board ('Vorstandsvorlage') on the economic developments of FFHG of 14 May 2001; see also minutes of the meeting of the committee for acquisitions of the supervisory board of 30 May 2001; see also BCG analysis of the potential of FFHG of 14 February 2001, p. 10.

(71) Proposed resolution to the supervisory board of Fraport from 23 November 2001.

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

(73) Case T-73/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

(337) Furthermore, 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid' <sup>(74)</sup>. In this case, in order to determine whether the 2001 capital increase grants an advantage to FFHG that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the direct investment grants and capital injections to that of a MEO who is guided by prospects of profitability in the long-term <sup>(75)</sup>.

(338) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the Market Economy Operator ('MEO') principle is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' <sup>(76)</sup>.

(339) In Stardust Marine the Court stated that, '[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.' <sup>(77)</sup>.

(340) Furthermore, the Court declared in the EDF case that, '[...] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen.' <sup>(78)</sup>.

(341) In order to be able to apply the MEO principle, the Commission has to place itself at the time when the decision to increase the capital of FFHG was taken. Also, the Commission must in principle base its assessment on the information and assumptions which were at the disposal of FFHG's public shareholders at the time when the decision regarding the financial arrangements at stake was taken.

(342) The Commission recognises that it may be difficult for the relevant Member State and for the operators concerned to provide full contemporaneous evidence in respect of financial arrangements concluded many years ago and will take that into account when applying the criterion at stake in the present case.

(343) Germany argues that FFHG's shareholders based their decision to inject additional capital on several documents drawn up by FFHG, Fraport and external advisers, showing that the decision was justified.

(344) While it is true that a long-term plan 2001-2015 for investments into FFHG was drawn up, at the time of the 2001 capital increase the investment was considered by Fraport's consultants BCG and SD as involving high risks, because FFHG would reach an annual profit of EUR [...] under disproportionately high growth assumptions only in 2015. In that context, several observations can be made concerning the timing of the 2001 capital increase and the available information at the time this measure was decided by *Land Rhineland-Palatinate* and Fraport.

(345) The decision to inject additional capital into FFHG was taken against the background of the worsening financial situation of the airport in 2001. In January 2001, a report on the economic situation of FFHG was presented. This report concluded that, even though the preliminary goals which Fraport had set itself for FFHG had been reached swiftly and the passenger numbers were increasing, the overall economic situation was declining dramatically since two of FFHG's major clients (Malaysian Airlines Cargo and MNG Airlines) shifted their activities from, or reduced their activities at, Frankfurt Hahn airport. Against this background, Fraport mandated BCG and SD to develop a strategy for FFHG. BCG's report shows that even in the event of disproportionate growth no profitability of the investments into FFHG could be expected until 2015. Such growth assumptions

<sup>(74)</sup> Case C-482/99 *France v Commission* ('Stardust Marine') [2002] ECR I-4397, paragraph 69.

<sup>(75)</sup> Case C-305/89 *Italy v Commission* ('ALFA Romeo') [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia v Commission* [2000] ECR II-03871, paragraph 84.

<sup>(76)</sup> Case 40/85 *Belgium v Commission* [1986] ECR I-2321.

<sup>(77)</sup> *Stardust Marine*, paragraph 71.

<sup>(78)</sup> Case C-124/10P *European Commission v Électricité de France (EDF)* [2012], not yet reported, paragraph 85.

were also confirmed as unrealistic by Interplan<sup>(79)</sup> (<sup>80</sup>). Moreover, BCG stated in its report that under realistic growth assumptions no profitability of the investments undertaken could be expected. To support this, BCG calculated the Net Present Value (NPV) of the investment as summarised in Table 19.

Table 19

**BCG's profitability calculation of investments into FFHG<sup>(1)</sup>**

Assumptions <sup>(2)</sup>	NPV <sup>(3)</sup> (in EUR)
20 % growth as from 2005	[...]
10 % growth as from 2005	[...]
7 % growth as from 2005	[...]

<sup>(1)</sup> Profitability assessment, BCG, 14 February 2001.

<sup>(2)</sup> The discount rate for the calculation of the NPV was assumed to be [...] %.

<sup>(3)</sup> The Net Present Value (NPV) indicates whether the income from a given project exceeds the (opportunity) costs of capital. The project is considered as an economically profitable investment when it generates a positive NPV. Investments producing lower income as the (opportunity) costs of capital are not economically profitable. The (opportunity) costs of capital are reflected in the discount rate.

(346) Moreover, according to the traffic projections of Fraport's external expert further growth would be subject to additional infrastructure investments<sup>(81)</sup>. The overall amount of the necessary investments was estimated to be up to EUR [...] million and would have involved the extension of the runway, taxiways, aprons and other infrastructure measures. However, as stated by BCG, no detailed assessment underpinning this considerable investment plan was conducted. For these reasons, BCG considered that the investment involved high risks and recommended to share these risks with an additional investor or to consider selling Fraport's share in FFHG.

(347) Germany submitted a MEOT conducted by PWC to justify the market conformity of the 2001 capital increase. That document does, however, not support Germany's argument that FFHG's shareholders acted like prudent investors as assessed in recital 348 and following.

(348) The Commission takes note of the long-term business plan drawn up by Fraport's SD in 2001, which served as the basis for the MEOT conducted by PWC in 2006 and 2008, respectively. In that business plan, the following three scenarios were identified:

- (i) Status quo: no further investments to be undertaken by Fraport;
- (ii) Alternative scenario 1: limited investments into the extension of the runway under very pessimistic traffic forecasts; and
- (iii) Alternative scenario 2: with identical investments, but best case traffic forecasts.

(349) However, PWC did not calculate the NPV of the different scenarios in order to allow for a comparison. The NPV established in Table 20 shows that in all scenarios the NPV<sub>2001-2015</sub> would be negative. Also, the projections underlying PWC's profitability assessment show that the alternative scenarios would only under very optimistic traffic forecasts, assuming a disproportionately high growth, result in losses that are smaller (by EUR [...] million) than in the status quo scenario (without taking into account that an additional investment of EUR [...] million would be required). In the worst case scenario, the NPV of the alternative scenario would even be higher (by EUR [...] million) than in the status quo scenario.

<sup>(79)</sup> Interplan was a consultant hired by Fraport to analyse the traffic potential of Frankfurt Hahn airport.

<sup>(80)</sup> Minutes of the Committee for acquisitions of FFHG's supervisory board of 30 May 2001.

<sup>(81)</sup> SH&E: Study of traffic potential of Frankfurt-Hahn Airport, 18 July 2001.

Table 20

**Profitability assessment of the 2001 capital increase (82)**

[...]

*Source:* PWC Report, 24 October 2008, p. 39 and Commission's assessment (83).

- (350) Germany further argued that an exit of Fraport had been considered, but was not possible until at least 2005, therefore this was not considered as an option. However, even though Fraport was bound by the 2001 PLTA, the NPV of the losses expected to be incurred from 2001 to 2005 amounted to EUR [...] million. Hence, the Commission considers that a coverage of losses of FFHG until 2005 without any further investments would have been less costly than investing further into the airport.
- (351) Moreover, it has to be also recalled that the profitability forecast of Fraport's investment into FFHG deteriorated substantially after the decision to conclude the 2001 PLTA was taken (namely after August 1999).
- (352) Table 21 compares the expected annual results in 2001 to 2010 under the business plan of FFHG drawn up to support the 2001 PLTA decision and the business plan of FFHG supporting the 2001 capital increase. Accordingly, the NPV of FFHG's annual results for the same period decreased by approximately EUR [...] million.

Table 21

**Comparative assessment of the annual results of FFHG under the business plan for the 2001 PLTA versus the 2001 capital increase (84)**

[...]

*Source:* PWC Report, 24 October 2008, p. 32 and 39 and Commission's assessment (85).

- (353) The Commission further observes that according to the minutes of the supervisory board meeting on 16 November 2001 the profitability of the 2001 capital increase was discussed. According to those minutes, the investments — even the intermediate investments of EUR 27 million — into FFHG were not expected to be profitable. Moreover, it was stated that nevertheless Fraport would provide the 'risk capital in order to open up opportunities for the future'. In addition, the representative of the Land Rheinland-Palatinate (Landrat of the Rhein-Hunsrück District) noted that according to the minutes of the supervisory board meeting of FFHG in May 2001, 'Fraport's decision to investment into FFHG will not depend on the profitability prospect, but on the agreement of Fraport's supervisory board acquisition committee, which has given its agreement.'
- (354) In the light of the above, the Commission concludes that the 2001 capital increase of Fraport was not granted in conformity with the MEOP and conferred an advantage to FFHG.
- (355) With regard to the capital increase of *Land* Rhineland-Palatinate, the Commission notes that Germany's justification of its market conformity is based on the same grounds as for Fraport, which was already discussed in recital 344 and following. The arguments put forward in this regard also apply here.

(82) The scenarios 'Status quo', 'Alternative 1' and 'Alternative 2' are based on the data provided in the PWC Report of 24 October 2008, p. 39; the discount rate was identified in the BCG's 'Potential assessment' of 14 February 2010.

(83) The Commission calculated the NPV using the discount rate of [...] %, which was established in BCG's profitability assessment. Moreover, the Commission identified another option, i.e. the Status quo (coverage of losses until 2005).

(84) Discount rate as identified in the PWC Report, 24 October 2008, p. 33.

(85) The Commission calculated the NPV by using the discount rate indicated in the PWC Report.

(356) In that regard, the Commission first observes that, since 1994, the Land had already invested several times into FFHG without any success. Second, the *Land* participated in the capital increase under different conditions as Fraport (no remuneration of its investment during the duration of the 2001 PLTA could have been expected). Third, according to the 2003 investment report for Rhineland-Palatinate, the reason for the *Land's* investment into Frankfurt Hahn airport were important social and structural policy objectives, such as the creation of jobs and the fulfilment of transport policy objectives, rather than profitability considerations.

(357) Therefore, the Commission also concludes that the 2001 capital increase of *Land* Rhineland-Palatinate was not granted in conformity with the MEOP and conferred an advantage to FFGH.

#### 8.1.2.4. *Selectivity*

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

(359) In the case at hand, the 2001 capital increases by Fraport and *Land* Rhineland-Palatinate only benefitted FFHG. Both capital increases were thus by definition selective within the meaning of Article 107(1) of the Treaty.

#### 8.1.2.5. *Distortion of competition and effect on trade*

(360) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid. In accordance with settled case law<sup>(86)</sup>, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

(361) As assessed in recital 304, the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, in particular with respect to low cost carriers and charter operators, airports that are not located in the same catchment areas and even in different Member States can also be in competition with each other to attract those airlines.

(362) Given the size of Frankfurt Hahn airport (see Table 1) and its proximity to other Union airports, notably Frankfurt Main airport, Luxembourg airport, Zweibrücken airport, Saarbrücken airport and Köln-Bonn airport<sup>(87)</sup>, the Commission considers that the measures concerned were liable to affect trade between Member States. There are international flights from Frankfurt Hahn airport to a number of international destinations as set out in recital 202. The runway at Frankfurt Hahn airport is of sufficient length and allows airlines to serve international destinations.

(363) In addition, Frankfurt Hahn airport serves as a freight airport (see Table 2). With regard to competition for air freight, the Commission notes that freight is usually more mobile than passenger transport<sup>(88)</sup>. In general, a catchment area for freight airports is considered to have a radius of at least around 200 kilometres and 2 hours travelling time. With regard to competition for air freight, the Commission notes that freight is usually more mobile than passenger transport<sup>(89)</sup>. In general, the catchment area for freight airports is considered to have a radius of at least around 200 kilometres and 2 hours travelling time. Based on the Commission's information, industry players generally consider that the catchment area of a freight airport may be even larger as up to a half a day of trucking time (that is to say, up to 12 hours driving time by trucks) would in general be acceptable for

<sup>(86)</sup> Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

<sup>(87)</sup> See Section 2.2 further above.

<sup>(88)</sup> For example, Leipzig/Halle airport was in competition with Vatry airport (France) for the establishment of the DHL European hub. See *Leipzig/Halle judgment*, paragraph 93.

<sup>(89)</sup> See footnote 88.

freight forwarders to use the airport in order to transport freight <sup>(90)</sup>. Against that background, the Commission considers that, since freight airports are more fungible than passenger airports given that it is sufficient for air freight to be delivered into a certain area and then forwarded by road and rail freight forwarders to its final destination, *inter alia*, there is a higher likelihood of distortions of competition and effect on trade between Member States.

(364) On the basis of the arguments presented in recitals 360 to 364, the economic advantage which FFHG received has strengthened its position vis-à-vis its competitors on the Union market for the provision of airport services. Against that background, the advantage provided to FFHG through the 2001 capital increase must be considered as being liable to distort competition and have an effect on trade between Member States.

#### 8.1.2.6. **Conclusion**

(365) The 2001 capital increase of EUR 27 million by Fraport and *Land* Rhineland-Palatinate constitutes State aid within the meaning of Article 107(1) of the Treaty.

#### 8.1.3. MEASURE 3: 2004 CAPITAL INCREASE AND MEASURE 4: 2004 PLTA

(366) In 2004, the capital of FFHG was increased by a further EUR 42 million (Fraport invested EUR 10,21 million, *Land* Hesse invested EUR 20 million and *Land* Rhineland-Palatinate invested EUR 11,79 million). *Land* Rhineland-Palatinate and *Land* Hesse agreed to that capital increase in 2002 subject to the condition that a new PLTA (namely the 2004 PLTA) between FFHG and Fraport would be concluded, covering the period until 31 December 2014.

(367) On 5 April 2004, Fraport and FFHG concluded the 2004 PLTA. That agreement was approved by the shareholders of Fraport on 2 June 2004.

##### 8.1.3.1. **Notion of undertaking and economic activity**

(368) As analysed in recitals 293 and following, since 12 December 2000 FFHG has to be considered as an undertaking exercising an economic activity for the purposes of Article 107(1) of the Treaty.

##### 8.1.3.2. **State resources and imputability**

#### **2004 capital increase and the 2004 PLTA — Fraport**

(369) The Commission considers that due to the fact that the 2004 PLTA was a pre-condition for the 2004 capital increase to become effective and because both measures were subject to the agreement of Fraport's shareholders at the same shareholder meeting, the imputability of both measures needs to be assessed together (as regards Fraport's contribution).

(370) The 2004 capital increase and the 2004 PLTA were confirmed by Fraport's shareholders assembly on 2 June 2004 with 99,992 % of the votes of the shareholders present at the meeting.

(371) Furthermore, Germany argued that for the decision of the 2004 PLTA to be approved, a majority of 74,994 % of the votes at the shareholders assembly was needed, whereas the public shareholders only held approximately 70 % of the shares in Fraport and were therefore in fact not able to control the decisions of Fraport. In this regard it needs to be recalled that the 2004 capital increase would not become effective without the endorsement of the 2004 PLTA by Fraport's shareholders.

<sup>(90)</sup> Response of Liège airport to the public consultation on the 2014 Aviation Guidelines.

(372) The Commission considers that as a majority shareholder the State had an important share in the vote on the 2004 capital increase and 2004 PLTA. Nevertheless, according to the German *Aktiengesetz* (*AktG*) a PLTA becomes effective only upon its approval by the shareholder's meeting with majority of votes representing at least three quarters of the authorised capital taking part in the vote <sup>(91)</sup>. Hence, the public authorities could not without the substantial participation of the private shareholders control the decision to implement the 2004 PLTA and to carry out the 2004 capital increase by Fraport.

(373) Therefore, in light of the considerations in recital 369 and the following, the Commission considers that the 2004 capital increase by Fraport and the 2004 PLTA are not imputable to the State. Even if imputability were to be confirmed and the measure considered to be aid, such aid would be compatible with the internal market. In this respect, the considerations below in Sections 10.3 and 10.4 equally apply.

### **2004 capital increase — Land Rhineland-Palatinate and Land Hesse**

(374) *Land Rhineland-Palatinate and Land Hesse* financed their shares of the 2004 capital increase from their general budget. Hence, those parts of the 2004 capital increase were clearly financed from State resources and are imputable to the State.

#### **8.1.3.3. Economic advantage**

(375) As was stated in recitals 336 and following, the Commission applies the MEO principle to test whether there is an economic advantage conferred on an undertaking. The principles regarding the application of the MEO principle set out in recitals 336 and following apply equally.

### **Application of the MEOT — Land Rhineland-Palatinate**

(376) In relation to the 2004 capital increase of Land Rhineland-Palatinate, Germany submitted that it acted in line with the MEO principle. To support this, following the 2008 opening decision Germany provided a MEOT conducted by PWC in 2008.

(377) The Commission first of all notes that Land Rhineland-Palatinate did not draw up its own *ex ante* profitability calculation or calculated its own return on investment. On the contrary, Land Rhineland-Palatinate was relying on the business plan prepared by FFGH and Fraport.

(378) Second, the Commission considers however that the situation of the Land was not the same as the situation of Fraport's shareholders. Table 22 shows Land Rhineland-Palatinate was supposed to inject EUR [...] million in 2005 to 2009 (in total EUR [...] million), but expected receiving dividend payments or any other remuneration for its participation only as of 2025. However, Fraport's shareholders were supposed to inject EUR [...] million and expected after the negative results during the first four years, to receive dividend payments. The NPV of the expected dividends for the period up to 2025 amounted to EUR [...] million with an Internal Rate of Return (IRR) of [...] %.

(379) Third, In view of this long planning horizon and given the fact that Land Rhineland-Palatinate had already invested several times without any success into FFGH, the Commission considers that no prudent private investor in the position of the Land would have decided to inject further capital into FFGH without also conducting an *ex ante* sensitivity assessment.

<sup>(91)</sup> § 293(1) of the *AktG*.

Table 22

**Profitability assessment of the 2004 capital increase by Land Rhineland-Palatinate**

[...]

*Source:* PWC Report: Rheinland-Pfalz, 24 October 2008, p. 21.

(380) Furthermore, the MEOT for the 2004 capital increase and the 2004 PLTA are based on significant growth expectations as regards FFHG's annual financial results (see Table 23). These growth assumptions underlying the MEOT are substantially higher than those underpinning the MEOT for the 2001 capital increase. In addition, they are subject to high fluctuations and for example in 2009 amounted to more than 300 %.

Table 23

**Comparison of the forecasted annual results of FFHG in the business plans used by PWC for the MEOT for the 2001 capital increase and for the 2004 capital increase**

In 1 000 EUR	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>2004 capital increase</b>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<b>2004 capital increase — annual changes in %</b>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<b>2001 capital increase</b>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<b>2001 capital increase — annual changes in %</b>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

In 1 000 EUR	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
<b>2004 capital increase</b>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<b>2004 capital increase — annual changes in %</b>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<b>2001 capital increase</b>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<b>2001 capital increase — annual changes in %</b>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

*Source:* PWC Report, 24 October 2008, p. 45 and Commission's assessment (92)

(92) Commission has calculated the growth rates on the basis of the forecasted annual results.

- (381) Furthermore, according to the investment reports for Land Rhineland-Palatinate, the reason for the Land's investment into Frankfurt Hahn airport was the achievement of important social and structural policy considerations, such as the creation of jobs and the fulfilment of transport policy objectives, rather than profitability considerations. However, social and regional considerations cannot be taken into account when conducting the MEOT.
- (382) In view of these specific factors concerning Land Rhineland-Palatinate's decision to inject further capital into FFHG (recitals 376 to 380) the Commission considers that the 2004 capital increase by Land Rhineland-Palatinate was not in line with the MEO principle and conferred an advantage on FFHG.

#### **Application of the MEOT — Land Hesse**

- (383) In relation to the behaviour of Land Hesse, Germany argued that the restricted growth possibilities for Frankfurt Main airport deriving, *inter alia*, from the night flight curfew made further development of Frankfurt Hahn airport necessary in the eyes of Land Hesse. Germany pointed out that this development allowed to comprehensively exploit the existing growth opportunities in the framework of the 24 hours-flight permission for Frankfurt Hahn airport together with the envisaged introduction of the airport system Frankfurt Main airport — Frankfurt Hahn airport. Moreover, with the participation in the 2004 capital increase, Land Hesse could further support the development of air traffic in the Rhine-Main area.
- (384) First of all, the Commission notes that no specific *ex ante* profitability calculation was drawn up by Land Hesse. Second, similarly as for Land Rhineland-Palatinate, also Land Hesse was expecting to start receiving dividend payments only after 2025. Third, despite the long planning horizon no sensitivity assessment of the assumptions was conducted. Moreover, the reason for the Land's investment into Frankfurt Hahn airport, such as development of air traffic in the Rhine-Main area or other important social and structural policy considerations, cannot be taken into account when conducting the MEOT.
- (385) In view of these specific factors concerning Land Hesse's decision to become a shareholder of FFHG (recitals 383 to 384), the Commission considers that the 2004 capital increase by Land Hesse was not in line with the MEO principle and conferred an advantage on FFHG.

#### **Conclusion**

- (386) In the light of those considerations, the Commission concludes that the 2004 capital increases by Land Rhineland-Palatinate and Land Hesse confer an advantage to FFHG.

##### **8.1.3.4. Selectivity**

- (387) As the 2004 capital increases by Land Rhineland-Palatinate and Land Hesse were put in to place only for the benefit of FFHG, those measures are thus by definition selective within the meaning of Article 107(1) of the Treaty.

##### **8.1.3.5. Distortion of competition and effect on trade**

- (388) For the same reasons as outlined in recitals 360 and following, the Commission considers that any selective economic advantage granted to FFHG was liable to distort competition and affect trade between Member States.

##### **8.1.3.6. Conclusion**

- (389) The 2004 capital increase, granted by the *Länder* Rhineland-Palatinate and Hesse in favour of FFHG constitutes State aid within the meaning of Article 107(1) of the Treaty.

(390) The 2004 PLTA under which Fraport took over all losses incurred by FFHG between 2004 and 2009 and the 2004 capital increase by Fraport are not imputable to the State. As one of the cumulative criteria pursuant to Article 107(1) of the Treaty is not fulfilled, the Commission considers that the 2004 PLTA and the 2004 capital increase by Fraport do not constitute State aid within the meaning of Article 107(1) of the Treaty.

(391) Even if, the 2004 PLTA and the 2004 capital increase would constitute State aid, this aid would be compatible on the basis of the considerations set out in Section 10.

#### 8.1.4. MEASURE 5: COMPENSATION OF FFHG FOR SECURITY CHECKS

##### 8.1.4.1. *Notion of undertaking and economic activity*

(392) As stated in recital 293, while FFHG must be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty, it must be recalled that not all activities of an airport owner and operator are necessarily of an economic nature<sup>(93)</sup>.

(393) The Court of Justice<sup>(94)</sup> has held that activities which normally fall under a State's responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities may include, for example, security, air traffic control, police, customs, etc. The financing has to be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities<sup>(95)</sup>.

(394) Therefore, the financing of activities falling within the public policy remit or of infrastructure directly related to those activities in general does not constitute State aid<sup>(96)</sup>. At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature<sup>(97)</sup>.

(395) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities<sup>(98)</sup>. Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves as non-economic. Therefore, an analysis of the legal framework applicable to the airport operator is necessary in order to assess whether under that legal framework airport managers or airlines are required to bear the costs of the provision of some activities that might be non-economic in themselves but are inherent to the deployment of their economic activities.

(396) Germany submitted that the costs arising from the security checks pursuant to §8 *Luftsicherheitsgesetz* (Air Security Law, 'LuftSiG') are to be considered as falling within the public policy remit.

(397) The Commission agrees that measures pursuant to §8 LuftSiG can, in principle, be considered to constitute activities falling within the public policy remit.

(398) As regards the costs for carrying out such measures, Germany appears to consider that all of them will be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) LuftSiG only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the listed

<sup>(93)</sup> Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

<sup>(94)</sup> Case C-118/85 *Commission v Italy* [1987] ECR 2599, paragraphs 7 and 8, and Case C-30/87 *Bodson/Pompes funèbres des régions libérées* [1988] ECR 2479, paragraph 18.

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

<sup>(96)</sup> Commission Decision N309/2002 of 19 March 2003.

<sup>(97)</sup> See, in particular, Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 *P Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

<sup>(98)</sup> See, *inter alia*, Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-01627, paragraph 36, and case-law cited.

activities pursuant to §5 LuftSiG may be reimbursed. All other costs, including in particular those for security checks, must be borne by the airport operator. Hence, to the extent that public financing granted to FFHG relieved this undertaking of costs they normally had to bear given the limits prescribed in §8(3) LuftSiG, that public financing is not exempted from scrutiny under EU State aid rules.

#### 8.1.4.2. ***State resources and imputability to the State***

- (399) In this case, insofar as the Land has not only transferred the revenues collected from the airlines for the security checks to FFHG, the funds provided were granted from the budget of the Land Rhineland-Palatinate.
- (400) Thus, the Commission considers that they are financed through State resources and are also imputable to the State.

#### 8.1.4.3. ***Economic advantage***

- (401) The Commission notes that the measures at stake covered a portion of costs incurred by FFHG in the context of its economic activity. The operator of an airport normally has to bear all the costs related to the construction and operation of the airport (with the exception of those costs that fall within the public policy remit and do not generally have to be borne by the airport operator under the applicable legal framework). Hence, covering a part of those costs relieves FFHG of a burden it would normally have to bear and therefore provides to FFHG an economic.

#### 8.1.4.4. ***Selectivity***

- (402) As the measures at stake were granted only to FFHG, those measures have to be qualified as being selective in nature.

#### 8.1.4.5. ***Distortion of competition***

- (403) For the same reasons as outlined in recitals 360 and following, the Commission considers that any selective economic advantage granted to FFHG is liable to distort competition and affect trade between Member States.

#### 8.1.4.6. ***Conclusion***

In the light of the considerations in recital 392 and following, the Commission considers that the public funding granted to FFHG, to the extent that the payments of the Land Rhineland-Palatinate for the security checks exceeded the revenue collected from the airlines, constitutes State aid within the meaning of Article 107(1) of the Treaty.

### 8.1.5. MEASURE 6: DIRECT GRANTS FROM LAND RHINELAND-PALATINATE

#### 8.1.5.1. ***Applicability of State aid rules to public grants decided before 2000 and notion of an undertaking***

- (404) For the reasons outlined in recital 293 and following, as of 12 December 2000 FFHG must be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty.
- (405) Germany clarified that in 2001 Land Rhineland-Palatinate granted to FFHG EUR [...] to support some of its infrastructure investments. According to Germany, however, those grants were based on a decision taken already in 1999.

(406) For the same reasons as outlined in recital 293 and following, the Commission considers that for grants (like the one described in recital 405) decided prior to the Court judgment in *Aéroports de Paris*, public authorities could legitimately consider that the financing did not constitute State aid and accordingly did not need to be notified to the Commission. It follows that the Commission can not put into question such grants under State aid rules.

(407) Moreover, Germany stated that Land Rhineland-Palatinate partially financed personnel costs for security checks in the years 2001 ([...] % of total costs), 2002 ([...] %), 2003 ([...] %) and 2004 ([...] %).

(408) As assessed in recital 397 and following, the carrying out of security checks (pursuant to §8 LuftSiG) can, in principle, be considered to constitute an activity falling within the public policy remit. However, pursuant to §8 (3) LuftSiG only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the listed activities pursuant to §5 LuftSiG may be reimbursed. However, in the present case the Land Rhineland-Palatinate has taken over costs for security checks, which must be borne by the airport operator. Hence, the public support granted to FFHG through the financing of personnel costs for security checks is not exempted from scrutiny under EU State aid rules.

#### 8.1.5.2. ***State resources and imputability to the State***

(409) The Commission considers that the direct grants are financed through State resources and are also imputable to the State.

#### 8.1.5.3. ***Economic advantage***

(410) The Commission notes that the measures at stake covered a portion of costs incurred by FFHG in the context of its economic activity. The operator of an airport normally has to bear all the costs related to the construction and operation of the airport, including those for security checks, so that covering a part of those costs relieves FFHG of a burden it would normally have to bear and provides to FFHG an economic advantage it would normally not receive under normal market conditions.

(411) Moreover, the measures at stake were non-repayable in nature and did not yield a return on investment. Germany has not presented any evidence that the direct grants were put at the disposal of FFHG on market terms. Furthermore, Germany does not rely on the MEO principle. The Commission therefore finds that the measures at stake by the *Land* in favour of FFHG granted after 12 December 2000 conferred an economic advantage on FFHG.

#### 8.1.5.4. ***Selectivity***

(412) As the measures at stake were granted only to FFHG, those measures have to be qualified as being selective in nature.

#### 8.1.5.5. ***Distortion of competition and effect on trade***

(413) For the same reasons as outlined in recitals 360 and following, the Commission considers that any selective economic advantage granted to FFHG is liable to distort competition and affect trade between Member States.

#### 8.1.5.6. ***Conclusion***

(414) In the light of the considerations in recital 392 and following, the Commission concludes that, as the direct grants amounting to EUR [...] million (years 1997-2000) and EUR [...] million (paid in 2001) were irrevocably decided by the public authorities before the *Aéroports de Paris* judgment, they could legitimately consider that those grants did not constitute State aid.

(415) The Commission considers that the public funding granted to FFHG amounting to EUR 1,93 million (years 2001-2004) constitutes State aid within the meaning of Article 107(1) of the Treaty.

#### 8.1.6. MEASURE 12: EQUITY INCREASE AMOUNTING TO EUR [...] MILLION

##### 8.1.6.1. *Relation between the capital increase and the financial arrangements already put in place in favour of FFHG*

(416) Before assessing whether the capital increase amounting to EUR [...] million in favour of FFHG constitutes State aid, it is necessary to determine whether this capital increase and the financial arrangements previously put in place in favour of FFHG should be considered as separate measures or as a single measure.

(417) Germany submitted that the capital increase is intended to refinance the loans covering investments into of infrastructure which were irrevocably committed to be financed or refinanced by the public shareholder between 1997 and 2012, but not been yet been paid.

(418) In view of the evidence presented by Germany, the Commission considers that the equity injection is aimed to refinance loans which financed the infrastructure improvements at Frankfurt Hahn airport between 1997 and 2012. As according to Germany by the decision to undertake these investments, FFHG was entitled to receive this funding. Hence, the Commission considers that the capital injection of EUR [...] million has to be assessed in the context of the previous commitments by the public shareholders when these investments were decided.

##### 8.1.6.2. *Conclusion*

(419) In that regard, and in the light of the considerations in Section 8.1.1, the Commission concludes that FFHG has been engaged in an economic activity as from the date of the *Aéroports de Paris* judgment (12 December 2000) onward and constitutes an undertaking within the meaning of Article 107(1) of the Treaty.

(420) Moreover, in line with the considerations in Sections 8.1.1, 8.1.3 and 8.1.4, which apply equally to that measure, the Commission considers that the equity injection constitutes State aid within the meaning of Article 107(1) of the Treaty, as it involves State resources, it is imputable to the State and confers an selective economic advantage on FFHG that distorts or threatens to distort competition and trade between Member States.

#### 8.2. AID NATURE OF THE MEASURES RELATING TO RYANAIR AND OTHER AIRLINES USING THE AIRPORT

##### 8.2.1. GENERAL CONSIDERATIONS REGARDING THE APPLICATION OF THE MEO PRINCIPLE

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

(422) In that analysis, all the relevant incremental revenues and costs associated with the agreement must be taken into account. The various elements (discounts to airport charges, marketing grants, other financial incentives) should not be assessed separately. Indeed, as stated in the *Charleroi* judgment: 'It is (...) necessary, when applying the

private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context [...].’<sup>(99)</sup>.

- (423) The expected incremental revenues must include in particular the revenues from airport charges, taking into account the discounts as well as the additional traffic expected to be generated by the agreement and the non-aeronautical revenues expected to be generated by the traffic. The expected incremental costs must include in particular all the incremental operating and investment costs that would not be incurred in the absence of the agreement as well as the costs of the marketing grants and other financial incentives.
- (424) The Commission also notes in that context that price differentiation (including marketing support and other incentives) is a standard business practice. Such differentiated pricing policies should, however, be commercially justified<sup>(100)</sup>.
- (425) The Court held in the Stardust Marine judgment that, ‘[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State’s conduct, and thus to refrain from any assessment based on a later situation.’<sup>(101)</sup>.
- (426) Hence, in order to be able to apply the MEOT the Commission has to place itself at the time when the respective agreements between FFHG and Ryanair were concluded. Also, the Commission in principle must base its assessment on the information at the disposal of the airport manager when the respective agreements were signed or put in place, as well as any reasonable assumptions that it could entertain at such time.
- (427) Point 63 of the 2014 Aviation Guidelines provides that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test when they incrementally contribute, from an *ex ante* perspective, to the profitability of the airport. While this criterion reflects the logic of the MEO test, it has been spelt out only recently and refers to individual arrangements rather than to the overall business, as is more often the case when applying the MEO test. Therefore, the Commission recognises that it may be difficult for the relevant Member State and for the operators concerned to provide full contemporaneous evidence in respect of arrangements concluded many years ago and will take that into account when applying the criterion at stake in the present case.

#### 8.2.1.1. *The feasibility of comparing Frankfurt Hahn airport to other European airports*

- (428) Under the 2014 Aviation Guidelines, the existence of aid to an airline using a particular airport can, in principle, be excluded if the price charged for the airport services corresponds to the market price, or if it can be demonstrated that from an *ex ante* analysis —, i.e. one founded on information available when the aid was granted and on developments foreseeable at the time — the airport/airline arrangement could be expected to lead to a positive incremental profit contribution for the airport<sup>(102)</sup>.
- (429) In that respect, the Commission considers an *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines<sup>(103)</sup>. The reason is that, at the present time, it is doubtful that an appropriate benchmark can be identified to establish a true market price for services provided by airports. In general, the application of the MEO principle based on an average price on other, similar markets may prove helpful if such a price can be reasonably identified or deduced from other

<sup>(99)</sup> Case T-196/04 Ryanair v Commission [2008] ECR II-3643, paragraph 59.

<sup>(100)</sup> See Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/08 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p. 24).

<sup>(101)</sup> Case C-482/99 France v Commission [2002] ECR I-04397, paragraph 71 ('Stardust Marine judgement').

<sup>(102)</sup> See point 53 of the 2014 Aviation Guidelines.

<sup>(103)</sup> See points 59 and 61 of the 2014 Aviation Guidelines.

market indicators. However, this method is not as relevant in the case of airport services, as the structure of costs and revenues tends to differ greatly from one airport to another. This is because costs and revenues depend on how developed an airport is, the number of airlines which use the airport, its capacity in terms of passenger traffic, the state of the infrastructure and related investments, the regulatory framework which can vary from one Member State to another and any debts or obligations entered into by the airport in the past (<sup>104</sup>).

- (430) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As can be seen in the present case, commercial practices between airports and airlines are not always based exclusively on a published schedule of charges. Rather, these commercial relations are very varied. They include sharing risks with regard to passenger traffic and any related commercial and financial liability, standard incentive schemes and changing the spread of risks over the term of the agreements. Consequently, one transaction cannot really be compared with another based on a turnaround price or price per passenger.
- (431) Finally, assuming that it could be established, based on a valid comparative analysis, that the 'prices' involved in the various transactions that are the subject of that assessment are equivalent to or higher than the 'market prices' established through a comparative sample of transactions, the Commission would, nevertheless, not be able to conclude from this that these transactions comply with the MEO test if it emerges that, when they were concluded, the airport operator had expected them to generate incremental costs higher than the incremental revenues. This is because an MEO will have no incentive to offer goods or services at 'market price' if doing so would result in an incremental loss.
- (432) In such conditions, the Commission considers that, taking into account all the information available to it, there are no grounds for diverging from the approach recommended in the 2014 Aviation Guidelines for applying the MEO principle to relations between airports and airlines, i.e. an *ex ante* analysis of incremental profitability.

#### 8.2.1.2. *Assessment of Incremental Costs and Revenues*

- (433) The Commission considers that price differentiation is a standard business practice, as long as it complies with all relevant competition and sectoral legislation. Nevertheless, such differentiated pricing policies should be commercially justified to satisfy the MEO test.
- (434) In the view of the Commission, arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test when they incrementally contribute, from an *ex ante* perspective, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline (for example, an individual contract or an overall scheme of airport charges), it is capable of covering all costs stemming from the arrangement, over the duration of the arrangement, with a reasonable profit margin on the basis of sound prospects.
- (435) In order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non-aeronautical revenues stemming from the airline's activity must be taken into consideration together with airport charges, net of any rebates, marketing support or incentive scheme. Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport must be taken into account. Such incremental costs may encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs. In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test.
- (436) Moreover, when deciding on whether or not to enter into an airport service agreement and/or a marketing service agreement, a MEO will choose a time frame for its assessment based on the duration of the agreements in question. In other words, it will assess the incremental costs and revenues for the term of application of the agreements.

<sup>(104)</sup> Decision 2011/60/EU.

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

#### 8.2.2. MEASURE 7: 1999 RYANAIR AGREEMENT

(438) Germany submitted that FFHG prepared an *ex ante* incremental profitability assessment of the agreement before concluding any individual agreement with Ryanair. Hence, Germany argued that FFHG acted as a rational investor when concluding the 1999 Ryanair agreement.

(439) The Commission notes that FFHG had indeed drawn up several business plans and calculations around the time it entered into its commercial relation with Ryanair. FFHG's profitability calculations took into account all revenues (aeronautical and non aeronautical) expected to be generated by Ryanair at the airport and all costs induced by the presence of the airline.

#### FFHG's first profitability assessment of the 1999 Ryanair agreement

(440) Table 24 summarises the incremental profitability calculation of the 1999 Ryanair agreement conducted by FFHG for the year 1999, which was conducted by FFHG on the basis of the expected revenue to be generated by the agreement, expected non-aeronautical revenue generated by duty free and sales in shops at the airport and the expected incremental costs related to the agreement.

Table 24

#### Ex ante incremental profitability of the 1999 Ryanair agreement (year 1999)

[...]

Source: FFHG incremental profitability calculation, 4 March 1999.

(441) While the *ex ante*-analysis of 4 March 1999 undertaken by FFHG and submitted by Germany did not include a projection for the whole period covered by the agreement, it was clear that the contract was expected to be profitable from the first year of Ryanair's operation. Even though a MEO would normally draw up a business plan for the whole duration of the agreement, the agreement was expected to generate as from the beginning a positive incremental contribution for the airport. This is in particular because the first year of starting-up airline operations at an untested airport is the most risky period of time. In the present case, the traffic forecasts appear to be based on prudent assumptions and were also confirmed by the actual traffic development at the airport (see Table 1). Hence, even if — what was however very unlikely — the passenger traffic would remain at the same level over the duration of the agreement, the airport could still reasonably expect the agreement would generate a positive contribution to the overall profitability of FFHG.

(442) The incremental revenue taken into account in that incremental profitability calculation includes the aeronautical revenue and other non-aeronautical revenue (such as ticketing revenue) as agreed in the 1999 Ryanair agreement, as well as duty free and shopping revenue. The key value driver of the forecasted revenues was the expected passenger traffic. With regard to the passenger forecast, FFHG expected to handle approximately [...] Ryanair passengers in 1999<sup>(105)</sup>. That traffic forecast was confirmed by the actual passenger development at the airport (see Table 1).

<sup>(105)</sup> This is based on the following calculation: [...] flights in 1999 \* [...] passengers per flight = [...] Ryanair passengers.

(443) The incremental costs taken into account include the costs of groundhandling, carried out by an external ground-handling company, the costs of fuel, the costs for additional staff to be hired (additional 8 employees), as well as the costs for marketing, the call centre and security checks. In addition, also depreciation and costs of financing for investments directly induced by Ryanair were taken into account. Those investments were estimated to amount to approximately DM [...] million and mainly concerned general airport equipment.

(444) Germany submitted that the investment costs for the new passenger terminal amounting to DM [...] million were not induced by Ryanair. In that context, Germany explained that until the new terminal was built, the airport did not dispose of a proper passenger terminal. Therefore, according to Germany, the construction of a new terminal was a pre-condition for the airport's expansion strategy into scheduled passenger traffic. Moreover, also in the context of FFHG's freight expansion strategy several investments were undertaken by the airport that were not induced by a specific airline. As those costs would have been incurred irrespective of the presence of Ryanair at the airport, according to Germany those costs did not need to be taken into account in the incremental profitability calculation.

(445) First, the Commission notes that indeed, according to FFHG's business plan of 16 November 1998 for the year 1999, the construction of a new passenger terminal had already commenced (i.e. before any agreement with Ryanair was negotiated).

(446) Second, the authentic *ex ante* business plans submitted by Germany show that the construction of the terminal and other infrastructure measures was part of the conversion of a former US military base into a full functioning civil aviation airport (with a broader objective to develop the airport as a means to better connect the region) and was not limited to the 1999 Ryanair agreement.

(447) In view of the above considerations, the Commission considers that the *ex ante* calculation conducted by FFHG was based on realistic assumptions and correctly did not take into account the costs for infrastructure. Moreover, even though the *ex ante* profitability calculation did not cover the overall period, it established that as from the first year the 1999 Ryanair agreement would provide a positive profit contribution to the airport.

### FFHG's second profitability assessment of the 1999 Ryanair agreement

(448) A second *ex ante* profitability assessment of the 1999 Ryanair agreement covering the period 1999 — 2003 was conducted in the context of the discussions in FFHG's supervisory board regarding the acquisition of new clients (Ryanair) <sup>(106)</sup>, as summarised in Table 25. The Commission observes that also that assessment is based on an incremental profitability calculation and the principles described in recitals 442 to 444. While that assessment is based on higher passenger forecasts than the previous calculation, also those forecasts were confirmed by the actual passenger development at the airport (see Table 1).

Table 25

### Incremental profitability assessment of the 1999 Ryanair agreement 1999-2003

[...]

Source: Report on airport charges — Frankfurt Hahn airport, 1999 and Commission assessment.

(449) While the *ex ante*-analysis undertaken by FFHG and submitted by Germany did not discount the future payments to the date on which the agreement was concluded, it is clear that the agreement was expected to be profitable. The Commission considers that that assumption was realistic taking into account the prevailing market conditions at the time when the 1999 Ryanair agreement was concluded. The traffic forecasts which are a main

<sup>(106)</sup> Report on airport charges — Frankfurt Hahn airport, 1999.

driver for the aeronautical revenue were based on prudent assumptions, and confirmed by the actual passenger development at the airport. Moreover, it was expected that the induced incremental costs will remain stable in 2000 to 2003, as only a marginal increase in the frequencies offered by Ryanair was expected. Also the forecasts for the non-aeronautical revenue were based on realistic assumptions, as it was expected that each passenger will spend around EUR [...] at the airport.

- (450) The Commission notes that the management of FFHG, taking into account all incremental costs and revenues stemming from the activity of Ryanair at the airport, expected that the 1999 Ryanair agreement would not just cover all incremental costs but over its duration generate a positive contribution to the profitability of Frankfurt Hahn airport with a NPV which amounts to DM [...] million (discount rate = [...] %). Given that expected positive contribution also the overall business of Frankfurt Hahn airport was expected to become more profitable over the duration of the 1999 Ryanair agreement.
- (451) Even though in order to comply with the MEOT, it is sufficient to demonstrate that the expected revenue generated by the agreement with an airport was capable of covering its expected incremental costs, the Commission also conducted a sensitivity analysis including the costs of depreciation of the new passenger terminal in the profitability calculation (see Table 26).

Table 26

**Incremental profitability assessment of the 1999 Ryanair agreement 1999-2003 (incl. annual depreciation for the new passenger terminal of DM [...] <sup>(107)</sup>)**

[...]

*Source:* Report on airport charges — Frankfurt Hahn airport, 1999 and Commission assessment.

- (452) Even after taking into account the full costs of depreciation of the new passenger terminal, the 1999 Ryanair agreement could reasonably have been expected to generate a positive NPV of around DM [...] million (discount rate = [...] %).

**Oxera's profitability assessment of the 1999 Ryanair agreement**

- (453) In addition, also Ryanair submitted a profitability assessment conducted by Oxera on the basis of information available at the time the 1999 Ryanair agreement was concluded, which was provided by the airport and Ryanair. The results of that calculation are summarised in Table 16. Oxera's assessment equally shows that the 1999 Ryanair agreement could be expected to result in a positive NPV for the airport.
- (454) Moreover, based on the information available the Commission considers as convincing Germany's argument that the ability to generate additional traffic through agreements with Ryanair offered FFHG the possibility to attract customers with growth potential, to improve the overall utilisation of the airport and overall to reduce its losses.

**Conclusion**

- (455) Having analysed the agreement and the expectations of FFHG at the time of the conclusion of the 1999 Ryanair agreement, the Commission is satisfied that the agreement contributed to the profitability of Frankfurt Hahn airport, in that the expected incremental revenues were higher than the expected incremental costs. As the contract thus complied with the MEO principle, it did not confer an advantage on Ryanair.

<sup>(107)</sup> Investment costs of the new terminal of DM [...] million/expected economic utilization of the terminal of 20 years = Depreciation of DM [...] p. a.

(456) As one of the cumulative criteria pursuant to Article 107(1) of the Treaty is not fulfilled, the Commission considers that the 1999 Ryanair agreement between Frankfurt Hahn airport and Ryanair does not constitute State aid within the meaning of Article 107(1) of the Treaty.

#### 8.2.3. MEASURE 8: 2001 SCHEDULE OF AIRPORT CHARGES

(457) The Commission notes that the 2001 schedule of airport charges entered into force on 1 October 2001. At that point in time, Ryanair was the main passenger airline operating at Frankfurt Hahn airport, as Volare and Air Polonia started operating at the airport only in 2003 and Wizzair and Iceland Express only in 2005.

(458) The 2001 schedule of airport charges applied to all airlines using Frankfurt Hahn airport and offered variable and fixed marketing support for new airlines, new destinations and increased passenger numbers.

(459) The 2001 schedule of airport charges was introduced to enhance the competitiveness of Frankfurt Hahn airport and to support the growth strategy of the airport at that time.

(460) Against that background, Germany argued that no advantage was granted through the 2001 schedule of airport charges and agreed with the Commission that the results of the MEOT for the 2002 Ryanair agreement, which is based on the 2001 schedule of airport charges and introduced an additional marketing support, can serve as a benchmark (see Section 8.2.4).

(461) The Commission agrees that the 2002 Ryanair agreement can serve as a benchmark for the 2001 schedule of airport charges, in particular, given the fact that the main airline at the airport at the time the 2001 schedule of airport charges was introduced was Ryanair and that the charges agreed in the 2002 Ryanair agreement correspond to charges set in the 2001 schedule.

#### Conclusion

(462) In view of the incremental profitability calculation conducted in the context of the 2002 Ryanair agreement, which was based on the 2001 schedule of airport charges, the Commission concludes that also the introduction of the 2001 schedule of airport charges was in line with the MEO principle, as it incrementally contributed, from an *ex ante* point of view, to the profitability of the airport.

(463) As at least one of the cumulative criteria pursuant to Article 107(1) of the Treaty is not fulfilled, the Commission considers that the 2001 schedule of airport charges does not constitute State aid within the meaning of Article 107(1) of the Treaty.

#### 8.2.4. MEASURE 9: 2002 RYANAIR AGREEMENT

(464) The 1999 Ryanair agreement was replaced by the 2002 Ryanair agreement, which came into effect on 14 February 2002. The 2002 Ryanair agreement was concluded for a period of [...] years (that is until [...]). Ryanair has the option to prolong the agreement on similar terms and conditions until [...].

(465) Before a decision on the 2002 Ryanair agreement was taken, a rough profitability assessment was carried out by FFHG on 21 May 2001 (see Table 27).

Table 27

**Profitability assessment of the 2002 Ryanair agreement**

Turnover revenues per flight (132,30 passengers per flight)	Unit	Amount per flight	Costs/turnover per flight in DM
Ticketing revenue	Flight	[...]	[...]
Passenger charge (less DM 3,52 marketing support) (1)	Pass.	[...]	[...]
Security tax	Pass.	[...]	[...]
Fuel	m <sup>3</sup>	[...]	[...]
Non-aviation turnover (basis year 2000)	Pass.	[...]	[...]
Parking	Pass.	[...]	[...]
<b>Total turnover per flight</b>			[...]
<b>Variable costs per flight</b>			
Wages			
OPS	Hours	[...]	[...]
Ramp handling	Hours	[...]	[...]
Clearance devices (2)			
— overall operating supply costs	Flight	[...]	[...]
— 1 follow me vehicle	Flight	[...]	[...]
— 1 luggage transport vehicle	Flight	[...]	[...]
— 1 sewage vehicle	Flight	[...]	[...]
— 1 water vehicle	Flight	[...]	[...]
— 1 ground power unit	Flight	[...]	[...]
— 1 push back	Flight	[...]	[...]
Passenger and luggage clearance			
— passenger clearance (check-in lump sum)	Flight	[...]	[...]
— luggage clearance (lump sum)	Flight	[...]	[...]
— passenger control	Pass.	[...]	[...]
<b>Total variable costs per flight</b>			[...]
<b>Deckungsbeitrag I per flight</b>			[...]
<b>Deckungsbeitrag I per year (3)</b>			[...]
New route support (4)			[...]

Turnover revenues per flight (132,30 passengers per flight)	Unit	Amount per flight	Costs/turnover per flight in DM
Depreciations of investments induced by Ryanair <sup>(5)</sup>			[...]
Financing costs of the aforementioned investments (interest rate: 5 %)			[...]
<b>Incremental profit contribution per annum</b>			[...]

<sup>(1)</sup> FFHG based its expectations for passenger charge revenue on the assumption that Ryanair would base 3 aircrafts at HHN which is why the passenger fee was reduced by the marketing support of EUR [...] per passenger.

<sup>(2)</sup> Costs correspond to the rent charged for the use of the clearance devices plus operating costs of material ('operating supply costs').

<sup>(3)</sup> On the basis of [...] annual flights.

<sup>(4)</sup> FFHG presumed Ryanair would open 3 new routes, for which it would pay DM [...].

<sup>(5)</sup> The depreciation concerns the extension of the passenger terminal requiring an investment in the amount of EUR [...] (EUR [...] plus EUR [...] for the expected additional demand) plus financing costs. These investment costs have been broken down to Ryanair according to its share in the passenger volume of HHN amounting to [...] %. Depreciation period: [...] years. Even though the original investment costs of the Terminal were considered not to be induced by Ryanair, FFHG's calculation took into account the expected additional investment costs for the Terminal.

Source: PWC Report 2006, p. 34 and FFHG's profitability assessment of the 2002 Ryanair agreement 21 May 2001.

(466) While FFHG's profitability assessment submitted by Germany did not include a projection for the whole period covered by the 2002 Ryanair agreement, it was clear that the 2002 Ryanair agreement was expected to be profitable from the first year of Ryanair's operation. Even though a MEO would normally conduct a calculation for the overall duration of an agreement, in the present case, due to the fact that the agreement was expected to generate positive contribution as from the first year — even if the number of passengers and the expected revenue would remain stable (while in fact they were expected to increase) — FFHG could reasonably expect that the agreement would provide an overall positive contribution to its profitability (see recital 471).

(467) The incremental revenue taken into account in that profitability assessment includes aeronautical revenue and other non-aeronautical revenue as set out in the 2002 Ryanair agreement, as well as duty free and shopping revenue. The key value driver of the forecasted revenues was the expected passenger traffic. With regard to the latter, FFHG expected to handle approximately 392 137 Ryanair passengers in 2002 <sup>(108)</sup>. That traffic forecast was even exceeded by the actual passenger development at the airport (see Table 1).

(468) Even if, as stated by Lufthansa, the New Route Support would have been underestimated in the profitability assessment FFHG, the higher marketing support would have been balanced by the higher revenue from aeronautical and non aeronautical revenue due to a larger volume of passengers.

(469) The incremental costs taken into account include costs of groundhandling, carried out by an external ground-handling company, costs for additional staff to be hired, costs for marketing and new route development and security checks. In addition, also depreciation and costs of financing for investments directly induced by Ryanair were taken into account. Those investments were estimated to amount to approximately DM [...] million and concern the extension of the passenger terminal. Even though the Terminal was considered not to be induced by Ryanair, FFHG's calculation took into account the expected additional investment costs for the Terminal.

(470) While FFHG's profitability assessment as submitted by Germany did not discount future payments to the date on which the 2002 Ryanair agreement was concluded, it is clear that the agreement was expected to be profitable. The Commission notes that the assumption underlying the *ex ante* calculation, taking into account the prevailing market conditions at the time when that calculation was conducted, were reasonable. In particular, the expected passenger volume was even exceeded by the actual passenger development at the airport (see Table 1) and resulted in higher aeronautical and non aeronautical revenues.

<sup>(108)</sup> This was based on the following calculation: [...] flights in 2002 \* [...] passengers per flight = 392 137 Ryanair passengers. This assumption was based on approximately [...] daily flight operated by Ryanair.

(471) The Commission notes that the management of FFHG, taking into account all incremental costs and revenues stemming from the activity of Ryanair at the airport, expected that the 2002 Ryanair agreement would generate over its duration a positive contribution to the profitability of Frankfurt Hahn airport with a NPV amounting to at least DM [...] million (discount rate = [...] %) (109). The Commission notes that, given the actual passenger development at Frankfurt Hahn airport, the NPV calculated on the basis of the 2002 Ryanair agreement appears to underestimate the actual incremental profitability of that agreement.

(472) Moreover, given that the 2002 Ryanair agreement was expected (not only to cover all incremental costs but) to positively contribute to FFHG's profitability, also the overall business of Frankfurt Hahn airport was expected to become more profitable during the duration of the 2002 Ryanair agreement.

#### **Oxera's profitability assessment of the 2002 Ryanair agreement**

(473) In addition, Ryanair also submitted a profitability assessment conducted by Oxera on the basis of information available at the time the 2002 Ryanair agreement was concluded (which was provided by the airport and Ryanair). The results of that calculation are summarised in Table 17. On the basis of Oxera's MEIT of the 2002 Ryanair agreement, the Commission conducted a sensitivity analysis with regard to the non-aeronautical revenue taken into account in the assessment.

(474) Even if the non-aeronautical revenue had been reduced by 20 % on average — in order to carry out a sensitivity assessment of the assumed non-aeronautical revenues — the NPV of the 2002 Ryanair agreement would have amounted to EUR [...] million, while leaving all other assumptions constant (see Table 28).

*Table 28*

#### **Adjusted Oxera's profitability assessment of the 2002 Ryanair agreement (reduction of the non-aeronautical revenue by 20 %)**

[...]

#### **Conclusion**

(475) Having analysed Oxera's profitability assessment of the 2002 Ryanair agreement and the expectations of FFHG at the time of the conclusion of that agreement, the Commission is satisfied that the agreement could reasonably be considered as contributing to the profitability of Frankfurt Hahn airport (taking into account the prevailing market conditions at that time), in that the expected incremental revenues were higher than the expected incremental costs. As the 2002 Ryanair agreement thus complied with the MEO principle, it did not confer an advantage to Ryanair.

(476) As one of the cumulative criteria pursuant to Article 107(1) of the Treaty is not fulfilled, the Commission considers that the 2002 Ryanair agreement does not constitute State aid within the meaning of Article 107(1) TFEU.

#### **8.2.5. MEASURE 10: 2005 RYANAIR AGREEMENT**

(477) On 4 November 2005, an amendment to the 2002 Ryanair agreement was agreed, the 'Agreement Ryanair/ Flughafen Frankfurt-Hahn GmbH Delivery of aircraft 6 to 18 — year 2005 to year 2012'. On 18 November 2005, the conclusion of the 2005 Ryanair agreement was approved by the supervisory board of FFHG. The 2005 Ryanair agreement is valid until [...].

<sup>(109)</sup> Profitability assessment based on the 2002 profit contribution of the 2002 Ryanair agreement:  
[...]

(478) Germany also submitted that the 2005 Ryanair agreement is in line with the MEO principle. To support that, Germany provided a MEOT conducted by PWC. The MEOT of PWC compares two scenarios in order to determine the incremental impact of the 2005 Ryanair agreement: (i) an *ex ante* business plan of FFHG with Ryanair's engagement and (ii) an alternative scenario with an *ex ante* business plan of FFHG without Ryanair's engagement. The incremental cash flow is calculated as the difference between the two scenarios (as summarised in Table 29).

Table 29

**MEOT of the 2005 Ryanair agreement**

[...]

Source: PWC Report 2006, page 88 and 89.

(479) The Commission considers that the incremental cash flow identified as the difference between the two scenarios takes into account all incremental costs and revenues induced by the presence of Ryanair at the airport. In addition, that profitability calculation takes into account also the investments induced by the presence of Ryanair at the airport. According to the supplementary MEOT conducted by PWC following the 2008 opening decision, a total amount of EUR [...] million of investments can be attributed to Ryanair, whereas the remaining EUR [...] million concern the development of the airport's freight infrastructure (namely, EUR [...] million in total).

(480) The Commission notes that the management of FFHG, taking into account all incremental costs and revenues stemming from the activity of Ryanair at the airport, expected that the 2005 Ryanair agreement would generate over its duration a positive contribution to the profitability of Frankfurt Hahn airport with a NPV amounting to at least EUR [...] million (discount rate = [...] %) (<sup>(110)</sup>).

(481) In that context, the Commission notes that taking into account the prevailing market conditions and the significant growth of low cost carriers since 2000, the assumptions underpinning the *ex ante* business plan appear to be realistic. At the same time, given the long planning horizon of the actual passenger development at Frankfurt Hahn airport the NPV calculated on the basis a [...] % discount rate might not appropriately take into account the risks potentially affecting the underlying assumptions.

(482) Hence, the Commission has conducted a sensitivity assessment of the discount rate (see Table 30). When applying a [...] % discount rate the NPV still amounts to EUR [...] million. Moreover, even if one were to consider that a [...] % discount rate would still not allow to remedy any uncertainty regarding long-term passenger forecasts, it needs to be taken into account that the agreement was expected to generate positive contribution to the profitability of FFHG as from the first year onwards and that there appeared to be no compelling reason, given the overall market development, for FFHG to expect a decrease in subsequent years.

Table 30

**MEOT of the 2005 Ryanair agreement — Sensitivity assessment of the discount rate**

[...]

<sup>(110)</sup> The Commission has learned that the Land Rhineland-Palatinate also concluded marketing agreements with Ryanair. These agreements, however, were not included in the measures in respect of which the Commission initiated the formal investigation procedure in 2008 and are therefore not included in the analysis in this Decision, which is without prejudice to any future action that the Commission might wish to take with respect to these agreements.

## Conclusion

(483) In view of the conducted incremental profitability analysis, the Commission concludes that the 2005 Ryanair agreement was in line with the MEO principle, as it incrementally contributed, from an *ex ante* perspective and taking into account the prevailing market conditions, to the profitability of the airport manager. Thus, the Commission concludes that FFHG's decision to enter into the 2005 Ryanair agreement did not confer any economic advantage to the airline that it would not have obtained under normal market conditions.

(484) As one of the cumulative criteria pursuant to Article 107(1) of the Treaty is not fulfilled, the Commission considers that the 2005 Ryanair agreement between Frankfurt Hahn airport and Ryanair does not constitute State aid within the meaning of Article 107(1) of the Treaty (111).

### 8.2.6. MEASURE 11: 2006 SCHEDULE OF AIRPORT CHARGES

(485) The 2006 schedule of airport charges entered into force on 1 June 2006 and replaced the 2001 schedule of airport charges. It follows however the same basic principles as the 2001 schedule of airport charges. The changes compared to the 2001 schedule concern the take-off and landing charges, the passenger fee, and marketing support for the starting-up of a new route and the generated traffic volume depending on the number of total passengers (departing and arriving passengers transported by the airline).

(486) Germany argued that no advantage was conferred on Ryanair through the 2006 schedule of airport charges. Firstly, Germany justified the different passenger charges, on the ground that those were created in order to give an incentive to other low cost carriers while covering the operational costs of the airport. A reduction of charges according to the volume of passengers, Germany argued, is a common behaviour at national and international airports. Since the threshold for acquiring rebates was very low, namely 100 000 passengers per year, those rebates were also open to smaller airlines.

(487) To support that, Germany submitted an *ex ante* profitability assessment comparing a scenario with the introduction of the 2006 schedule of airport charges with a scenario without the introduction of that schedule, as summarised in Table 31. The Commission considers, that taking into account the prevailing market conditions and the actual operating results of FFHG at the time, the profitability calculation was based on realistic assumptions.

Table 31

#### Profitability assessment of the 2006 schedule of airport charges

In 1 000 EUR	2006	2007	2008	2009	2010	2011
<b>EBITDA with the 2006 schedule of airport charges</b>	[...]	[...]	[...]	[...]	[...]	[...]
<b>EBITDA without the 2006 schedule of airport charges</b>	[...]	[...]	[...]	[...]	[...]	[...]
<b>Incremental impact of the 2006 schedule of airport charges</b>	[...]	[...]	[...]	[...]	[...]	[...]

Source: PWC Report, 2006, page 57.

(111) The Commission has learned that the Land Rhineland-Palatinate concluded marketing agreements with Ryanair. Those agreements, however, were not included in the measures in respect of which the Commission initiated the formal investigation procedure in 2008 and are therefore not included in the analysis in this Decision, which is without prejudice to any future action that the Commission might wish to take with respect to these agreements.

(488) As stated in Section 8.2.1, arrangements concluded between airlines and an airport can be deemed to satisfy the MEOT when they incrementally contribute, from an *ex ante* point of view, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline (for example, an individual contract or an overall scheme of airport charges), it is capable of covering all costs stemming from the arrangement, over the duration of the arrangement, with a reasonable profit margin on the basis of sound medium-term prospects.

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

(490) As regards the profitability assessment carried out by FFHG prior the introduction of the 2006 schedule of airport charges, the Commission considers that all incremental costs and revenues induced by the introduction of this schedule were taken into consideration and were based on reasonable assumptions taking into account the prevailing market conditions and the actual results of FFHG. The 2006 schedule of airport charges was not limited in time, hence it was sufficient for the airport operator to calculate the overall profitability of the 2006 schedule of airport charges for several consecutive years. Moreover, FFHG could any time modify the schedule of airport charges, in the even it was proven that the revenue generated was insufficient to cover the incremental costs induced by the airlines using that schedule. In addition, as Ryanair has concluded an individual agreement, the schedule did not apply to the main airline (with a passenger share of around 90 %), but was applied to the remaining airlines with a passenger share of around 10 %. Hence, the incremental costs of the 2006 schedule of airport charges were very limited and the FFHG expected to be able to better use its resources.

(491) While the *ex ante*-analysis undertaken by FFHG and submitted by Germany did not discount the future payments to the date on which the 2006 schedule of airport charges was put into effect, it is clear that the schedule was expected to be profitable from the first year onwards.

(492) Moreover, given the high fixed costs and very limited incremental costs relating to the provision of services under the 2006 schedule of airport charges, those forecasts were not sensitive to the assumptions regarding the overall traffic development.

## Conclusion

(493) In view of the conducted incremental profitability calculation, the Commission concludes that the introduction of 2006 schedule of airport charges was in line with the MEO principle, as it incrementally contributed, from an *ex ante* point of view, to the profitability of the airport. In particular, all costs of the airport stemming from the introduction of the 2006 schedule of airport charges were covered by the revenues (both aeronautical and non-aeronautical activities) stemming from the introduction of that schedule, with a reasonable profit margin. Moreover, the costs directly attributable to individual agreements with specific airlines were reasonably expected to be exceeded by the revenues attributable to the presence of those airlines (see Section 8.2.5). Hence, the 2006 schedule of airport charges could reasonably be expected (taking into account the prevailing market conditions at the time of its introduction) to contribute to the overall profitability of the airport in the long term.

(494) Thus, the Commission concludes that the 2006 schedule of airport charges does not confer an economic advantage on the airlines that they would not have obtained under normal market conditions. Moreover, it was open to all potential users of the airport on transparent and non-discriminatory terms. Therefore, the 2006 schedule of airport charges does not constitute State aid within the meaning of Article 107(1) of the Treaty.

## 9. LAWFULNESS OF THE AID

- (495) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and must not put the proposed measures into effect until the notification procedure has resulted in a final decision.
- (496) As the measures number 1, 2, 3, 4, 5, 6 and 12 have already been put at the disposal of FFHG or irrevocably granted with an entitlement for FFHG to receive the respective funds, the Commission considers that Germany has not respected the prohibition of Article 108(3) of the Treaty <sup>(112)</sup>.

## 10. LEGAL ASSESSMENT — COMPATIBILITY OF AID

### 10.1. THE APPLICABILITY OF THE 2014 AND 2005 AVIATION GUIDELINES

- (497) Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) of the Treaty that State aid is not compatible with the internal market. In particular, Article 107(3)(c) of the Treaty stipulates that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market.
- (498) In that regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the Treaty.
- (499) According to the 2014 Aviation Guidelines, the Commission considers that the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid <sup>(113)</sup> applies to unlawful investment aid to airports. In that respect, if the unlawful investment aid was granted before 4 April 2014, the Commission will apply the compatibility rules in force at the time when the unlawful investment aid was granted. Accordingly, the Commission will apply the principles set out in the 2005 Aviation Guidelines in the case of unlawful investment aid to airports granted before 4 April 2014 <sup>(114)</sup>.
- (500) According to the 2014 Aviation Guidelines, the Commission also considers that the provisions of the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid should not apply to cases of illegal operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid to airports (pending notifications and unlawful non-notified aid) even if the aid was granted before 4 April 2014 and the beginning of the transitional period <sup>(115)</sup>.
- (501) The Commission has already concluded in recital 496 that the measures under assessment constitute unlawful State aid granted before 4 April 2014.

### 10.2. DISTINCTION BETWEEN INVESTMENT AND OPERATING AID

- (502) In view of the provisions of the 2014 Aviation Guidelines referred to in recitals 499 and 500, the Commission has to determine whether the measures in question constitute unlawful investment or operating aid.
- (503) According to point 25(18) of the 2014 Aviation Guidelines, investment aid is defined as 'aid to finance fixed capital assets; specifically, to cover the "capital costs funding gap"'. Moreover, according to that provision investment aid can relate both to an upfront payment (that is to say cover upfront investment costs) and to aid paid out in the form of periodic instalments (to cover capital costs, in terms of annual depreciation and costs of financing).

<sup>(112)</sup> Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127.

<sup>(113)</sup> OJ C 119, 22.5.2002, p. 22.

<sup>(114)</sup> Point 173 of the 2014 Aviation Guidelines.

<sup>(115)</sup> Point 172 of the 2014 Aviation Guidelines.

(504) Operating aid, on the other hand, means aid covering all or part of the operating costs of an airport, defined as 'the underlying costs of the provision of airport services, including categories such as costs of personnel, contracted services, communications, waste, energy, maintenance, rent, administration, etc., but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit' (116).

(505) In the light of those definitions, it can be considered that the capital increases and direct grants which were linked to investment projects constitute investment aid in favour of FFHG.

(506) In contrast, the part of the annual loss transfers used to cover FFHG's annual operating losses (117) of FFHG, net of the costs included in the EBITDA that fall within the public policy remit as established in Section 8.1.4.1 constitute operating aid in favour of FFHG.

(507) Finally, the part of the annual loss transfers covering losses of FFHG that were not already included in the EBITDA (that is the annual depreciation of assets, costs of financing, etc.), minus costs falling within the public policy remit as established in Section 8.1.4.1, constitute investment aid.

(508) As explained earlier, it all cases only support granted after the Aéroports de Paris judgment on 12 December 2000 will be considered.

#### 10.3. COMPATIBILITY OF THE INVESTMENT AID PURSUANT TO THE 2005 AVIATION GUIDELINES

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

- (a) the construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.);
- (b) the infrastructure is necessary and proportional to the objective which has been set;
- (c) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;
- (d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner; and
- (e) the development of trade is not affected to an extent contrary to the Union interest.

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

(511) Germany submitted that the investment aid in favour of FFHG complies with all the compatibility criteria contained in the 2005 Aviation Guidelines.

##### (a) *The aid contributes to a clearly defined objective of common interest*

(512) The investment aid in favour of FFHG aimed at financing the further conversion of the former US military base into a civilian airport and substantially developing the infrastructure of the airport. Those measures provided a significant contribution to the regional development and connectivity of the Hunsrück region, and the creation of new jobs in an area economically hit by the closure of the US military base as well as the decongestion of Frankfurt Main airport.

<sup>(116)</sup> Point 25(22) of the 2014 Aviation Guidelines.

<sup>(117)</sup> Expressed as *Earnings Before Interest, Taxes, Depreciation and Amortisation* (EBITDA).

(513) The Hunsrück region, as pointed out by Germany, is surrounded by a number of areas (such as Landkreis Birkenfeld), which were marked as regions in need of support in the framework of the 'Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur'. Indeed, in the period under consideration, Landkreis Birkenfeld was at least partly considered to be a region with a Gross Domestic Product (GDP) below the Union average (<sup>118</sup>).

(514) The Commission considers that the development of Frankfurt Hahn airport also contributed significantly to the creation of new jobs in the Hunsrück region. As shown by Germany, taking into account all parts of the airport activities, Frankfurt Hahn airport created 3 063 jobs in the Hunsrück region in 2012 out of which 74 % were full-time positions and 90 % of those employees also live in that region.

(515) Moreover, the development of Frankfurt Hahn airport had also positive indirect, induced and catalysing effects on the creation of jobs in the region as well as regional development in general through an increasing number of economic and touristic activities. According to the information provided by Germany, Frankfurt Hahn airport contributes significantly to the development of incoming (~ 33 % of passengers corresponding to approximately 1 million passengers in 2005) and outgoing tourism (~ 67 % of passengers) in the Land Rhineland-Palatinate. As pointed out by Germany, 88 % of the incoming passengers stay at least one night in the region and generated approximately 5,7 million overnight stays in 2005. Since 88 % of incoming tourists from Frankfurt Hahn stay at least one night and more than 80 % of those even stay two to 10 days, they generate a total turnover of about EUR 133,7 million per year. Moreover, incoming tourism generated around 11 000 jobs in Rhineland-Palatinate.

(516) The aided investments at issue also helped to improve the accessibility of the area. Nevertheless, the duplication of unprofitable airports (or the creation of additional unused capacity) does not contribute to an objective of common interest. In this case, the Commission takes the view that the investment aid does not lead to such a duplication which would diminish the medium-term prospects for the use of existing infrastructure at other, neighbouring airports. Indeed, there are no other airports within 100 kilometres or 60 minutes travelling time from Frankfurt Hahn airport. The closest airports to Frankfurt Hahn are Frankfurt Main airport, which is located at 115 kilometres distance or 1 hour 15 minutes traveling time by car, and Luxembourg airport, which is located 1 hour and 30 minutes travelling time (111 kilometres) away.

(517) Frankfurt Main airport is an international hub airport with a wide variety of destinations and is predominantly served by network carriers offering connecting traffic, whereas Frankfurt Hahn airport serves low-cost point-to-point flights. Traffic at Frankfurt Main airport has continuously increased since 2000, from 49,4 million passengers in 2000 to approximately 58 million in 2012. However, during that period growth has been affected by congestion problems and capacity constraints. As pointed out by Germany, the capacity limits of Frankfurt Main airport were constantly exceeded. Therefore, according to Germany, especially in the light of its 24 hour operating licence, Frankfurt Hahn airport played an important role in providing additional capacity in order to relieve the congestion at Frankfurt Main airport. In fact, until 2009 Fraport was the majority shareholder of FFHG, the operator of Frankfurt Hahn airport (2,7 million passengers in 2013, around 4 million passengers in 2007 at its peak) and the operator of Frankfurt-Main airport (58 million passengers and 2,1 million freight), and was as such pursuing a diversification strategy.

(518) Luxembourg airport, which is the nearest airport to Frankfurt Hahn but still around 111 kilometres or 1 hour 30 minutes traveling time by car away, had around 1,7 million passengers in 2008 and experienced a rapid growth to 2,2 million in 2013. Even though Luxembourg airport is slightly smaller than Frankfurt Hahn airport in terms of passenger traffic, its freight activity is substantially larger with 674 000 tonnes in 2013. It offers a variety of scheduled flights to European capitals and charter flights to leisure destinations. That selection of destinations to a large extent meets the needs of the employees of the financial and international institutions located in Luxembourg.

(519) Saarbrücken airport is located around 128 kilometres away from Frankfurt Hahn airport which amounts to over 2 hours traveling time by car. In addition, Frankfurt Hahn is served mainly by low-cost carriers (Ryanair) and freight constitutes a rather important element in its business model whereas Saarbrücken airport offers mainly scheduled flights to national destinations and has only limited air freight transport.

<sup>(118)</sup> Commission Decision of 8 November 2006 in State aid case N459/2006 — Germany — Guidelines on National Regional aid for 2007-2013 — National regional State aid map: Germany (OJ C 295, 5.12.2006, p. 6).

(520) With regard to Zweibrücken airport, Germany emphasised that the distance of 127 km to Frankfurt Hahn airport translates into a travelling time of 1 hour and 27 minutes by car or around 4 hours by train. Moreover, Germany submitted that, looking at passenger and air freight traffic between 2005 and 2012, no relationship of substitution between the airports can be deduced.

(521) The Commission observes that there is a certain overlap in the activities of both Frankfurt Hahn and Zweibrücken airports, as Zweibrücken airport also engaged in handling air freight and the destinations served by Zweibrücken airport are predominantly for charter traffic. In that regard, the Commission notes that freight is usually more mobile than passenger transport <sup>(119)</sup>. In general, a catchment area for freight airports is considered to have a radius of at least around 200 kilometres and 2 hours travelling time. Comments from the industry suggest that up to a half-day of trucking time (that is to say, up to 12 hours driving time by trucks) would in general be acceptable for freight forwarders to transport their goods <sup>(120)</sup>. Moreover, charter traffic is also, in general, less time sensitive and may accept traveling times of up to 2 hours by car.

(522) At the same time it should be noted that, before Zweibrücken entered the market in 2006, Frankfurt Hahn airport was already a well-established airport with more than 3 million passengers and channelling 123 000 tonnes of freight. In view of the historical development of the two airports, their geographical location and the free capacity available at Frankfurt Hahn airport at the time when Zweibrücken airport entered the commercial aviation market in 2006, the Commission concludes that it is rather the opening of Zweibrücken airport which constituted an unnecessary duplication of infrastructure.

(523) Therefore, the Commission concludes that the investments into Frankfurt Hahn airport do not constitute a duplication of existing non-profitable infrastructure. On the contrary, Frankfurt Hahn airport has played an important role in decongesting Frankfurt Main airport without limiting the latter's plans to expand. Without the investments into Frankfurt Hahn airport there was in fact a risk that the region would be underserved in terms of its transport needs.

(524) In the light of the considerations in recitals 512 to 523, the Commission therefore concludes that the investment aid directed at the construction and operation of infrastructure at Frankfurt Hahn airport meets a clearly defined objective of common interest, namely regional economic development, creation of jobs and improvement of the accessibility of the region.

**(b) *The infrastructure is necessary and proportionate to the objective***

(525) According to Germany, the investments were undertaken according to the needs (and were thus proportionate) and the constructed infrastructure was necessary for the airport in order to serve the connectivity and the development of the region and to decongest Frankfurt Main airport.

(526) Based on the information provided by Germany, the Commission agrees that the financed investments were necessary and proportionate to the objective of common interest. Indeed, without those investments the conversion of the former U.S. base into a fully functioning civil aviation airport could not have been completed. The construction of passenger and freight facilities, aprons and modernisation of taxiways had to be carried out in order to further develop civil flight operations. Hence, the constructed infrastructure was necessary for the airport in order to serve the connectivity and the development of the region.

(527) Also, the infrastructure project was undertaken only to the extent it was necessary to attain the goals set: while the infrastructure was built for a maximum passenger traffic of around 4 to 5 million passengers and 500 000 tonnes of freight, the traffic statistics displayed in Tables 1 and 2 show that the passenger traffic steadily increased until 2007 to reach a record of 4 million passengers (following by a decline to 2,7 million in 2013 for the reasons set out in recital 532) and that the freight volume increased to more than 500 000 tonnes of freight in 2011. This means that the expected traffic demand largely corresponded to the actual demand and that the investments were not disproportionately large.

<sup>(119)</sup> For example, Leipzig/Halle airport was in competition with Vatry airport (France) for the establishment of the DHL European hub. See *Leipzig/Halle judgment*, paragraph 93.

<sup>(120)</sup> Response of Liège airport to the public consultation on the 2014 Aviation Guidelines.

(528) While it is important to avoid that the investment constitutes a duplication of an existing unprofitable infrastructure, that is not the case here. As already explained in recitals 516 to 523, there are no other airports within 100 kilometres distance and 60 minutes travelling time, and even if a wider catchment area was to be considered there are no duplications effects. The closest airport is Frankfurt Main airport, which Frankfurt Hahn airport was intended to decongest.

(529) In the light of those considerations, the Commission considers that this compatibility condition is met.

***(c) The infrastructure has satisfactory medium-term prospects for use***

(530) Germany submitted that before the decision to further develop the airport infrastructure was taken, traffic forecast studies were conducted by external experts in order to identify the traffic potential for Frankfurt Hahn airport.

(531) The information submitted shows that at that time the external experts forecasted significant growth from 0,3 million passengers in 2000 to up to 3,8 million passengers by 2010 (see Figures 2, 3 and 4). With regard to freight development, the experts projected a development from 151 000 tonnes in 2001 to up to 386 000 tonnes in 2010 (see Figure 5), with the growth in the freight business between 2006 and 2010 coming from the freight flights diverted from Frankfurt Main airport due to curfew. However, those projections could only be fulfilled if the investments were undertaken to the planned extent.

(532) The Commission notes that those traffic forecasts (see recital 531) were confirmed by the actual traffic development at Frankfurt Hahn airport (see Tables 1 and 2). In 2007 Frankfurt Hahn airport served around 4 million passengers. Following a period of significant growth, air traffic in Germany and the Union in recent years has been negatively affected by the economic and financial crisis in 2008/09, which resulted in a decrease in passenger air transport in Germany in 2009. The passenger development at Frankfurt Hahn airport was further impacted by the introduction of an air passenger tax in Germany in 2011. Currently Frankfurt Hahn airport serves around 2,7 million passengers p.a. With regard to freight, Frankfurt Hahn airport handled 565 000 tonnes of freight in 2011. Due to the bankruptcy of one of its clients, the airport processed only 447 000 tonnes in 2013.

(533) In the light of those considerations, it can therefore be concluded that Frankfurt Hahn airport is already using most of its capacity and that the medium-term prospects for the use of the capacity were satisfactory.

***(d) Access to the infrastructure in an equal and non-discriminatory manner***

(534) All potential users of the infrastructure have access to the airport on equal and non-discriminatory terms. Indeed, the schedule of airport charges applicable at Frankfurt Hahn airport is publicly available and open to all potential and current users of the airport in a transparent and non-discriminatory manner. Any differences in airport charges actually paid for the use of the infrastructure were based on commercially justified differentiation <sup>(121)</sup>.

(535) Hence, the Commission considers that this condition is satisfied.

***(e) Trade is not affected contrary to common interest***

(536) According to point 39 of the 2005 Aviation Guidelines the category of an airport can provide an indication of the extent to which airports are competing with one another and therefore also the extent to which public funding granted to an airport may distort competition.

<sup>(121)</sup> Commission decision of 1 October 2014 in State aid case SA.21211 — Germany — Frankfurt Hahn airport and Ryanair, not yet published in the Official Journal.

(537) Within the standard catchment area of Frankfurt Hahn airport (1 hour travelling time by car or 100 kilometres distance) there are no other commercially exploited airports. Even if one were to extend the catchment area, the Commission considers that the aid does not create undue negative effects on competition and trade between the Member States.

(538) As far as Frankfurt Main airport (the closest airport at around 115 kilometres distance and 1 hour 15 minutes travelling time) is concerned, the investments at Frankfurt Hahn airport did not result in negative substitution effects. In fact, before getting involved in Frankfurt Hahn airport, Fraport was already the operator of Frankfurt Main airport, but was nevertheless investing into Frankfurt Hahn airport with a view to de-congesting Frankfurt Main airport as a future capacity overload was foreseeable for that hub. In particular, the ban on night flights at Frankfurt Main airport was one of the main factors to be taken into consideration as Frankfurt Hahn airport had a 24 hour operating license.

(539) Even though Frankfurt Hahn experienced significant growth in the period from 2000 until 2007 (Tables 1 and 2) shows that in comparison to Frankfurt Main the traffic share remained very limited. From 2000 to 2003 Frankfurt Main airport experienced steady passenger growth from 48 million in 2000 to 54,2 million in 2007. Due to the economic crisis, Frankfurt Main experienced a slight decrease to 50,9 million in 2009, followed by a rapid increase to 58 million. With regard to the freight activities, Frankfurt Main airport experienced steady growth from 1,6 million to 2,2 million tonnes in 2013.

(540) As for other airports, the Commission has already explained that the investments at Frankfurt Hahn airport had no significant impact on competition and trade between the Member States <sup>(122)</sup>. That also applies to Zweibrücken airport, given that it is rather the latter that constitutes an unnecessary duplication of infrastructure (and would thus be responsible for any distortive effect on competition).

(541) In addition, contrary to Frankfurt Main and Luxembourg airports Frankfurt Hahn airport is not served by a train connection. Overall, no substitution effect on rail transport can be expected.

(542) In view of the considerations in recitals 536 to 541, the Commission considers that any undue negative effects on competition and trade between Member States are limited to the minimum.

**(f) *Incentive effect, necessity and proportionality***

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

(544) According to the information submitted by Germany, without the aid the investment could not have been realised. Germany submitted that the aid was necessary as it compensated only the costs of financing and a lower amount would have led to lower levels of investment.

(545) Indeed, according to the financial results summarised in Tables 3 and 4 the airport is still loss-making and not able to finance its investment costs. Therefore, it can be concluded that the aid was necessary to make investments in order to decongest the airport infrastructure and to meet the current requirements for modern airport infrastructure. Without the aid, Frankfurt Hahn airport would not have been able to meet the expected demand of airlines, passengers and freight forwarders and the level of the economic activity of the airport would have been reduced.

<sup>(122)</sup> As regards Frankfurt Main and Luxembourg airport, the Commission further notes that the business travel segment occupies a significant market share at these airports, while it only represents a comparatively limited share at Frankfurt Hahn airport.

(546) It should also be noted that the public support was granted in a period when FFHG realised very significant investments into the infrastructure (more than EUR 220 million in 2001-2012). It follows that the investment aid covers only a fraction of the overall investment costs.

(547) The Commission therefore considers that the aid measure at stake had an incentive effect, that the amount of aid was limited to the minimum necessary for the aided activity to take place, and was thus proportionate.

### **Conclusion**

(548) On the basis of the above, the Commission concludes that the investment aid granted to Frankfurt Hahn airport is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty as it complies with the compatibility conditions laid down in point 61 of the 2005 Aviation Guidelines.

#### **10.4. COMPATIBILITY OF OPERATING AID PURSUANT TO THE 2014 AVIATION GUIDELINES**

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

(550) According to point 137 of the 2014 Aviation Guidelines, unlawful operating aid granted before the date of the publication of the 2014 Aviation Guidelines may be declared compatible with the internal market to the full extent of uncovered operating costs provided that the following cumulative conditions are met:

- (a) *contribution to a well-defined objective of common interest*: that condition is fulfilled, *inter alia*, if the aid increases the mobility of citizens of the Union and connectivity of the regions or facilitates regional development (<sup>123</sup>);
- (b) *need for State intervention*: the aid must be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver (<sup>124</sup>);
- (c) *existence of incentive effect*: that condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced (<sup>125</sup>);
- (d) *proportionality of the aid amount (aid limited to the minimum necessary)*: in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place (<sup>126</sup>);
- (e) *avoidance of undue negative effects on competition and trade* (<sup>127</sup>).

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

(551) According to Section 5.1.2(a) of the 2014 Aviation Guidelines, in order to give airports time to adjust to new market realities and to avoid any disruptions in the air traffic and connectivity of the regions, operating aid to airports will be considered to contribute to the achievement of an objective of common interest, if it: (i) increases the mobility of Union citizens and connectivity of regions by establishing access points for intra-Union flights; (ii) combats air traffic congestion at major Union hub airports; or (iii) facilitates regional development.

<sup>(123)</sup> Points 137, 113 and 114 of the 2014 Aviation Guidelines.

<sup>(124)</sup> Points 137 and 116 of the 2014 Aviation Guidelines.

<sup>(125)</sup> Points 137 and 124 of the 2014 Aviation Guidelines.

<sup>(126)</sup> Points 137 and 125 of the 2014 Aviation Guidelines.

<sup>(127)</sup> Points 137 and 131 of the 2014 Aviation Guidelines.

(552) In the light of the considerations in recitals 512 to 519, the Commission considers that the continued operation of Frankfurt-Hahn airport increased the mobility of Union citizens and connectivity of regions by establishing an access point for intra-Union flights in the Hunsrück region. In addition, the continued operation of the airport facilitated the regional development of the Hunsrück region and the creation of new jobs. Moreover, the operation and development of Frankfurt-Hahn airport also served to decongest Frankfurt Main airport.

(553) The Commission therefore concludes that the measure at stake meets a clearly defined objective of common interest.

**(b) *Need for State intervention***

(554) According to Section 5.1.2(b) of the 2014 Aviation Guidelines, in order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. In that respect, any State aid to an airport must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself.

(555) The Commission notes that Frankfurt Hahn airport is a regional airport with approximately 2,7 million passengers p.a. which experience in the period under investigation a significant growth in passengers (see Table 1). It has high fixed operating costs and under present market conditions it is not able to cover its own operating costs. Therefore, there is a need for State intervention (see point 89 of the 2014 Aviation Guidelines).

**(c) *Appropriateness of the aid measures***

(556) According to Section 5.1.2(c) of the 2014 Aviation Guidelines, any aid measure to an airport must be an appropriate policy instrument to address the objective of common interest. The Member State must, therefore, demonstrate that no other less distortive policy instruments or aid instruments could have allowed the same objective to be reached.

(557) According to Germany, the aid measures at stake are appropriate to address the intended objective of common interest that could not have been achieved by another less distortive policy instrument.

(558) In this case the aid amount corresponded to the uncovered operating losses (see Table 4) actually incurred and was limited to the minimum necessary as it was granted only as to the extent of actually incurred operating losses. No other policy measure would allow the airport to continue its operation. Hence, the compensation of losses is limited to the minimum and does not provide for any profits.

(559) In view of recitals 557 and 558, the Commission considers that the measures at stake were appropriate to reach the desired objective of common interest.

**(d) *Existence of incentive effect***

(560) According to Section 5.1.2(d) of the 2014 Aviation Guidelines, the operating aid has an incentive effect if it is likely that, in the absence of operating aid, the level of economic activity of the airport would be significantly reduced. That assessment needs to take into account the presence of investment aid and the level of traffic at the airport.

(561) Without the aid the scale of the operations at Frankfurt-Hahn airport would be severely impacted and reduced, leading eventually to the market exit of the airport due to uncovered operating losses.

(562) Therefore, the Commission considers that the aid measures at stake had an incentive effect.

(e) ***Proportionality of the aid amount (aid limited to a minimum)***

(563) According to Section 5.1.2(e) of the 2014 Aviation Guidelines, in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place.

(564) In this case, the aid amount was limited to the extent of uncovered operating losses, as it compensated only the costs actually incurred.

(565) Therefore, the Commission considers that the operating aid amount in this case was proportionate and limited to the minimum necessary for the aided activity to take place.

(f) ***Avoidance of undue negative effects on competition and trade between Member States***

(566) According to Section 5.1.2(f) of the 2014 Aviation Guidelines, when assessing the compatibility of operating aid account will be taken of the distortions of competition and the effects on trade.

(567) Within the standard catchment area of Frankfurt Hahn airport (1 hour travelling time by car or 100 kilometres distance) there are no commercially exploited airports. Even if this standard catchment area was to be further extended to other airports in the proximity of Frankfurt Hahn airport, as demonstrated in recitals 537 and 541 there are no undue negative effects on competition between the airports located in the proximity of Frankfurt Hahn airport (that is Frankfurt Main, Luxembourg and Saarbrücken airports).

(568) In view of the above, the Commission considers that any undue negative effects on competition and trade between Member States due to the operating aid granted in favour of FFHG are limited to the minimum.

***Conclusion***

(569) In light of the considerations in recitals 551 to 568, the Commission concludes that the measures are compatible with the internal market on the basis of Article 107(3)(c) of the Treaty.

**11. CONCLUSION**

**11.1. FINANCING OF THE AIRPORT**

(570) **Measure 1: 2001 PLTA:** In the light of the considerations in recitals 291 to (302), the Commission concludes that at the time the 2001 PLTA was put into place the public authorities could legitimately consider that a PLTA to cover annual losses of FFHG did not constitute State aid.

(571) **Measure 2: 2001 capital increase:** The 2001 capital increase of EUR 27 million by Fraport and Land Rhineland-Palatinate constitutes State aid within the meaning of Article 107(1) of the Treaty.

(572) **Measure 3: 2004 capital increase and Measure 4: 2004 PLTA:** The 2004 capital increase granted by Fraport and the 2004 PLTA do not constitute State aid within the meaning of Article 107(1) of the Treaty. Even if they would constitute State aid, that aid can be deemed compatible on the basis of Article 107(3)(c) of the Treaty.

(573) The 2004 capital increase by the Länder Rhineland-Palatinate and Hesse in favour of FFHG constitutes State aid within the meaning of Article 107(1) of the Treaty.

(574) **Measure 5: Compensation of FFHG for tasks falling within the public policy remit (security checks) and Measure 6: Direct grants from Land Rhineland-Palatinate:** The Commission considers that the public funding granted to FFHG in the form of direct grants granted after 12 December 2000 constitutes State aid within the meaning of Article 107(1) of the Treaty.

(575) **Measure 12: Equity increase:** As the equity increase is intended to finance infrastructure measures which according to Germany by the decision to undertake those investments by the public shareholders, FFHG was entitled to receive that funding, the Commission considers that the equity increase has to be assessed in the context of FFHG's public support. In that regard, and in the light of the considerations in Section 8.1.1, the Commission concludes that FFHG has been engaged in an economic activity as from the date of the Aéroports de Paris judgment (12 December 2000) onward and constitutes an undertaking within the meaning of Article 107(1) of the Treaty.

(576) Moreover, in line with the considerations in Sections 8.1.1, 8.1.3 and 8.1.4, which apply equally to that measure, the Commission considers that the equity injection constitutes State aid within the meaning of Article 107(1) of the Treaty, as it involves State resources, it is imputable to the State and confers an selective economic advantage on FFHG that distorts or threatens to distort competition and trade between Member States.

(577) As the measures have already been put at the disposal of FFHG or irrevocably granted with an entitlement for FFHG to receive those funds, the Commission considers that Germany has not respected the prohibition of Article 108(3) of the Treaty.

(578) In view of recitals 512 to 545, the Commission concludes that the investment aid granted to Frankfurt Hahn airport is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty as it complies with the compatibility conditions laid down in point 61 of the 2005 Aviation Guidelines.

(579) In light of the considerations in recitals 551 to 568, the Commission concludes that the measures are compatible with the internal market on the basis of Article 107(3)(c) of the Treaty.

**11.2. AGREEMENTS WITH RYANAIR AND THE SCHEDULE OF AIRPORT CHARGES**

(580) **Measures 7, 9 and 10: 1999, 2002 and 2005 Ryanair agreement:** Having analysed the agreements and the information available to FFHG at the time of the conclusion of those agreements, the Commission is satisfied that FFHG could reasonably expect the agreements to contribute to the profitability of Frankfurt Hahn airport, in that the expected incremental revenues were higher than the expected incremental costs. As the agreements thus complied with the MEO principle, they did not confer an advantage to Ryanair.

(581) **Measures 8 and 11: 2001 and 2006 schedule of airport charges:** In view of the *ex ante* profitability analysis conducted by FFHG the Commission considers that the 2001 and 2006 schedules of airport charges do not confer an economic advantage on the airlines which they would not have obtained under normal market conditions.

(582) As one of the cumulative criteria pursuant to Article 107(1) of the Treaty is not fulfilled, the Commission considers that the 1999, 2002 and 2005 Ryanair agreements between Frankfurt Hahn airport and Ryanair and the 2001 and 2006 schedules of airport charges do not constitute State aid within the meaning of Article 107(1) of the Treaty.

(583) The Commission notes that Germany accepts the adoption of the decision in English only,

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HAS ADOPTED THIS DECISION:

*Article 1*

1. The State aid, unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty in favour of *Flughafen Frankfurt Hahn GmbH* between 2001 and 2012 by means of capital increases in 2001 amounting to EUR 27 million, capital increases in 2004 amounting to EUR 22 million and direct grants by *Land Rhineland-Palatinate* (to the extent that those grants were not purely related to public policy remit activities and did not to cover investments irrevocably decided prior 12 December 2000) is compatible with the internal market.

2. The capital increase in 2004 by *Fraport AG* and the profit and loss transfer agreement of 2004 do not constitute aid within the meaning of Article 107(1) of the Treaty.

*Article 2*

1. The agreement between *Ryanair* and *Flughafen Frankfurt Hahn GmbH*, which entered into force on 1 April 1999, does not constitute aid within the meaning of Article 107(1) of the Treaty.

2. The agreement between *Ryanair* and *Flughafen Frankfurt Hahn GmbH* dated 14 February 2002 does not constitute aid within the meaning of Article 107(1) of the Treaty.

3. The 'Agreement Ryanair/Flughafen Frankfurt-Hahn GmbH — Delivery of aircraft 6 to 18 — year 2005 to year 2012' of 4 November 2005 does not constitute aid within the meaning of the Article 107(1) of the Treaty.

*Article 3*

The schedules of airport charges, which entered into force on 1 October 2001 and on 1 June 2006, do not constitute aid within the meaning of the Article 107(1) of the Treaty.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 2014.

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*

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