

## II

(Non-legislative acts)

## DECISIONS

## COMMISSION DECISION (EU) 2016/1944

of 23 July 2014

**on the measures SA.22030 — 2007/C, SA.29404 and SA.32091 — 2012/C — Germany Financing arrangements regarding Flughafen Dortmund GmbH and the schedules of airport charges NERES and NEO**

(notified under document C(2014) 5060)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above and having regard to their comments <sup>(2)</sup>,

Whereas:

### 1. PROCEDURE

#### 1.1. PROCEDURE SA.22030 (NERES)

- (1) By letter dated 27 November 2006, a complaint from a citizen was filed with the Commission alleging State aid in connection with NERES ('*New and Existing Routes Expansion Scheme*') and with a profit and loss transfer agreement between the Flughafen Dortmund GmbH ('FD') and the public utility company Dortmunder Stadtwerke AG ('DSW21').
- (2) By letter dated 10 July 2007, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of NERES and the financing of FD ('*2007 opening decision*').
- (3) Germany transmitted its comments on the 2007 opening decision on 5 October 2007.

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

<sup>(2)</sup> OJ C 217, 15.9.2007, p. 25; and OJ C 268, 5.9.2012, p. 1.

- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(3)</sup>. The Commission invited interested parties to submit their comments on the measure.
- (5) The Commission received comments from 11 interested parties. It forwarded them to Germany on 11 January 2008, which was given the opportunity to react; its comments were received by letter dated 28 February 2008.
- (6) The Commission then requested further information on 10 November 2008 and 26 October 2009, which Germany provided on 19 December 2008 and 12 November 2009 respectively.

#### 1.2. PROCEDURE SA.29404 AND SA.32091 (NEO)

- (7) By fax of 14 September 2009, the Commission received a complaint from a private citizen alleging that the discount scheme NEO ('*Neue Entgeltordnung*' = 'New schedule of airport charges') constitutes unlawful and incompatible State aid in favour of airlines using FD. In addition, the complainant alleged that unlawful and incompatible State aid was also provided to the publicly owned airport operator FD. This complaint was registered under the State aid case number SA.29404 (CP 284/2009).
- (8) By letter of 13 July 2010 the Commission forwarded this complaint to Germany and requested information. Germany replied by letter of 14 October 2010.
- (9) On 14 December 2010 the Commission received a complaint from the District of Paderborn ('*Kreis Paderborn*'). This complaint was registered under the State aid case number SA.32091.
- (10) The Commission forwarded this complaint to Germany and requested information by letter of 20 December 2011. The German authorities submitted their comments on 1 February 2012.
- (11) The Commission requested further information on 21 February 2012 and 4 March 2012. Germany replied on 12 April 2012 and 24 April 2012 respectively.
- (12) By letter dated 21 March 2012, the Commission informed Germany of its decision to initiate the procedure laid down in Article 108(2) of the Treaty ('*2012 opening decision*'). Germany transmitted its comments on the 2012 opening decision on 23 April 2012.
- (13) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(4)</sup>. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.
- (14) The Commission received comments from 7 interested parties. It forwarded them to Germany on 6 March 2013, which was given the opportunity to react. Germany transmitted its comments by letter dated 8 April 2013.

#### 1.3. JOINT PROCEDURE CONCERNING SA.22030, SA.29404 AND SA.32091 (NERES AND NEO)

- (15) The Commission requested further information on 10 December 2013. Germany replied by letters dated 9 January 2014 and 17 February 2014.
- (16) By letter dated 22 February 2014 the Commission informed Germany of the adoption of the 2014 Aviation Guidelines <sup>(5)</sup> and of the fact that these guidelines would become applicable to the case at hand from the moment of their publication in the *Official Journal of the European Union*, and invited Germany to submit its comments.

<sup>(3)</sup> OJ C 217, 15.9.2007, p. 25.

<sup>(4)</sup> OJ C 268, 5.9.2012, p. 1.

<sup>(5)</sup> Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

- (17) The 2014 Aviation Guidelines were published in the *Official Journal of the European Union* on 4 April 2014 <sup>(6)</sup>. They replaced the 2005 Aviation Guidelines <sup>(7)</sup> <sup>(8)</sup>.
- (18) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within 20 working days from the date of publication of that notice <sup>(9)</sup>.
- (19) The Commission received comments from six interested parties. It forwarded them to Germany on 28 May 2014, which was given the opportunity to react. Germany submitted its comments by letter dated 13 June 2014.
- (20) By letter dated 17 June 2014, due to the urgent need to adopt and notify a Decision, Germany agreed that this decision would be adopted in English.

## 2. DETAILED DESCRIPTION OF THE MEASURES

### 2.1. BACKGROUND TO THE INVESTIGATIONS

#### 2.1.1. GENERAL INFORMATION ABOUT THE AIRPORT

- (21) Dortmund airport is located around 14 km from the City of Dortmund in North Rhine-Westphalia, with a population of approximately 17,6 million inhabitants. It serves the Ruhr area with 5,2 million inhabitants, in particular the city of Dortmund.
- (22) Table 1 gives an overview of airports with regular scheduled connections located in the proximity of Dortmund airport.

Table 1

#### Overview of airports located in the proximity of Dortmund airport

Airport	Distance	Travel time by car	Travelling time by train
Dortmund airport			
Paderborn/Lippstadt airport	74,1 km	44 min	1 h 44 min
Düsseldorf airport	76,8 km	56 min	2 h 15 min
Münster/Osnabrück airport	77,9 km	51 min	1 h 27 min
Cologne-Bonn airport	104 km	1 h 03 min	2 h 23 min
Niederrhein-Weeze airport	123 km	1 h 30 min	2 h 57 min
Kassel-Calden airport	138 km	1 h 23 min	2 h 56 min

<sup>(6)</sup> See footnote 5.

<sup>(7)</sup> Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

<sup>(8)</sup> Point 171 of the 2014 Aviation Guidelines.

<sup>(9)</sup> OJ C 113, 15.4.2014, p. 30.

- (23) Dortmund airport is owned and operated by FD, which is 100 % publicly owned <sup>(10)</sup>.

#### 2.1.2. HISTORICAL CONTEXT AND TRAFFIC DEVELOPMENT

- (24) Already in 1969 the City Council of Dortmund decided on the General Development Plan for Dortmund airport <sup>(11)</sup>. Against this background, several infrastructure development programmes (such as the construction of a new runway in 1983, and its extension in 1987) took place.
- (25) In 1992/1993, in the context of the structural and political changes in Germany (such as deindustrialisation of the Rhein-Ruhr area, reunification of Germany and opening of the borders in central and eastern Europe), FD commissioned surveys on the passenger growth potential in the region <sup>(12)</sup>. These surveys showed that 90 % of passengers used Dortmund airport for business trips as opposed to private travel. Charter flights to tourist destinations have played a minor role. The forecasts expected an increase in the airport's passenger traffic from 196 000 in 1991 to at least 664 000 to 731 000 in 2000 and 1,1 million passengers per annum in 2010.
- (26) Against this background, in 1993 the public shareholders of FD decided to upgrade and extend the existing infrastructure. As a consequence, in 2000 the new terminal of Dortmund airport and the extension of the runway to 2 000 m were completed. Since then Dortmund airport had the capacity to handle approximately 2,5 million passengers per year. Only around 30 % of the maximum capacity of the airport was used from 2001 to 2003.
- (27) After the terrorist attacks of 11 September 2001, the airport lost many business passengers. Lufthansa and Eurowings significantly decreased the number of their frequencies and offered routes. Air Berlin temporarily replaced these two airlines, but in 2003 it decided to concentrate its activities on Düsseldorf airport.
- (28) Table 2 indicates the development of Dortmund airport in terms of passenger numbers from 1999 to 2013.

Table 2

#### Passenger development at Dortmund airport 1999-2013

Year	Passenger traffic flow
1999	677 400
2000	719 365
2001	1 064 153
2002	994 508
2003	1 023 339
2004	1 179 278
2005	1 742 891
2006	2 019 666
2007	2 155 064
2008	2 329 455

<sup>(10)</sup> Shareholders of Flughafen Dortmund GmbH are the City of Dortmund (26 %) and DSW21 (74 %). The only shareholder of DSW21 (100 %) is the city of Dortmund. DSW21 is a holding company of the City of Dortmund, which manages the utility companies and the infrastructure managers of the city.

<sup>(11)</sup> Dortmund airport was at that point in time called 'Dortmund-Wickede' airfield.

<sup>(12)</sup> Submission from Germany from 13 October 2010, point 58.

Year	Passenger traffic flow
2009	1 716 519
2010	1 747 731
2011	1 822 117
2012	1 902 747
2013	1 924 313

- (29) In 2003, 1 338 people worked at Dortmund airport: 274 of them directly for the airport operator, 614 for airlines operating from the airport, 365 for enterprises active at the airport and the remaining 85 for public authorities (such as police, customs and fire brigade).
- (30) In 2004, in order to increase the degree of utilisation, the shareholders of FD decided for a strategy change and to attract low-cost airlines providing connections to tourist destinations, central and eastern Europe. On 1 July 2004 a scheme of lower airport charges ('*New and Existing Routes Expansion Scheme*') called NERES was introduced. On 1 July 2009 a new schedule of airport charges called NEO ('*Neue Entgeldordnung*', 'NEO'), was put into place.
- (31) The Commission investigated the following four measures: a 100 % State guarantee for loans to FD, a profit and loss transfer agreement between FD and the public utility company DSW21, and two measures concerning the lowering of airport charges for certain airlines, NERES and NEO.

## 2.2. MEASURE 1: THE 100 % STATE GUARANTEES IN FAVOUR OF FD

- (32) The infrastructure development programmes at Dortmund airport were financed directly by FD through loans collateralised by 100 % State guarantees issued in 1987 until 2000.

## 2.3. MEASURE 2: THE 1991 PROFIT AND LOSS TRANSFER AGREEMENT

- (33) On 20 December 1991 the shareholders of FD (city of Dortmund and DSW21) decided to conclude a profit and loss transfer agreement (hereinafter: '1991 PLTA') between the airport and DSW21 <sup>(13)</sup>. Under this agreement DSW21 covers all losses of FD. The agreement entered into effect on 1 January 1992.
- (34) The 1991 PLTA includes the following provisions:
- (a) the incorporation of FD into the DSW21 tax group (Section 2);
  - (b) coverage of the total amount of annual losses of FD by DSW21 (Section 3(3));
  - (c) the duration of the agreement was set at a minimum of five years. Thereafter it was automatically renewed for an additional year (Section 4(3)). According to Germany, the coverage of losses is therefore indefinite, because the annual automatic renewal was chosen for tax reasons.
- (35) In order to comply with tax legislation an addendum was adopted in 1999. The 1991 PLTA was amended on 12 December 2008, with retroactive effect from 1 January 2008, in order to guarantee the fiscal effectiveness of the coverage of losses. For this reason, a reference to the version of the AktG (*Aktiengesetz* — Companies Act) currently in force regarding the coverage of losses was inserted and (in accordance with the original version) a minimum duration period of five years with automatic annual renewal was specified for reasons of legal certainty.

<sup>(13)</sup> At that point in time named Dortmunder Stadtwerke AG.

- (36) The following tables (Table 3, Table 4 and Table 5) show the investment and operating costs financed by the 1991 PLTA as well as the costs of public policy remit activities.

Table 3

**Investment decided after the *Aéroports de Paris* judgment and financed by the PLTA**

(EUR)

Jahr	Investition inkl Nachaktivierungen	Entschieden	Betrag	Abschreibungen zum 31.12.2013	Betrag finanziert durch Verlustübernahme
2002	Erschließung Infrastruktur West	2001	1 276 584	– 978 183	1 276 584
	Ausgleichs- u Ersatzmaßnahmen	2001	964 529	– 735 373	964 529
	Enteignung von Land	2001	853 382		853 382
	Skidatasystem geb pflicht Parken West	2001	306 469	306 469	306 469
	Summe:		3 400 964	– 1 407 087	3 400 964
2006	Ausbau Parkplatz West 6, Pr 45	2006	941 215	– 474 310	941 215
	Summe:		941 215	– 474 310	941 215
2008	Erweiterung West, Bauteil C	2008	3 694 700	– 1 148 720	3 694 700
	F — Gepäckförderanlage Umrüstung	2008	2 004 069	– 1 246 012	2 004 069
	G Parkplatz Ost — P3	2008	1 077 466	– 321 267	1 077 466
	Entwässerungsanlagen, G-P3	2008	664 420	– 188 252	664 420
	G — Erschließungsstr/Kreisverkehr	2008	519 789	– 155 023	519 789
	G — P3 2 Bauabschnitt	2008	229 058	– 144 223	229 058
	G-P3 Beleuchtungsanlagen	2008	195 237	– 58 230	195 237
	G-P3 Lärmschutzwall	2008	152 812	– 34 637	152 812
	Skidata, Erweiterung Parksystem P3	2008	150 078	– 109 432	150 078
	3 Wartehäuser P3	2008	18 833	– 13 340	18 833
	Summe:		8 706 462	– 3 419 136	8 706 462

(EUR)

Jahr	Investition inkl Nachaktivierungen	Entschieden	Betrag	Abschreibungen zum 31.12.2013	Betrag finanziert durch Verlustübernahme
2009	B — Umbau Mitte-West	2009	1 082 791	– 170 520	1 082 791
	Summe:		1 082 791	– 170 520	1 082 791
	Summe:		14 131 432	– 5 471 053	14 131 432

Table 4

**Operating costs including public policy remit financed by the 1991 PLTA**

(TEUR)

Jahr	Operative Betriebskosten nach Rn 25 22) der LL		Operative Einnahmen	Operatives Ergebnis	Betrag
2007			26 116		
	Materialaufwand	11 980			
	Personal	11 242			
	sonstige betr. Aufwendungen	6 824			
	sonstige Steuern	295			
	— hoheitliche Aufgaben nach Tabelle 3	– 6 173	– 4 179		
	Summe	24 168	21 937	– 2 231	2 231
2008			26 561		
	Materialaufwand	12 932			
	Personal	10 727			
	sonstige betr. Aufwendungen	7 675			
	sonstige Steuern	316			
	— hoheitliche Aufgaben nach Tabelle 3	– 7 078	– 4 047		
	Summe	24 572	22 514	– 2 058	2 058

(TEUR)

Jahr	Operative Betriebskosten nach Rn 25 22) der LL		Operative Einnahmen	Operatives Ergebnis	Betrag
2009			21 577		
	Materialaufwand	13 343			
	Personal	10 860			
	sonstige betr. Aufwendungen	5 848			
	sonstige Steuern	266			
	— hoheitliche Aufgaben nach Tabelle 3	– 7 475	– 3 396		
	Summe	22 842	18 181	– 4 661	4 661
			[...] (*)		
2010	Materialaufwand	[...]			
	Personal	[...]			
	sonstige betr. Aufwendungen	[...]			
	sonstige Steuern	[...]			
	— hoheitliche Aufgaben nach Tabelle 3	[...]	[...]		
	Summe	22 808	20 035	– 2 773	2 773
2011			[...]		
	Materialaufwand	[...]			
	Personal	[...]			
	sonstige betr. Aufwendungen	[...]			
	sonstige Steuern	[...]			
	— hoheitliche Aufgaben nach Tabelle 3	[...]	[...]		
	Summe	22 642	20 176	– 2 466	2 466



(TEUR)

Jahr	Operative Betriebskosten nach Rn 25 22) der LL		Operative Einnahmen	Operatives Ergebnis	Betrag
2012			[...]		
	Materialaufwand	[...]			
	Personal	[...]			
	sonstige betr. Aufwendungen	[...]			
	sonstige Steuern	[...]			
	— hoheitliche Aufgaben nach Tabelle 3	[...]	[...]		
	Summe	23 908	21 396	– 2 512	2 512
2013			[...]		
	Materialaufwand	[...]			
	Personal	[...]			
	sonstige betr. Aufwendungen	[...]			
	sonstige Steuern	[...]			
	— hoheitliche Aufgaben nach Tabelle 3	[...]	[...]		
	Summe	27 148	24 254	– 2 894	2 894
2014			[...]		
Jan-Mar	Materialaufwand	[...]			
	Personal	[...]			
	sonstige betr. Aufwendungen	[...]			
	sonstige Steuern	[...]			
	— hoheitliche Aufgaben nach Tabelle 3	[...]	[...]		
	Summe	5 842	3 937	– 1 905	1 905

(\*) Confidential information.

Table 5

**Costs of public policy remit financed by the 1991 PLTA**

Jahr	Hoheitliche Aufgabe	Investitionen inkl. Nachaktivierungen (EUR)	Abschreibungen zum 31.12.2013 (EUR)	Betriebskosten finanziert durch Verlustübernahme (TEUR)
2007	Flugsicherung/Wetterdienst	61 300	– 61 300	
	Brandbekämpfung/Rettungsdienst	13 631	– 10 366	
	Summe	74 931	– 71 666	1 994
2008	Flugsicherung/Wetterdienst			1 530
	Brandbekämpfung/Rettungsdienst	616 032	– 343 950	1 501
	Summe	616 032	– 343 950	3 031
2009	Flugsicherung/Wetterdienst	—	—	1 697
	Brandbekämpfung/Rettungsdienst	—	—	2 160
	Eigensicherung EU-VO 300/2008	—	—	222
	Summe	—	—	4 079
2010	Flugsicherung/Wetterdienst	[...]	[...]	[...]
	Brandbekämpfung/Rettungsdienst	[...]	[...]	[...]
	Eigensicherung EU-VO 300/2008	[...]	[...]	[...]
	Summe	40 455	– 26 970	4 487
2011	Flugsicherung/Wetterdienst	[...]	[...]	[...]
	Brandbekämpfung/Rettungsdienst	[...]	[...]	[...]
	Eigensicherung EU-VO 300/2008	[...]	[...]	[...]
	Summe	446 856	– 149 248	5 163

Jahr	Hoheitliche Aufgabe	Investitionen inkl. Nachaktivierungen (EUR)	Abschreibungen zum 31.12.2013 (EUR)	Betriebskosten finanziert durch Verlustübernahme (TEUR)
2012	Flugsicherung/Wetterdienst	[...]	[...]	[...]
	Brandbekämpfung/Rettungsdienst	[...]	[...]	[...]
	Eigensicherung EU-VO 300/2008	[...]	[...]	[...]
	Summe	8 400	– 2 012	4 874
2013	Flugsicherung/Wetterdienst	[...]	[...]	[...]
	Brandbekämpfung/Rettungsdienst	[...]	[...]	[...]
	Eigensicherung EU-VO 300/2008	[...]	[...]	[...]
	Summe	118 678	– 6 674	4 650
2014	Flugsicherung/Wetterdienst	[...]	[...]	[...]
Jan-Mar	Brandbekämpfung/Rettungsdienst	[...]	[...]	[...]
	Eigensicherung EU-VO 300/2008	[...]	[...]	[...]
	Summe	—	—	1 212

(37) In its last submission Germany explained that it considered as public policy remit the costs for the following activities covered by the 1991 PLTA:

- (a) air traffic control, control tower and technical equipment such as landing systems;
- (b) meteorological services;
- (c) fire and rescue brigade;
- (d) security covered by Regulation (EC) No 300/2008 of the European Parliament and of the Council <sup>(14)</sup> and §8 *Luftverkehrsgesetz* <sup>(15)</sup>.

(38) Further, Germany provided the costs related to activities falling within the public policy remit, which are covered by the *Land North Rhine-Westphalia*:

- (a) security in terms of passenger and luggage control pursuant to §5 *Luftverkehrsgesetz*;
- (b) police (costs of provision of premises);
- (c) customs and border control (costs of provision of premises).

<sup>(14)</sup> Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 (OJ L 97, 9.4.2008, p. 72).

<sup>(15)</sup> *Luftverkehrsgesetz* (LuftSiG) of 11 January 2005 (BGBl I S. 78).

## 2.4. MEASURE 3: THE NERES SCHEDULE OF AIRPORT CHARGES

- (39) To increase its revenues (from airport charges and non-aeronautical activities) and to optimise the use of its infrastructure, FD introduced NERES on 1 July 2004. It remained applicable until 30 June 2009. Airlines could apply for the lower airport charges for each new connection and for all existing connections. The application had to be received by the airport between 1 July 2004 and 30 June 2009 and had to be submitted 3 months in advance of the opening of a new connection.
- (40) For connections already existing on 1 July 2004, the discount applied only to all subsequent passengers. An airline was not supported by NERES when it opened a new connection, if the connection replaced a existing one for which a support measure had already been granted. The approval of support was limited only by the capacity of Dortmund airport.
- (41) If an airline met the scheme criteria, NERES granted a marketing contribution per passenger and a discount on the uniform airport-use charge per plane, depending on the total yearly passenger traffic flow of the airline.
- (42) According to the schedule of charges, airport charges were set in principle on the basis of all aircraft movements and not on the number of passengers. They included the following items: landing charge, parking charge, infrastructure service charges (check-in, baggage handling and aircraft parking charges) and ground handling service charges (passenger check-in, baggage reclaim, loading and unloading and ground handling).
- (43) The scheme was applied simultaneously with FD's schedule of charges at the time, which had been in force since 1 November 2000 (the '2000 scheme'), in accordance with the approval by the North Rhine-Westphalia Ministry of Transport. For connections benefiting from NERES, the NERES scheme replaced the 2000 scheme. Instead of the different charges set out in the 2000 scheme, the airlines concerned paid a uniform airport-use charge per passenger. This charge then included the charges for all airport services, with the exception of the flight security charge.
- (44) The level of the uniform airport-use charge depended on the number of seats of the individual aircraft. The following five categories were distinguished, based on the number of seats, as set out in Tables 6 and 7:

Table 6

**The five seating categories**

Category 1	Minimum 140 seats
Category 2	Minimum 100 seats
Category 3	Minimum 70 seats
Category 4	Minimum 40 seats
Category 5	Less than 40 seats

Table 7

**Uniform airport-use charge by category**

1 July 2004-30 June 2005	EUR 5,00	category 1
	EUR 8,00	category 2
	EUR 11,00	category 3
	EUR 20,00	category 4
	EUR 25,00	category 5

1 July 2005-3 June 2006	EUR 6,75	category 1
	EUR 9,00	category 2
	EUR 11,75	category 3
	EUR 20,00	category 4
	EUR 25,00	category 5
1 July 2006-30 June 2007	EUR 6,75	category 1
	EUR 9,00	category 2
	EUR 11,75	category 3
	EUR 20,00	category 4
	EUR 25,00	category 5
1 July 2007-30 June 2008	EUR 7,50	category 1
	EUR 9,75	category 2
	EUR 12,25	category 3
	EUR 20,00	category 4
	EUR 25,00	category 5
1 July 2008-30 June 2009	EUR 7,50	category 1
	EUR 9,75	category 2
	EUR 12,25	category 3
	EUR 20,00	category 4
	EUR 25,00	category 5

- (45) Apart from the discounts on the uniform airport-use charge, the airport also granted a marketing contribution per passenger for the opening of a new connection. This contribution depended on the frequency of the new connection and on the number of seats available for the connection.

Table 8

**Marketing contribution**

Frequency of new assisted flights	Marketing contribution per passenger per flight
3 flight connections with capacity of at least 100 000 seats a year	EUR 0,30
4 flight connections with capacity of at least 175 000 seats a year	EUR 0,50
5 flight connections with capacity of at least 225 000 seats a year	EUR 1,00

- (46) On 1 July 2005 an additional discount depending on the total amount of departing passengers per airline per year entered into force. The discount was given on top of the uniform airport-use charge which airlines had to pay. Taking into account also the discount through marketing distribution, user charges were, however, not supposed to be less than EUR 5.

Table 9

**Discounts on the total of departing passengers**

Number of departing passengers per year	500 000 to 1 000 000	1 000 001 to 1 500 000	1 500 001 to 2 000 000	Over 2 000 000
Discount on the uniform airport charge per departing passenger	EUR 1,00	EUR 1,50	EUR 2,00	EUR 3,00

**2.5. MEASURE 4: THE NEO SCHEDULE OF AIRPORT CHARGES**

- (47) NEO was introduced on 1 July 2009, replacing both the previous discount scheme NERES <sup>(16)</sup> and the schedule of charges introduced on 1 November 2000. NEO was initially not limited in time and the decision to implement NEO was based on the business plan approved in 2008, which had provided forecasts until 2019. NEO was amended on 1 November 2011 when some of the charges were increased.

**2.5.1. THE TAKE-OFF AND LANDING CHARGES**

- (48) For scheduled flights, NEO provided for a uniform take-off and landing charge <sup>(17)</sup>. The take-off charge (including landing charges) depended on the number of passengers on board, the total number of passengers carried per year, and the size of the aircraft. The minimum charge was set at EUR 100. The charges were subdivided into three categories according to the type of aircraft and of the number of seats available.
- (49) Table 10 provides an overview of the applicable take-off charges for scheduled flights introduced on 1 July 2009.

Table 10

**NEO take-off charges (including landing charges) for scheduled flights at Dortmund airport in the period July 2009–November 2011**

Category 1 take-off charges — Aircraft with more than 120 seats		
Total number of passengers per calendar year	Take-off charge per passenger (EUR)	% reduction
More than 500 000	2,50	68,75
250 001 to 500 000	4,00	50,00
0 to 250 000	8,00	0
Category 2 take-off charges — Aircraft with between 50 and 120 seats		
Total number of passengers per calendar year	Take-off charge per passenger (EUR)	% reduction
More than 100 000	3,75	68,75
50 001 to 100 000	6,00	50,00
0 to 50 000	12,00	0

<sup>(16)</sup> NERES is the subject of a formal investigation procedure by the Commission: State aid C 26/07 (ex NN 28/07) — NERES — Flughafen Dortmund (OJ C 217, 15.9.2007, p. 25).

<sup>(17)</sup> The landing charge was included in the take-off charge.

## Category 3 take-off charges — Aircraft with up to 50 seats

Total number of passengers per calendar year	Take-off charge per passenger (EUR)	% reduction
More than 50 000	6,00	62,50
25 001 to 50 000	8,00	50,00
0 to 25 000	16,00	0

- (50) For non-scheduled flights, NEO distinguished between take-off charges and landing charges. The landing charge was EUR 2,23 per 1 000 kg MTOW (maximum take-off weight). The take-off charge depended on the MTOW of the aircraft and on noise protection level among other criteria.
- (51) Additionally, there was a parking charge for aircraft that stayed at the airport for longer than three hours. The amount of the parking charge depended on the aircraft's MTOW. Normally this charge did not apply to low-cost carriers as they kept their turnaround time as short as possible.
- (52) The security charge was EUR 0,30 per departing passenger; the PRM-levy <sup>(18)</sup> was EUR 0,36 per departing passenger.

## 2.5.2. GROUND HANDLING CHARGES

- (53) Charges for ground handling services for scheduled flights were established in individual contracts between the airlines and the airport, based on the scope of the services supplied. A volume-based discount was granted depending on the number of passengers carried.
- (54) In 2010, individual contracts existed with Wizz Air, EasyJet, Air Berlin, Germanwings, Sky Airlines and Sun Express. On 1 November 2011, there were further contracts with Corendon, Tailwind, Germania, Pegasus, Freebird, Air Arabia, Bulgarian Air Charter and Air Via.
- (55) For non-scheduled flights, the charges for ground handling services depended on the size of the aircraft. Passenger services were calculated on the basis of individual contracts. De-icing was priced on the basis of MTOW.
- (56) Table 11 shows cost coverage level of ground handling charges at Dortmund airport between 2009 and 2019. The ground handling charges shown in Table 11 are the average charges for the main clients of Dortmund airport. The lowest handling charges of EUR [...] (for [...]) in 2009 covered the costs of the services which were around EUR [...].

Table 11

## Cost coverage of ground handling charges

(in EUR)

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Revenue from ground handling	[5,8-6,2]	[5,8-6,2]	[5,8-6,2]	[5,8-6,2]	[5,8-6,2]	[6,2-6,5]	[6,2-6,5]	[6,2-6,5]	[6,5-6,8]	[6,5-6,8]	[6,5-6,8]
Ground handling costs	[4,0-4,4]	[4,0-4,4]	[4,0-4,4]	[4,0-4,4]	[4,0-4,4]	[4,5-4,9]	[4,5-4,9]	[4,5-4,9]	[4,5-4,9]	[5,0-5,2]	[5,0-5,2]

<sup>(18)</sup> Passenger-related levy for assistance at airports for disabled persons and persons with reduced mobility (hereinafter: 'PRM') pursuant to Regulation (EU) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.7.2006, p. 1).

## 2.5.3. THE TOTAL CHARGES PAID BY AIRLINES NET OF MARKETING SUPPORT

- (57) Germany provided Table 12 to show the actual airport revenues per passenger stemming from take-off charges and from all other charges after deducting the amounts of marketing benefits in favour of the airlines as from 1 November 2011. The take-off charges have increased between the introduction of NEO in 2009 and 2011.

Table 12

**Revenue per departing passenger as from 1 November 2011**

(EUR)

Airline	Take-off charge	Total charges agreed under individual contracts (ground handling)	Total
Wizz Air	3,00	[...]	[5-10]
Germanwings	5,00	[...]	[5-10]
EasyJet	5,00	[...]	[5-10]
Air Berlin/Fly Niki	10,00	[...]	[15-20]
Sun Express	10,00	[...]	[15-20]
Sky Airlines	10,00	[...]	[15-20]
Corendon	10,00	[...]	[15-20]
Tailwind	10,00	[...]	[20-25]
Germania	10,00	[...]	[20-25]
Pegasus	10,00	[...]	[20-25]
Freebird	10,00	[...]	[20-25]
Air Arabia	10,00	[...]	[20-25]
Bulgarian Air Charter	10,00	[...]	[20-25]
Air Via	10,00	[...]	[25-30]

**3. GROUNDS FOR INITIATING THE PROCEDURE AND THE INVESTIGATION OF THE COMMISSION**

- (58) In the 2007 and 2012 opening decisions the Commission initiated investigations into the 100 % State guarantees, the 1991 PLTA, the NERES scheme of charges, and the NEO scheme of charges including the related discounts.



### 3.1. MEASURE 1: THE 100 % STATE GUARANTEE

- (59) With regard to the 100 % State guarantee, the Commission expressed doubts whether under normal market conditions a market economy operator ('MEO') would also have provided 100 % guarantees for the loans financing infrastructure programmes at Dortmund airport. If it should be concluded that this was not the case the Commission also doubted whether such aid could be considered compatible with the internal market.

### 3.2. MEASURE 2: THE 1991 PLTA

- (60) In the 2012 opening decision the Commission had doubts in particular on whether the 1999 and 2008 modifications led to a substantial amendment of the 1991 PLTA. Thus the Commission raised the question whether the amended 1991 PLTA would need to be assessed as a new measure.
- (61) The Commission furthermore was in doubt whether certain losses relating to activities falling within public policy remit, such as customs, air traffic control, and fire brigade, were falling within the ambit of State aid control or not.
- (62) Furthermore, the Commission questioned whether DSW21 acted as a MEO by concluding and amending the 1991 PLTA with FD. Therefore, the Commission had doubts on whether the coverage of annual losses of FD constituted State aid, and whether such aid could be considered compatible with the internal market under Article 107(3)(c) of the Treaty. In particular the coverage of operating losses of FD seemed to involve operating aid, which was unlikely to meet the requirements of the exemptions provided for in Article 107(3)(c) of the Treaty.

### 3.3. MEASURE 3: THE NERES SCHEDULE

- (63) With regard to NERES, the Commission had doubts whether a MEO would have introduced NERES and entered into similar agreements on this basis with airlines using Dortmund airport. If the schedule and the agreement were found to constitute State aid, then the Commission furthermore doubted whether these measures could be deemed compatible with the internal market.

### 3.4. MEASURE 4: THE NEO SCHEDULE

- (64) With regard to NEO, the Commission had doubts whether a MEO would have introduced NEO and would have entered on this basis into similar agreements with airlines using Dortmund airport. If this would not be the case then the Commission again doubted whether the aid contained in the schedule and the agreements could be deemed compatible with the internal market.

## 4. COMMENTS FROM GERMANY

### 4.1. MEASURE 1: 100 % STATE GUARANTEE IN FAVOUR OF FD

- (65) According to Germany, the Commission did not take into account that the guarantees are part of the infrastructure development programme for Dortmund airport. In this respect, Germany stated that since 1991 Dortmund airport played an important role in the transport concept of North Rhine-Westphalia.
- (66) Germany clarified that the 100 % State guarantees were granted by the City of Dortmund and by DSW21 in order to collateralise loans for financing of the infrastructure development at Dortmund airport.
- (67) Germany provided a comprehensive overview of all (100 % State) guarantees granted in favour of FD from 1987 to 2000, as summarised in Table 13 <sup>(19)</sup>.

<sup>(19)</sup> The guarantees under investigation amount to EUR 74,182 million, the amount of loans from the Table 13 that were still outstanding at the end of 2008.

Table 13

**Overview of 100 % State guarantees for the collateralisation of loans of FD 1987-2000**

No	Measures of infrastructure	Amount of loan (EUR)	Year of granting	Loan guarantee
A. Old infrastructure projects in 1987-1992				
1	Extension of the runway A, diversion of high voltage power line	1 278 230	1987	City of Dortmund
2	Extension of the runway A, diversion of high voltage power line	1 278 230	1987	City of Dortmund
3	Extension of the runway A, diversion of high voltage power line	1 022 584	1988	City of Dortmund
4	Extension of the runway A, diversion of high voltage power line	1 278 230	1989	City of Dortmund
5	Other measures	1 022 584	1992	DSW21
B. Historical investments in 1993-2003				
6	Extension of soundproof booth, sanitary sewer East, movement area East, canalisation	2 812 105	1995	DSW21
7	Property [...]	4 090 335	1996	City of Dortmund
8	Property [...]	2 045 168	1996	DSW21
9	Extension runway 1 450m	3 988 077	1997	City of Dortmund
10	Tower, terminal/car park 1, movement area, etc.	17 383 924	1997	City of Dortmund
11	Tower, terminal/car park 1, movement area, etc.	17 383 924	1997	City of Dortmund
12	Reconstruction terminal A, cargo centre	1 482 747	1998	DSW21
13	Tower, terminal/car park 1, movement area, etc.	6 876 876	1998	City of Dortmund
14	Connection north-street, re-allocation gas pipe and water line	2 172 991	1999	DSW21
15	Mechanisation movement area	6 237 761	1999	DSW21
16	Tower, terminal, movement area and other infrastructure measures	6 736 782	1999	City of Dortmund

No	Measures of infrastructure	Amount of loan (EUR)	Year of granting	Loan guarantee
17	Extension runway, rearrangement General Aviation, etc.	3 195 574	2000	City of Dortmund
18	Extension runway, rearrangement General Aviation, etc.	33 795 393	2000	City of Dortmund
19	Tower, terminal/car park 1, movement area, etc.	11 120 598	2000	City of Dortmund
20	Tower, terminal/car park 1, movement area, etc.	13 484 812	2000	City of Dortmund
21	Extension runway, rearrangement General Aviation, etc.	21 781 034	2000	City of Dortmund

Source: German submission dated 23 April 2012.

- (68) Germany stated that these guarantees were irrevocably granted between 1987 and 2000, so before it was clarified that airports are subject to State aid rules. Germany argued further that the guarantees were thus irrevocably given prior the *Aéroports de Paris* judgment and were not amended since then. Germany moreover emphasised that these guarantees were neither extended nor otherwise changed.
- (69) Moreover, Germany argued that the airport operator paid a market based charge for these guarantees.

#### 4.2. MEASURE 2: THE 1991 PLTA

- (70) Germany argued on the interpretation and applicability of Article 107(1) of the Treaty to the 1991 PLTA that this agreement had been irrevocably concluded before the judgment of the General Court in *Aéroports de Paris* <sup>(20)</sup>. Germany affirmed that the 1991 PLTA had already been irrevocably concluded in 1991 and entered into effect on 1 January 1992, and that the coverage of annual losses by DSW21 was based entirely on that agreement. Germany is thus of the opinion that the rules of State aid should therefore not be applied to the agreement.
- (71) Germany took the view that the 2005 Aviation Guidelines could not be applied in this case since the 1991 PLTA was signed as part of the infrastructure measures implemented in the early 1990s, before the Guidelines were adopted and published. Furthermore, Germany stated that the 1991 PLTA was necessary for to the extension of the airport. Accordingly, Germany clarified that the city council of Dortmund agreed on the agreement as an alternative to a direct grant for financing the airport extension. Germany submitted, that the new infrastructure would be accessible for every potential user without discrimination in any way. Dortmund airport was supposed to become a public airport which in Germany's view was of common interest.
- (72) Germany provided studies presenting the possibilities and perspectives of the development of the former airfield Dortmund-Wickede <sup>(21)</sup>. The result was that a development of the airfield to an airport would have led to an increase of up to 196 000 passengers in 1991, up to 664 000-731 000 passengers in 2001 and even up to 1,1 million in 2010. Germany claimed that before the extension, the airport's capacity was only at around 750 000 passengers and therefore the extension was necessary. In this regard, Germany confirmed that the forecasts of the surveys had been correct. In the year 2000 already 719 365 passengers used Dortmund airport and the predicted numbers for 2010 were reached already in 2001 with 1 064 153 passengers.

<sup>(20)</sup> Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, upheld on appeal in Case C-82/01P [2002] ECR I-9297.

<sup>(21)</sup> See footnote 11.

- (73) Germany stated that the 1991 PLTA was neither extended nor otherwise changed, nor has it been terminated and it was also not limited in time. Germany pointed out that both the 1999 addendum and the 2008 amendment were concluded purely to comply with the requirements of German tax legislation and did not affect the principle of indefinite coverage of annual losses. Consequently, according to Germany the 2008 modification of the 1991 PLTA between FD and DSW21 was not a new measure, but still concerned the same agreement, investigated in the 2007 opening decision.
- (74) Moreover, Germany is of the opinion that the MEO principle can be applied only in the context of the situation at that time. Furthermore, Germany argued that since at that time the operation and construction of airports was not considered to be an economic activity, airports were not considered to be undertakings falling within the scope of Article 107(1) of the Treaty.
- (75) Germany clarified furthermore that certain operating and capital costs (depreciation and costs of financing) were falling within the public policy remit and would be outside the scope of State aid rules. In Germany's view these were costs such as police, customs, and air traffic control.
- (76) Germany pointed out that the 1991 PLTA met the requirements of the *Altmark* <sup>(22)</sup> judgment from 24 July 2003. In its submission, Germany stated that FD was officially entrusted by the city council of Dortmund to further develop the infrastructure at Dortmund airport, and that, it was not overcompensated. Although the operation of the airport was not tendered out, according to Germany FD was on average a well-managed undertaking.
- (77) Germany stated furthermore that losses of the airport included costs related to investments, which were decided prior to the 2000 *Aéroports de Paris* judgment and costs of public policy remit.
- (78) In this context, Germany provided at several occasions different lists of activities that were regarded as falling within the public policy remit. The overview from the most recent submission is summarised in Table 4 and Table 5.
- (79) In Germany's point of view, referring to the judgment *Leipzig/Halle*, these measures are outside of the scope of State aid control. According to Germany, if these costs were taken out of the cost-base, FD would have a positive EBITDA.
- (80) In any case, Germany pointed out that the measure must not be considered as operating aid, rather but as investment aid, which can be deemed compatible with the Treaty according to Article 107(3)(b) and (c) of the Treaty. However, Germany acknowledged that projects of common European interest within the meaning Article 107(3)(b) of the Treaty should be implemented by more than one Member State. Nevertheless, Germany argued that the overall structural transformation, of which the airport infrastructure construction was part, was in the common interest of the Union, and was therefore compatible with the internal market.

#### 4.3. MEASURE 3: NERES

- (81) Germany argued that the measures of the NERES programme could not be considered as State aid within the meaning of Article 107(1) of the Treaty. Germany regarded NERES as a programme supporting the extension of Dortmund airport, for which every airline could apply, and therefore, it was not discriminatory. In any case, according to Germany, NERES was applied to at least three airlines and for that reason could not be considered as a *de facto* discrimination in favour of EasyJet. Also, Germany emphasised that the programme was limited in time and applied only to airlines setting up or expanding their operation at Dortmund airport within this period. In Germany's opinion the measures of NERES were not selective because they did not give an advantage only to certain airlines.
- (82) According to Germany, NERES is not imputable to the state because the management of FD established the programme of its own motion and responsibility. Germany affirmed that neither the supervisory board of FD, nor the shareholders of DSW21, nor the city of Dortmund were involved in developing NERES.

<sup>(22)</sup> C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-07747.

- (83) Germany presented alternative scenarios with and without NERES and came to the conclusion that a MEO would have behaved in the same manner. According to these scenarios, the profits with the NERES scheme were expected to be higher than without introducing it since it aimed at an increase of passengers. With the NERES scheme the airport was expected to become profitable as from 2008. Germany reminded the Commission that a closure of the airport would also have caused costs and pointed out that § 45 of Air Traffic Licensing Regulation (*Luftverkehrs-Zulassungs-Ordnung*, 'LuftVZO') requests a proper operation and maintenance of an airport rather than a closure.
- (84) Following the attacks on 11 September 2001, the number of passengers decreased and the market conditions changed according to Germany. Therefore, NERES needed to be introduced in order to increase the passenger numbers and utilisation of the infrastructure again. Germany argued that, due to NERES, FD was able to maintain its number of passengers, unlike other airports during those times.
- (85) Furthermore, according to Germany, the Europe-wide demand at the time concentrated on low-cost carriers. Germany argued that since Dortmund airport's main client, Air Berlin, increasingly relocated its flights to other airports, FD was forced to introduce incentives, such as NERES. However, Germany explained that NERES did not only target low-cost airlines; FD was also interested in establishing business airlines at Dortmund airport, but Lufthansa did not respond positively to a request of FD.
- (86) Germany stated that with NERES, FD did not take risks, but rather created a strategy to return to profitability. A MEO would also have behaved in that way, Germany argued, especially because the airport could already win EasyJet with the introduction of NERES incentives. Germany provided the business plan that was used for the introduction of NERES. The business plan compared the best-case scenario, the base-case scenario and the worst-case scenario of FD with and without the introduction of NERES. Every scenario expected an annual passenger growth of 4-7 %. This expectation was based on Europe-wide and global forecasts of the '*Luftverkehrsinitiative*'. The business plan expected in each scenario that FD would also be able to raise non-aviation revenues by 5 % per year. These expectations were based on the development during the years 1999 to 2003, when the amount of passengers increased on average by 14,39 % and at the same time the parking revenues increased on average by 27,64 % due to an average annual increase in parking charges by 13,25 %.
- (87) Furthermore, the scenarios relied on the assumption that FD would be able to save costs by outsourcing employees. All of the scenarios expected that, taking into consideration the incentives, Dortmund airport would be able to increase the parking charges by another 10 %, due to the increase of passengers. In the best-case scenario, the airport would be expected to become fully profitable by 2015. The worst-case scenario predicted that this increase would only be possible for the remaining time during which EasyJet stayed. Germany pointed out that even in the worst-case scenario with the introduction of the incentives, the result of FD would be better than without incentives. According to Germany, it was also expected that eventually so many airlines would settle at Dortmund airport that the passenger increase would even exceed the forecasts and expectations. Germany stated that by introducing the NERES incentives, the airport would be more profitable due to an increase in passenger numbers and the higher utilisation. Germany presented all scenarios in detail. Without the introduction of incentives, Dortmund airport would use 60 % of its capacity in the best-case scenario, which meant 1,7 million passengers. In the worst case it would use 44 % of its capacity. Even in the best-case scenario, FD would continue to make operating losses and a recovery could not be expected in the coming years. In the worst-case scenario, the operating losses would first increase and then slightly decrease towards 2014, but they would still be significantly higher than in 2003.
- (88) Germany stated that the introduction of NERES was the most profitable option for FD, even compared to the closure of Dortmund airport. In particular, it was more profitable than the alternative of applying the original scheme of airport charges introduced on 1 November 2000. Germany further clarified that the assessment carried out showed that with NERES FD would be able to maximise the number of passengers, its aviation and non-aviation revenues, and its earnings before interest, taxes, depreciation and amortisation ('EBITDA').
- (89) In this regard, Table 14 summarises the incremental profitability results of NERES. It shows the expected differences in terms of number of passengers, costs, revenues and results of FD as compared to alternative scenarios. These results are specifically due to the introduction of NERES.

Table 14

**Incremental costs of NERES as compared to the 2000 scheme of charges**

	Forecasts						Total
	2004	2005	2006	2007	2008	2009	
Passengers	340 000	940 000	1 210 000	1 550 000	1 830 000	2 110 000	7 980 000
<b>Revenues</b>							
Landing charges	366	1 464	1 425	1 936	1 943	1 263	8 397
Provision of services	625	1 938	2 201	2 830	3 326	3 234	14 154
Revenues from infrastructure	110	401	389	507	586	355	2 348
Provisions	432	1 194	1 537	1 969	2 324	2 680	10 136
Renting	0	200	500	800	1 700	1 750	4 950
Parking	876	2 586	3 710	5 252	6 879	8 786	28 089
Reallocations	0	50	50	100	100	100	400
Others	0	50	50	100	100	100	400
Total operating revenues	2 409	7 882	9 861	13 493	16 958	18 268	68 871
Other revenues	845	2 336	3 007	3 852	4 546	5 243	19 829
Interests and dividend income	0	0	0	0	0	0	0
<b>Total revenues</b>	<b>3 254</b>	<b>10 218</b>	<b>12 868</b>	<b>17 345</b>	<b>21 505</b>	<b>23 511</b>	<b>88 701</b>
<b>Costs</b>							
Salaries and wages	411	5 920	7 545	9 568	11 183	12 766	47 393
Material	300	941	1 229	1 591	1 880	2 169	8 110
Depreciation	0	0	0	0	1 500	1 450	2 950
Interests	0	0	0	1 500	1 485	1 470	4 455
Operating costs	1 253	1 629	2 102	2 693	3 158	3 623	14 458
Other	0	0	0	0	0	0	0

	Forecasts						Total
	2004	2005	2006	2007	2008	2009	
Marketing contributions	155	426	546	695	825	503	3 150
<b>Total costs</b>	<b>2 119</b>	<b>8 916</b>	<b>11 422</b>	<b>16 047</b>	<b>20 031</b>	<b>21 980</b>	<b>80 515</b>
<b>Total contribution</b>	<b>1 135</b>	<b>1 303</b>	<b>1 446</b>	<b>1 298</b>	<b>1 474</b>	<b>1 531</b>	<b>8 186</b>
<b>Contribution to EBITDA</b>	<b>1 135</b>	<b>1 303</b>	<b>1 446</b>	<b>2 798</b>	<b>4 459</b>	<b>4 451</b>	<b>15 592</b>

(90) Germany stated that the overall aim of the measures was to generate the highest possible medium to long-term profits and that short-term losses would be balanced by the profits in the future as the introduction of NERES was expected to lead to a positive EBITDA (excluding costs falling within public policy remit) as from 2015 onwards.

(91) Germany also provided forecasts based on the total cost and total revenue calculations, as summarised in Table 15.

Table 15

**Forecast profit or loss in the NERES scenario**

	2004	2005	2006	2007	2008	2009	total
Passengers (million)	1,24	1,87	2,16	2,53	2,86	3,19	13,85
Revenues ('000 EUR)	22 548,00	28 778,00	31 921,00	37 080,00	42 246,00	45 298,00	207 871,00
Costs ('000 EUR)	46 029,00	50 487,00	53 165,00	58 095,00	62 649,00	65 160,00	335 585,00
Profit/Loss ('000 EUR)	- 23 481,00	- 21 709,00	- 21 244,00	- 21 015,00	- 20 403,00	- 19 862,00	- 127 714,00
EBITDA ('000 EUR)	- 2 881,00	- 1 159,00	- 744,00	936,00	2 982,00	3 408,00	2 541,00

(92) Germany furthermore argued that after the introduction of NERES, positive effects could be seen already in the second half of 2004. In 2005, losses of Dortmund airport had been already reduced by 8,5 % compared to 2004. Germany provided an updated business plan for FD which expected a positive development for the upcoming years and a return to profitability in terms of EBITDA level by 2011.

(93) Germany declared that a closure of the airport would have caused costs of EUR 170 million. When considering a closure of the airport, according to Germany, the following had to be taken into account: the accelerated depreciation for assets (EUR 187 million), demolitions (8,5 million), and indemnities due to personnel reductions (EUR 14 million). The sale of the property, buildings and equipment would yield at most EUR 38,75 million. A closure would have also required a surveillance of the buildings (EUR 450 000 per year) and the takeover of the employees with a life-term contract (EUR 1,3 million). Comparing the closure of the airport with the scenarios above, a continuation of activities of FD was the better alternative, Germany concluded <sup>(23)</sup>.

<sup>(23)</sup> Incidentally it can be referred to the Commission Decision concerning the Opening of the Proceeding (OJ C 217, 15.9.2007, p. 25).

[illegible]





	Forecasts											Total
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	
<b>Revenues</b>												
aviation	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	72 276
non-aviation	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	67 797
total — revenues	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	140 074
other revenues	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	25 710
interest rate and dividend income	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	0
<b>Total revenues</b>	<b>0</b>	<b>11 899</b>	<b>12 406</b>	<b>13 324</b>	<b>14 219</b>	<b>15 408</b>	<b>16 661</b>	<b>18 167</b>	<b>19 508</b>	<b>21 177</b>	<b>23 014</b>	<b>165 783</b>
<b>Costs</b>												
salaries and wages	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	20 160
purchases	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	80 788
depreciation	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	155
interest rate	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	3 125
operating costs	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	1 308
other costs	0	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	0
<b>Total costs</b>	<b>0</b>	<b>10 103</b>	<b>10 376</b>	<b>10 671</b>	<b>10 983</b>	<b>11 247</b>	<b>11 543</b>	<b>11 806</b>	<b>12 110</b>	<b>14 007</b>	<b>15 856</b>	<b>118 703</b>
<b>Total contribution</b>	<b>0</b>	<b>1 796</b>	<b>2 030</b>	<b>2 652</b>	<b>3 235</b>	<b>4 161</b>	<b>5 118</b>	<b>6 362</b>	<b>7 398</b>	<b>7 170</b>	<b>7 159</b>	<b>47 081</b>
<b>Contribution to EBITDA</b>	<b>0</b>	<b>1 716</b>	<b>1 950</b>	<b>2 572</b>	<b>3 155</b>	<b>4 081</b>	<b>5 038</b>	<b>6 282</b>	<b>7 318</b>	<b>8 665</b>	<b>10 179</b>	<b>50 956</b>

(102) Germany stated that the overall aim of the measures was to generate the highest possible medium to long-term profits. In this respect, Germany clarifies that short-term losses would be balanced by the profits in the future as the introduction of NEO was expected to lead to positive EBITDA (excluding costs falling within public policy remit) as from 2016 onwards.

(103) Germany also provided the forecasts based on the total costs and total revenues calculations, as summarised in Tables 18 and 19.

Table 18

**Forecast profit or loss in the NEO scenario**

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Passengers (million)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Revenue ('000 EUR)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Expenditure ('000 EUR)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Profit/loss ('000 EUR)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
EBITDA ('000 EUR)	[- 9 000 — - 11 000]	[- 9 000 — - 11 000]	[- 8 000 — - 10 000]	[- 8 000 — - 10 000]	[- 8 000 — - 10 000]	[- 6 000 — - 8 000]	[- 6 000 — - 8 000]	[- 4 000 — - 6 000]	[- 4 000 — - 6 000]	[- 2 000 — - 4 000]	[- 2 000 — - 4 000]

Table 19

**Forecast adjusted profit or loss in the NEO scenario**

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Passengers (million)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Revenue ('000 EUR)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Expenditure ('000 EUR)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Profit/loss ('000 EUR)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
EBITDA (TEUR)	[- 4 000 — - 6 000]	[- 2 000 — - 4 000]	[- 2 000 — - 4 000]	[- 2 000 — - 4 000]	[- 2 000 — - 4 000]	[0 — - 2 000]	[0 — - 2 000]	[0 — 2 000]	[0 — 2 000]	[2 000 — 4 000]	[2 000 — 4 000]

- <sup>1</sup>. Adjusted for approach charges imposed by FD to (partly) cover the costs of public service air traffic control. This responsibility, which is normally handled direct by the DFS, was transferred to FD, which charged for it direct.
- <sup>2</sup>. Adjusted (firstly) for public service costs, in particular public service wages and salaries for and Regulation (EC) No 300/2008; material costs for DFS/TTC/air traffic controllers/tower, fire service and (secondly) for depreciation and interest on historical infrastructure measures, incl. interest on late payments of construction bills, and other costs relating to historical investments, in particular property levies for infrastructure, land tax, material costs incl. pro rata expenditure on historical infrastructure investments.

- (104) Germany further presented that *ex ante* forecasts for NEO were confirmed by the actual results, as shown in Table 20.

Table 20

**Actual results of NEO**

	2009 <sup>a</sup>	2010	2011	2012
Number of passengers	1 716 519	1 747 731	1 822 117	1 902 747
In EUR thousands:				
Revenues	23 110	25 043	25 132	26 637
Costs	47 644	44 820	44 625	45 136
Total result	– 24 534	– 19 777	– 19 493	– 18 499
EBITDA	[– 7 000 — – 9 000]	[– 7 000 — – 9 000]	[– 7 000 — – 9 000]	[– 7 000 — – 9 000]

Source: Dr Bergmann, Kauffmann und Partner GmbH & Co.KG Wirtschaftsprüfungsgesellschaft; Flughafen Dortmund GmbH — Bericht über die Prüfung des Jahresabschlusses und des Lageberichtes zum 31.12.2012, submitted by Germany.

- (105) Germany further presented the uniform take-off charge introduced with NEO depending on the number of passengers carried by the airline. In this regard, Germany argued that a higher number of passengers would lead to higher aviation and especially non-aviation revenues, and that this justified the higher discounts.
- (106) Germany asserted that all charges were based on NEO, even if FD concluded individual agreements with airlines. Therefore, Germany is of the opinion that NEO is transparent.
- (107) Germany clarified moreover that benchmarking of the charges paid a FD with charges paid at other airports in its proximity is not appropriate. Germany is of the opinion that the Commission did not verify how the charges at these airports were determined. Moreover, according to Germany, the charges need to take into account the different business models pursued by the airports (such as point-to-point versus hub-and-spoke or low-cost traffic), as well as regional differences.
- (108) Germany states further that the charges for ground handling services were negotiated individually in order to take account of the level of services required by the various airlines. According to Germany, the ground handling charges in any case covers the underlying costs (see Table 11).

## 5. OBSERVATIONS FROM THIRD PARTIES

### 5.1. ON THE 2007 OPENING DECISION

#### 5.1.1. FD

- (109) FD emphasised the importance of Dortmund airport for the mobility of the population, for the economy in the eastern part of the *Land* North Rhine-Westphalia, and for the regions surrounding Dortmund. Consequently, according to FD, Dortmund airport is a substantial contribution to the economic development of the region which had stagnated due to the structural change initiated by the end of the 1980s. FD also pointed out the relevance of the airport referring to the enlargements to the east of the Union.

- (110) Furthermore, FD provided an analysis of Airport Council International which stated that airports on average provide 950 jobs per one million transported passengers. FD indicated that in the case of regional airports the amount of jobs offered is even higher. The analysis showed moreover that in addition to those jobs, airports also lead to an increase in regional and local employment levels.
- (111) According to FD the forecasts for FD's development were positive. FD stated that forecasts made in 1992 for 2000 had been accurate and that forecasts for the following years had not realised due to the events of 11 September 2001, which could not have been predicted. This meant that the amount of passengers was only increasing slowly and especially in the low-cost market segment. Therefore, FD used NERES to attract EasyJet and other airlines. In this context, it emphasised once again the effect of the incentive brought with low airport charges and marketing contributions.
- (112) FD stated that with the low charges under NERES it succeeded in creating new routes and therefore an increase of passenger volume in order to better use the infrastructure and to return to profitability at operating level.
- (113) According to FD the benefit was not provided from public resources, and therefore, could not be considered as unlawful State aid. FD indicated that it took the decisions without any consultation with the supervisory board of the airport, which could object to NERES, but could not impose an alternative. Therefore, NERES could not be imputed to public authorities, according to FD. It also claimed that a private investor would have introduced NERES as well. FD pointed out that it had taken up negotiations with Virgin Express and Ryanair, which failed because both requested even lower charges than NERES allowed. Moreover, FD noted that it had also negotiated with Germanwings and that in the end Germanwings signed contracts with Cologne/Bonn airport. So according to FD, Cologne/Bonn probably offered charges comparable to or lower than the Dortmund charges.
- (114) Referring to its *ex ante* business plan prepared for the introduction of NERES, FD is convinced that a private investor would have done the same since only the introduction of NERES and the favourable treatment of low-cost airlines could have led to the return to profitability at the operating level. FD furthermore stated that the charges pursuant to NERES were transparent and every airline could have applied for them, so NERES was not selective. Furthermore, FD claimed that the measure was limited to five years and that it did not qualify as State aid for the purposes of Article 107(1) of the Treaty, taking into account how the criteria were applied in the Commission decisions *Manchester* and *Charleroi*.

#### 5.1.2. DSW21

- (115) DSW21 declared that its task was to manage and operate the infrastructure of the city of Dortmund, therefore the operation of the airport is part of its tasks. The 1991 PLTA was concluded as a tax efficient alternative for financing the airport construction and operation compared to a direct grant. The aim of the expansion of the airport was to accompany the structural transition of the region from the coal and steel industry to a modern, service based economy.
- (116) DSW21 stated that it supported the decision of the airport to introduce NERES. According to DSW21, NERES was the best alternative to improve the profitability and growth of the airport. Other strategies, such as closure or a different positioning on the market were economically less advantageous. DSW21 stated that the success of NERES could be seen from the increased number of routes, the number of airlines and a better economic situation at the airport than it would have been without NERES.

#### 5.1.3. THE CITY OF DORTMUND

- (117) The city of Dortmund stated that it was not involved directly or indirectly in the decision-making process that led to the introduction of NERES. The city of Dortmund explained also that since the signature of the 1991 PLTA, FD was integrated into the DSW21, whose management organs and supervisory board consist of representatives of the city of Dortmund <sup>(24)</sup>, which are bound by the decision and instructions of the city council. Moreover, representatives of the city have to act in the interests of the city <sup>(25)</sup>.

<sup>(24)</sup> Gemeindeordnung NRW §§ 108(5) and 113.

<sup>(25)</sup> Gemeindeordnung NRW §§ 113.

- (118) The city of Dortmund claimed that the airport is pursuing a task of general economic interest. According to a study prepared by the University of Münster/Osnabrück in 2006, 1 550 persons were employed at the airport by FD and by about 70 other companies. The indirect employment created by the investments of these companies amounted to 2 100 employees and the induced employment created by the consumption of these companies amounted to 630 employees. Moreover, the city of Dortmund stated that the airport is important for the tourism industry of the region as well as for the region's competitiveness, in particular for modern Europe-wide service providers.

#### 5.1.4. EASYJET

- (119) EasyJet stated that the 2005 Aviation Guidelines were not applicable because NERES had been already set up in 2004 when the guidelines were not yet adopted and published. Therefore, in EasyJet's opinion, the Commission has to take a decision on the basis of its previous decisions, such as in the case *Ryanair/Charleroi*. EasyJet also noted that NERES met the requirements of Article 107(3)(c) of the Treaty and was therefore compatible with the common market.
- (120) Furthermore, EasyJet stated that it did not benefit from the lower charges, since it left the airport before reaching profitability. EasyJet pointed out that its business model did not rely on exploiting favourable deals, but that instead, it was willing to commit and share risks with the airport, which is supported by the fact that EasyJet never closed a base since 1995.
- (121) In EasyJet's opinion, NERES would also have been conceived and applied by a MEO. EasyJet stated that with NERES the number of flights increased again between 2002 and 2004. EasyJet pointed out that a MEO does not have to choose the most profitable investment in the short term, nor does he have to achieve profits in the short term. According to the airline, if an existing investment would pay off later, the investor would be more tempted to accept temporary lower returns, as was the case in Dortmund. EasyJet pointed out examples of airports, such as Liverpool, Glasgow Prestwick or London Stansted, where private capital and not State resources were involved, and incentives were used to increase the numbers of passengers and improve the profitability.
- (122) In its submission of 6 May 2014, EasyJet emphasised that the 2014 Aviation Guidelines clarified that only incremental costs have to be considered for the purpose of the MEO test. EasyJet claimed that this demanded an *ex ante* profitability analysis on the basis of sound medium-term prospects, which FD had carried out in the market studies concerning the two scenarios for future development, that is to say introducing NERES and keeping the pre-existing schedule of charges without NERES. According to these scenarios, non-aviation revenues would have been higher, if NERES were applied. According to EasyJet, FD took into account costs which go beyond the incremental costs in its initial business plan for NERES.
- (123) EasyJet pointed out that the airport charges together with the non-aeronautical revenues were capable of covering all costs stemming from the arrangements between airlines and the airport, with a reasonable profit margin on the basis of sound medium-term prospects. Therefore, according to EasyJet, NERES was likely to cause a substantial increase in passenger numbers, and hence, also in non-aviation revenues. EasyJet pointed out furthermore that the predicted increase of passengers by 2014 was realistic because experience showed that in the years between 2004 and 2007 the airport's passenger numbers increased significantly due to the introduction of NERES.

Table 21

#### Increase of passengers since the introduction of NERES (provided by EasyJet)

Year	Total passenger numbers	EasyJet's passenger numbers
2004	1 179 278	336 455
2005	1 742 891	891 057
2006	2 019 666	1 052 288
2007	2 155 064	Approx. 1 050 000

- (124) EasyJet argued that in 2004 the operator would have had no reason to be pessimistic regarding the potential of passenger number growth since the airport had an important catchment area, which is the Ruhr region with over 10 million inhabitants and EasyJet was determined to open a base at the airport. The series of circumstances that occurred since 2008, namely the raise of oil prices, the financial crisis and the local authorities refusing night flights, could not have been foreseen. EasyJet stated that these were the reasons why it had to reduce its operations despite the initial optimism. However, EasyJet argued that these circumstances could not have been predicted, and therefore, a MEO with the knowledge of 2004 would have had no reason to be less optimistic than the airport had been regarding the passenger traffic growth perspectives.
- (125) Considering the sensitivity of low-cost passengers to an increase of parking charges, EasyJet disagreed with the Commission's doubts. According to EasyJet there would be no reason to consider that a passenger who saves on the price of a plane ticket is so sensitive about moderate increases in parking charges that he will automatically start travelling only by public transportation means.
- (126) Finally, EasyJet stated that in light of the 2014 Aviation Guidelines, the focus should be on whether the airport charges and the related additional non-aviation revenues generated due to the application of NERES were sufficient to cover the incremental costs with a reasonable profit margin. Therefore, costs falling within the public policy remit should be excluded and the relevant time frame for the calculation should be 10 years. EasyJet concludes that the NERES incentives would satisfy the conditions of the MEO principle.

#### 5.1.5. DISTRICT OF PADERBORN

- (127) Together with Soest, which now is the district of Lippstadt, the district of Paderborn established the Paderborn/Lippstadt airport. In its comment the district of Paderborn mainly concentrated on the fact that Dortmund airport distorted competition by being only 95 km away from the Paderborn/Lippstadt airport. It is claimed that Paderborn/Lippstadt airport is the only German regional airport with a positive balance sheet and making profit, but is suffering from the fact that Dortmund airport and Kassel Calden airport are being financed mainly through State aid. The District of Paderborn furthermore claimed that the take-off airport charges and the charges for ground handling services covered only [...] % of FD's costs.

#### 5.1.6. AIR FRANCE

- (128) Air France argued that NERES was discriminatory in favour of low-cost airlines and that the measures were not limited. Air France claimed that since NERES benefits routes which are similar and in competition to the neighbouring Düsseldorf Airport (such as Alicante, Barcelona, Budapest, London, Malaga, Nice, Palma, Prague, Rome, Thessalonica), it cannot be deemed compatible with the internal market as start-up aid for development of new routes.

#### 5.1.7. THE ASSOCIATION OF EUROPEAN AIRLINES

- (129) According to the Association of European Airlines, it seemed that NERES favoured specific airlines and low-cost business models and that the scheme did not meet the conditions for granting start-up aid.

#### 5.1.8. INDUSTRIE- UND HANDELSKAMMER ZU DORTMUND ('IHK')

- (130) The IHK emphasised the necessity to introduce low-cost airlines at Dortmund airport since the region had to focus on aviation business after the structural change from steel to service industry. According to the IHK, difficulties arose only when Lufthansa became a shareholder of Eurowings AG and changed flight routes from Dortmund airport, which therefore lost its main customer.
- (131) The IHK claimed that Dortmund airport was the only airport specialised in low-cost traffic in the region surrounding the city of Dortmund and that its charges were not unusually low in this segment. So according to the IHK, in this region NERES did not affect competition. IHK also argued that the 1991 PLTA between FD and DSW21 was legitimate because during the structural change in the region, the development of the airport had positive effects on economy and population. Therefore, the 1991 PLTA served the general economic interest of the region.

## 5.1.9. VERKEHRSVERBAND WESTFALEN E.V. ('VWV')

- (132) According to VWV, a MEO would also have decided for the investments at Dortmund airport because the period of initial losses was expected and acceptable in the context of managing airport infrastructure. Furthermore, VWV argued that because at the time of the investment decision it was commonly accepted that financing of airport infrastructure does not constitute State aid, the possible aid could not be considered to be unlawful. VWV furthermore stated that FD was not competing with the surrounding airports Düsseldorf (which would not even have any more capacities for EasyJet), Münster/Osnabrück and Paderborn/Lippstadt (which both did not serve low-cost airlines). So according to VWV, the internal market was not affected by NERES.

## 5.1.10. COMMENTS FROM PRIVATE PARTIES

- (133) Private parties also submitted comments in the State aid procedure concerning Dortmund airport and NERES. They claimed that no MEO would adopt the measures taken at Dortmund airport because in fact the economic situation did not improve. They further stated that the submitted MEO test was deficient because it erroneously considered Dortmund airport as an international airport and the airport was not located as far from the city as the test claimed. These private parties also estimated that the financing covered more than the costs of public policy remit activities, such as fire protection and rescue services.
- (134) Furthermore, the private parties argued that State aid was given through the city of Dortmund granting State guarantees for loans.
- (135) Furthermore, the private parties dismissed the argument that the board of directors did not take part in developing NERES. As proof of the opposite, they provided minutes of a meeting during which the management submitted NERES to the supervisory board.

## 5.2. THE 2012 OPENING DECISION

## 5.2.1. DSW21 AND FD

- (136) The comments of DSW21 and FD were fully in line with the comments of Germany. In addition, DSW21 and FD stated that a MEO would also have concluded the 1991 PLTA, taking into consideration in particular the costs for closing down the airport.

## 5.2.2. EASYJET

- (137) EasyJet stated that NEO is in line with the MEO principle and thus does not constitute State aid. In EasyJet's opinion, from an economic perspective the introduction of NEO was the most feasible way forward for the operator of Dortmund airport.
- (138) EasyJet stated further that incentive schemes based on the growth of passenger volume as in the present case help airports in achieving economies of scale. EasyJet states that similar incentive schemes were introduced in Sweden, for example at Stockholm-Arlanda, Stockholm-Bromma and Göteborg Landvetter. EasyJet emphasised that according to the 2014 Aviation Guidelines, the investigation regarding NEO should exclusively concern the question whether the same conditions would have been offered by a profit-driven airport operator. EasyJet stated further that the *ex ante* profitability assessment on the basis of sound medium-term prospects of NEO is provided in the business plan and in the comparison of the different scenarios, and that therefore the MEO test would be satisfied. EasyJet stressed that the MEO test should only focus on incremental costs and revenues. EasyJet also pointed out that, when setting up an individual contract with an airline or an overall scheme of airport charges, it is possible to cover the incremental costs with a reasonable profit margin on the basis of sound medium-term prospects.
- (139) In this regard, EasyJet argued that in the NEO business plan FD took into account costs which go beyond the incremental costs. Accordingly, EasyJet concluded that if these costs would be excluded from the profitability assessment, the profitability of NEO would be even higher. EasyJet was further of the opinion that also costs related to tasks falling within the public policy remit and costs related to historical investments should not be taken into account when conducting the MEO test.



- (140) Moreover, EasyJet stated that the reduced rates pursuant to NEO were accessible to all airlines operating at the airport. Individual agreements between EasyJet and the airport did not go beyond the scope of NEO.

#### 5.2.3. GERMANWINGS

- (141) Germanwings clarified that its final charges including departing passenger charges and ground handling charges were on average between EUR [...] and [...] per departing passenger.
- (142) In addition, Germanwings declared that the relevant market to compare charges would be the charges paid at low-cost airports. Germanwings clarified further that the charges at Dortmund airport would not have differed from charges at Graz or Maastricht.
- (143) Germanwings stated furthermore that a MEO would also have to accept losses at least during the first few years of a new project.

#### 5.2.4. WIZZ AIR

- (144) Wizz Air stated that NEO is in line with the MEO principle and that it does not constitute State aid. Wizz Air agreed in particular that NEO was more economical than the closure of the airport. According to Wizz Air, in the framework of the closure of the airport, the Commission should take into account the high costs of closure that the city of Dortmund would have incurred.
- (145) Wizz Air asserted that the market conformity of airport charges needs to be compared with charges paid by low-cost airlines at different European regional airports, because a low-cost airline chooses its destinations not on a 'one-catchment-area' basis but across all of Europe.
- (146) Finally, Wizz Air expressed its view that its arrangement with FD were also market conform because they are incrementally profitable for the airport. Such an assessment should take into account network effects.
- (147) To support its argument of market conformity, Wizz Air provided the Oxera study.
- (148) Oxera first compared the charges Wizz Air paid at Dortmund airport to those paid at Doncaster, Liverpool, Memmingen, Prestwick and Stockholm-Skavsta airports. These airports are claimed to be similar to Dortmund airport in relation to traffic volume, type of airport traffic, and catchment area. According to Oxera, these airports are privately owned. They received public financing, which was, however, relatively small compared to their total asset base.
- (149) Oxera submitted that the charges paid by Wizz Air at Dortmund airport are on average significantly higher than those paid by Wizz Air at the airports used for the comparison, if the government security charge is taken into account. Oxera further submitted that the charges (net of the security charge) paid by Wizz Air are comparable to the levels of airport charges paid at the airports used for the comparison. Oxera concluded thereby that Wizz Air paid a market price at Dortmund airport and that the airport-airline arrangement is in line with the MEO principle.
- (150) Secondly, Oxera made an incremental profitability analysis of Wizz Air's contribution to the profitability of FD in the years 2009 to 2014. Oxera presented an approach to calculating incremental costs and revenues which is different from the one presented by Germany. Oxera included into this analysis incremental aeronautical and non-aeronautical revenues as well as incremental costs per passenger.
- (151) Oxera took into account the aeronautical revenues stemming from the airport charges net of the relevant discounts, based on the following agreements between Wizz Air and FD):
- (a) the Airport Service Agreement (ASA) between FD and Wizz Air dated 1 July 2009: The ASA specified the airport charges payable by Wizz Air. The charges included a [...] charge per departing passenger, a charge for [...] per departing passenger ([...] charge), a [...] charge per departing passenger, [...] per departing passenger, and an [...] charge per departing passenger;

- (b) the Standard Ground Handling Agreement dated 1 July 2009: it sets out the handling charge (which is already included in the ASA) and handling services;
  - (c) the Side Letter for airport and ground handling charges dated 1 July 2009: it specifies an [...] charge per departing passenger. [...];
  - (d) the agreement on additional flights and marketing support dated 10 December 2009: FD and Wizz Air agreed on FD co-financing additional flights through marketing contribution;
  - (e) the Side Letter for winter cash support dated 1 July 2010: concerned cash support to Wizz Air subject to a year-to-year increase by [...] % of the number of passengers in the winter season 2010;
  - (f) the Incentive System for Passenger Development (Schedule 6) dated 1 October 2010: set up a discount for each passenger between 1 October 2010 and 30 September 2011 that exceeded the number of departing passengers [...] and increase in [...] charge in the same period;
  - (g) the Side Letter for airport charges dated 6 June 2011: it specifies that FD shall pay to Wizz Air the difference between [...]. The Incentive System referred to in point (f) ended on 31 May 2011;
  - (h) the Amendment to the ASA made on 1 October 2011: modifies certain charges, but not affecting the all-inclusive charge determined above.
- (152) Oxera estimated the non-aeronautical revenues (for example relating to car parking, car rentals and other rentals relating to restoration) on the basis of the business plan provided by FD.
- (153) Based on FD's business plan, Oxera included into the analysis the incremental costs of marketing, incentive and cash support deriving from the agreements listed in recital 151, points (a) to (h). Moreover, it included an estimate of additional costs contained in the business plan of the airport, such as costs for personnel, material and other operating expenses that are not specific for Wizz Air.
- (154) According to Oxera, to assess the amount of general costs that is incremental to the agreement, a regression analysis has been carried out. On this basis, according to Oxera it would be possible to determine which fraction of the costs is fixed and which fraction varies depending on the passenger volume. Oxera estimated that the following costs vary with passenger numbers:
- (a) the cost of personnel increases by about EUR [...] with each additional departing passenger;
  - (b) the cost of materials increases by about EUR [...] with each additional departing passenger;
  - (c) other operating expenses <sup>(26)</sup> increase by about EUR [...] with each additional departing passenger.
- (155) These costs are averages across the whole airport and all its airlines and Oxera subsequently attributed them to Wizz Air based on its share of passenger departures.
- (156) Oxera estimated further the incremental costs of investments based on a schedule of investments for the period 2009 to 2019 as well as on the actual investments from 2004 to 2008 when Wizz Air was also operating at Dortmund airport. Investments before the arrival of Wizz Air to the airport were considered as sunk costs, and thus not incremental to the deal. According to Oxera, the costs of the investment cannot be attributed to the customers in the year of the investments, but must be spread over the lifetime of the investment. Therefore, Oxera took into account the annual depreciation costs and costs of financing of the relevant investment. The total annual costs of new investments were allocated to Wizz Air's passenger share of the passenger capacity of the airport of 2,5 million passengers as indicated by FD. Oxera considered this as a very conservative estimate, as not all of the envisaged investments were incremental to Wizz Air's presence, for example the runway extension planned originally for 2014.

<sup>(26)</sup> This includes costs such as land tax, occupancy costs, insurance charges, maintenance repairs, and vehicle costs.

Table 22

**Expected incremental revenues and costs from Wizz Air presence (EUR million)**

	2009 <sup>a</sup>	2010	2011	2012	2013	2014 <sup>a</sup>
Aeronautical revenues	[...]	[...]	[...]	[...]	[...]	[...]
Non-aeronautical revenues	[...]	[...]	[...]	[...]	[...]	[...]
Incremental operating costs	[...]	[...]	[...]	[...]	[...]	[...]
Incremental investment costs	[...]	[...]	[...]	[...]	[...]	[...]
One-off marketing support	[...]	[...]	[...]	[...]	[...]	[...]
Incremental profitability contribution	[...]	[...]	[...]	[...]	[...]	[...]

Source: Oxera, based on data provided by FD

Note: Figures for 2009 and 2014 are proportionate to the duration of the agreements.

- (157) Oxera calculated the incremental contribution of Wizz Air's presence as a difference between the incremental revenues and incremental costs. Finally, Oxera concluded that the agreements concluded between Wizz Air and FD, and NEO contributed to the profitability of the airport from an *ex ante* point of view.
- (158) According to Oxera, the agreements resulted in a positive estimated net present value of about EUR [300 000-400 000] over their duration (2009 to 2014), and therefore, a private investor would have been willing to conclude similar agreements with Wizz Air.

#### 5.2.5. DISTRICT OF PADERBORN

- (159) The District of Paderborn, the owner of Paderborn airport, stated that the possibility offered under the 2014 Aviation Guidelines for providing further operating aid to loss making airports for another 10 years gives these airports an unjustified advantage compared to profitable airports.

#### 5.2.6. PRIVATE PARTIES

- (160) Several private individuals have sent their comments within the framework of the procedure, stating that the public financing granted to the airport constituted State aid and that NEO was not on market terms.

## 6. COMMENTS OF GERMANY ON THIRD PARTIES

### 6.1. 2007 OPENING DECISION

- (161) In its observations on the comments of third parties, Germany took the view that the statements in most instances supported its opinion, and therefore, Germany emphasised the fact that 1991 PLTA could not be qualified as State aid. It pointed out once again that the 1991 PLTA was comparable to a historical investment grant for the infrastructure and in any case was compatible with the common market. This was supported by FD, the Verkehrsverband Westfalen e.V., the IHK Dortmund, DSW21 and the city of Dortmund.

- (162) In agreement with FD, Germany stated that if the Commission reached the conclusion that the 1991 PLTA between DSW21 and FD has to be considered as unlawful State aid, it could only be assessed under the 2005 Aviation Guidelines as from their date of application. Furthermore, Germany emphasised that the financing provided by DSW21 has to be seen as financing of a service of general economic interest ('SGEI') for which the Commission usually granted Member States a wide margin of discretion. Germany brought forward the argument that it is cheaper for the city Dortmund to finance the investments at the airport through the 1991 PLTA than through direct grants, since overall losses between 1998 and 2008 were lower than the depreciation and interests would have been. Joining the Verkehrsverband Westfalen e.V. and DSW21, Germany stated that the closure would have been even less cost-efficient because FD was at least able to pay part of its own fixed costs and had positive forecasts for the future in terms of passenger increase. An MEO would have behaved as the city and DSW21 did and at least have invested for a limited period of time. Germany especially agreed with the third parties about the fact that airports have a long economic life and that a period of losses was acceptable.
- (163) Germany then argued that NERES was accessible for all airlines on the basis of objective criteria. As the third parties had confirmed, Wizz Air, Germanwings, Sterling, AirBerlin and EasyJet fulfilled these criteria. According to Germany and also according to EasyJet and FD, an increase of passengers as well as an increase of returns were to be expected as a consequence of NERES.
- (164) As regards comments of the IHK and Verkehrsverband Westfalen e.V., stating NERES did not affect competition and the internal market, Germany agreed and stated that the nearby airports Münster/Osnabrück, Paderborn, Cologne/Bonn and Düsseldorf did not serve low-cost carriers.
- (165) Germany made clear that NERES was introduced after the extension of Dortmund airport. It was a reaction to the decline in passengers after 11 September 2001 in order to increase the use of the airport's underused capacity.
- (166) Germany stated that it does not agree with the observations of Air France and the Association of European Airlines because they were obviously not proven or substantiated in any way.
- (167) Germany commented that the 2005 Aviation Guidelines could be applied only as from 1 June 2007. According to Germany, if the 2005 Aviation Guidelines had to be applied, NERES was compatible with the common market.

## 6.2. 2012 OPENING DECISION

- (168) Generally Germany agreed with the comments provided by EasyJet, Germanwings, Wizz Air, DSW21 and FD. Germany asserted that NEO as well as any individual agreement concluded with the airlines using the airport was non-discriminatory, because it was applicable to every airline wishing to serve the airport.
- (169) Moreover, Germany agreed that NEO was in line with the MEO principle and that the different scenarios have shown that rising charges above the level of NEO would lead to a decrease of passengers, and due to the fixed costs of the airport it would result in higher losses. Germany submitted that a private investor would have accepted losses over a certain period. According to Germany, in this context an *ex ante* perspective is decisive since in an *ex ante* perspective NEO was the best economic alternative. Germany clearly pointed out that NEO was based on a business plan.
- (170) Germany furthermore agreed that the relevant market to determine whether there was an effect on competition is wider than point-to-point air connections and that comparable competing airports should not be located in the surrounding 100 km from Dortmund airport. Germany welcomed the conclusions of the comparative study on charges at other airports prepared by Oxera and submitted by Wizz Air.
- (171) Germany dismissed the observations of the private parties, who according to Germany partially relied on inaccurate facts. Germany clarified that the annual compensation of losses could not be automatically regarded as aid, because contrary to the assumptions of the private parties, operating results include also costs falling within the public policy remit and the marketing support was part of the charges.

## 7. ASSESSMENT

- (172) 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’.
- (173) The qualification of a measure as State aid within the meaning of this provision requires the following cumulative conditions to be met:
- (a) the measure must be financed through State resources and be imputable to the State;
  - (b) it must confer an economic advantage on its recipient;
  - (c) the advantage must be selective; and
  - (d) the measure must distort or threaten to distort competition.

## 7.1. MEASURE 1 — APPLICABILITY OF STATE AID RULES TO 100 % STATE GUARANTEES PROVIDED IN FAVOUR OF FD

- (174) The Commission recalls that an aid measure constitutes existing aid pursuant to Article 1(b)(v) of Council Regulation (EC) No 659/1999 <sup>(27)</sup> where it can be established that at the time the aid measure was put into effect, it did not constitute State aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State.
- (175) Germany submits that the 100 % State guarantees provided in favour of Dortmund airport constitute, if any, existing aid pursuant to Article 1(b)(v) Regulation (EC) No 659/1999, as they were put into place when the public funding of airports was not yet considered to constitute State aid and have not been altered since then.
- (176) Indeed, until recently, 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 had previously been considered by the Commission itself as a general measure of economic policy which could not be controlled under the Treaty rules for State aid.
- (177) However, the situation has changed. In the *Aéroports de Paris* judgment, the Court stated that the operation of an airport, including the provision of airport services to airlines and to the various service providers within airports, is an economic activity <sup>(28)</sup>. Consequently, as of the adoption of that judgment (12 December 2000) it is not possible anymore to consider the operation and construction of airports as a task carried out within the public policy remit by an administration, which is outside the ambit of State aid control.
- (178) In its *Leipzig/Halle airport* judgment the 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 construction of airport infrastructure is an economic activity <sup>(29)</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>(30)</sup>.

<sup>(27)</sup> 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).

<sup>(28)</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.

<sup>(29)</sup> Case T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v Commission*, [2011] ECR I-00000, in particular paragraphs 105 and 106.

<sup>(30)</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 C 76/2002 *Charleroi airport — Alleged State aid to the airport and Ryanair* (OJ C 248, 17.8.2012, p. 1).

- (179) In the light of the recitals 176 to 178 the Commission considers that prior to the Court judgment in *Aéroports de Paris*, public authorities could legitimately consider that financing measures definitively adopted before the judgment *Aéroports de Paris* did not constitute State aid and accordingly did not need to be notified to the Commission. It follows that the Commission can no longer put into question individual financing measures, which were not awarded on the basis of an aid scheme <sup>(31)</sup>, definitively adopted before *Aéroports de Paris* under State aid rules.
- (180) Accordingly, the Commission has to assess first, whether the 100 % State guarantees were put into place before the judgment in *Aéroports de Paris* (12 December 2000) and second whether the measure was amended since then. Third, the Commission has also to assess whether the measures at stake qualify as ‘individual aid’ pursuant to Article 1(e) of Regulation (EC) No 659/1999 or as an ‘aid scheme’ pursuant to Article 1(d) of Regulation (EC) No 659/1999. Only as regards the latter, the Commission can propose appropriate measures pursuant to Article 108(1) of the Treaty and Article 17 of Regulation (EC) No 659/1999.
- (181) With regard to the 100 % State guarantees at stake issued in 1987 and until 2000 (see Table 13), the Commission observes that they were irrevocably granted before the *Aéroports de Paris* judgment.
- (182) As Germany clarified during the formal investigation, the 100 % State guarantees have not been amended since. However, they have expired by now. In addition, the 100 % State guarantees were limited in time and in amount. Also the purpose of these 100 % guarantees was to collateralise concrete loans financing specific airport infrastructure investments at Dortmund airport. Therefore, they are to be considered as individual measures.
- (183) Therefore, at the time when these guarantees, which were at the end of 2008 worth EUR 74,182 million, were irrevocably granted, the Commission did not consider the financing of airports to constitute State aid. Even if they were State aid, they would have been individual existing aid and cannot be put into question at this time. In this light, it is not necessary to investigate further whether the 100 % State guarantees amounted to aid.

## 7.2. MEASURE 2 — AID NATURE OF THE 1991 PLTA

### 7.2.1. ECONOMIC ACTIVITY AND NOTION OF UNDERTAKING

- (184) According to settled case-law, the Commission must first establish whether FD is an undertaking within the meaning of Article 107(1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods or services on a given market is an economic activity.
- (185) In its *Leipzig/Halle airport* judgment the Court of Justice confirmed that the operation of an airport for commercial purpose and the construction of the airport infrastructure constitute an economic activity. Once an airport operator engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) of the Treaty, and the Treaty rules on State aid are therefore capable of applying to advantages granted by the State or through State resources to that airport operator.

### **Notion of undertaking**

- (186) FD is engaged in constructing, maintaining and operating Dortmund airport. FD offers airport services and charge users for the use of the airport infrastructure, thereby commercially exploiting the infrastructure. In the light of the considerations in recitals 184 and 185 it must therefore be concluded that FD was 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.

<sup>(31)</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’.

- (187) It follows that the Commission will not put into question compensation of investment costs of infrastructure investment projects that were irrevocably decided before 12 December 2000.
- (188) With regard to the present case Germany provided data included in Table 23 on the costs of capital related to investments that were irrevocably decided before the *Aéroports de Paris* judgment and other costs of investments during the years 2000 to 2012.

Table 23

**Capital costs of investment into infrastructure decided before *Aéroports de Paris* (in EUR thousands)**

Year	Depreciation for investments before AdP	Other depreciations	Total depreciations 1 + 2	Interests for investments before AdP	Other interests	Total interests 4 + 5	Capital costs for investments before AdP 1 + 4
2007	9 430	2 066	11 496	4 513	10	4 523	13 943
2008	8 947	2 957	11 904	4 009	4	4 013	12 956
2009	8 097	2 169	10 266	3 750	439	4 189	11 847
2010	[...]	[...]	[...]	[...]	[...]	[...]	[...]
2011	[...]	[...]	[...]	[...]	[...]	[...]	[...]
2012	[...]	[...]	[...]	[...]	[...]	[...]	[...]

- (189) As a result, the Commission concludes that it is not entitled to examine and put into question loss transfers that covered the amounts mentioned in the column 7 of Table 23.

**Public Policy Remit**

- (190) While FD must be considered to constitute an undertaking within the meaning of Article 107(1) of the Treaty, it must be recalled that not all the activities of an airport owner and operator are necessarily of an economic nature <sup>(32)</sup>.
- (191) According to the 2014 Aviation Guidelines and the Court of Justice <sup>(33)</sup> jurisprudence, activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities include for example security, air traffic control, police and customs. The financing has to be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities <sup>(34)</sup>.
- (192) 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>(35)</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>(36)</sup>.

<sup>(32)</sup> Point 34 of the 2014 Aviation Guidelines, Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

<sup>(33)</sup> Point 35 of the 2014 Aviation Guidelines and Commission Decision N 309/2002 of 19 March 2003 on Aviation security — compensation for costs incurred following the attacks of 11 September 2001.

<sup>(34)</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>(35)</sup> Point 36 of the 2014 Aviation Guidelines, Commission Decision N 309/2002 of 19 March 2003.

<sup>(36)</sup> Point 36 2014 of the Aviation Guidelines, Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 *P Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

- (193) 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>(37)</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 cost of the provision of some activities that might be non-economic in themselves but are inherent to the deployment of their economic activities.
- (194) Germany's view on the extent of the public policy remit evolved throughout the procedure. At one point Germany included in the public policy remit also costs related to salaries of public service officials working for the airport. While the extra costs of public service officials employed in a newly liberalised sector may be considered as sunk cost of the liberalisation, there is no legal obligation on the airports in Germany to employ such officials. Therefore, this item does not constitute a cost falling within public policy remit.
- (195) Furthermore, Germany has submitted that the costs arising from the following activities, whether as investments or operating expenses, are to be considered as falling within the public policy remit: airport security measures pursuant to §8 *Luftsicherheitsgesetz* (Air Security Law), measures assuring operational safety, air control and air safety measures pursuant to §27c(2) *Luftverkehrsgesetz* (Air Traffic Law), meteorological services and the fire brigade.
- (196) The Commission is of the view that measures pursuant to §8 *Luftsicherheitsgesetz*, measures pursuant to §27c(2) *Luftverkehrsgesetz* (including also meteorological services) and the fire brigade service can, in principle and subject to the analysis below, be considered to constitute activities falling within the public policy remit.
- (197) With respect to measures relating purely to operational safety, however, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport <sup>(38)</sup>. Subject to a more detailed review with respect to individual activities and costs, the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling in the public policy remit. Any undertaking wishing to operate an airport has to ensure the safety of the installations, such as the runway and the aprons.
- (198) As regards the legal framework, Germany has submitted that for the fire brigade there are no legal rules strictly imposing these costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for fire brigade is subject to regional responsibilities and those costs are usually remunerated by the relevant regional authorities. The remuneration of those costs is limited to the extent necessary to cover these costs.
- (199) As regards air traffic control and meteorological services, the Commission notes that according to §27d and §27f *Luftverkehrsgesetz* regulates that the costs related to §27c *Luftverkehrsgesetz* are covered by the State for a number of specific airports. While the Commission does not, in the present case, need to decide whether the provision may grant an advantage to those airports that profit from State financing pursuant to §27d and §27f *Luftverkehrsgesetz*, it is clear that the law envisages that all other airports have to bear the relevant costs themselves. In this light, costs related to air traffic control and meteorological services must be considered to constitute normal operating expenses of at least those airports not addressed by §27d and §27f *Luftverkehrsgesetz*.
- (200) With respect to measures pursuant to §8 *Luftsicherheitsgesetz*, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) *Luftsicherheitsgesetz* only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the measures listed therein may be reimbursed.

<sup>(37)</sup> Point 37 of the 2014 Aviation Guidelines, Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-01627, paragraph 36, and case-law cited.

<sup>(38)</sup> Commission Decision of 20 February 2014 in State aid case SA.35847 (2012/N) — Czech Republic — Ostrava Airport, not yet published in the OJ, recital 16.



All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FD relieved that undertaking of costs it had to bear pursuant to §8(3) *Luftsicherheitsgesetz*, that public financing is not exempted from scrutiny under Union State aid rules.

### **Conclusions on public policy remit**

- (201) In the light of the above considerations, the Commission finds it appropriate to draw more specific conclusions regarding investment costs and operating costs allegedly falling within the public policy remit.
- (202) As regards investment and operating costs linked to the fire brigade, the Commission accepts that these costs qualify as public policy remit costs, in so far as the remuneration of these costs is strictly limited to what is necessary to pursue these activities.
- (203) As regards investment and operating costs linked to measures taken pursuant to §8 *Luftsicherheitsgesetz*, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to §8(3) *Luftsicherheitsgesetz* qualify as public policy remit costs.
- (204) With respect to air traffic control and air safety measures pursuant to §27c(2) *Luftverkehrsgesetz*, and noting that Dortmund airport is not one of the airports for which a corresponding need has been recognised by the Federal government pursuant to §27d(1) and §27f(1) *Luftverkehrsgesetz*, the Commission finds that operating costs linked to air traffic control and air safety measures as well as meteorological services cannot qualify as public policy remit costs.
- (205) In any case, regardless of the legal classification of those costs as falling within the public remit or not, it has been demonstrated that they must be borne by the airport operator, under the applicable legal framework. Accordingly, where the State pays for those costs, the airport operator would be relieved from a cost that it should normally have incurred.
- (206) Also, operating costs related to ensuring the operational safety of the airport do not qualify as public policy remit costs.
- (207) Investments related to ensuring the operational safety of the airport do not qualify as public policy remit costs. The Commission observes that the improvement of the safety of the airport operation corresponds to normal costs of an economic activity that cannot be considered to fall within the public policy remit <sup>(39)</sup>. In particular, this means that the investments into the runway lighting and marking, etc., cannot be qualified as falling within the public policy remit.

### **7.2.2. STATE RESOURCES AND IMPUTABILITY TO THE STATE**

- (208) Any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it may be State aid <sup>(40)</sup>. Resources of local authorities are, for the application of Article 107 of the Treaty, State resources <sup>(41)</sup>.
- (209) The 1991 PLTA in favour of FD was concluded by DSW21. DSW21 is a holding of utility companies and companies managing the infrastructure of the city of Dortmund. It is fully owned by the city of Dortmund. For this reason DSW21 is clearly a public undertaking according to Article 2(b) of Commission Directive 2006/111/EC <sup>(42)</sup>. The 1991 PLTA was part of the decision of the city of Dortmund to transfer FD from a direct ownership by the city into the DSW21 holding structure. This was decided and implemented by the city of Dortmund.
- (210) Hence, the 1991 PLTA is imputable to the State and involves State resources.

<sup>(39)</sup> See Commission Decision in case SA.35847 (2012/N) — Czech Republic — Ostrava Airport, p. 16, not yet published.

<sup>(40)</sup> Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397.

<sup>(41)</sup> Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais* [2011], Rec. 2011, p. II-1999, paragraph 108.

<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).

## 7.2.3. ECONOMIC ADVANTAGE

- (211) 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 <sup>(43)</sup>. Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention <sup>(44)</sup>. Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.
- (212) The Commission further recalls that ‘capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid’ <sup>(45)</sup>. In the present case, in order to determine whether the 1991 PLTA grants FD an advantage 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>(46)</sup>.
- (213) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEO principle is whether ‘in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question’ <sup>(47)</sup>.
- (214) 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>(48)</sup>.
- (215) 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>(49)</sup>.
- (216) In order to be able to apply the MEO principle, the Commission has to place itself at the time when the decision to conclude the 1991 PLTA between FD and DWS21 was taken. The Commission must also base its assessment on the information and assumptions which were at the disposal of the city of Dortmund at the time, when the measure was adopted.
- (217) The Commission notes that according to Germany the 1991 PLTA was concluded as an alternative way to finance the construction of the infrastructure of FD. The 1991 PLTA maintained this function until today. Later it became also the tool to finance operating losses of FD. Germany does not argue that the 1991 PLTA would be expected to provide returns for the investment or for the operating expenditure. The financial forecasts that were provided for NERES (Table 15) and NEO (Table 18) also show that DSW21 did not expect FD to reach profitability when taking into account full costs and revenues.
- (218) The compensation of losses by DSW21 relieved FD from the burden of covering its own losses. DSW21 did not foresee that the future revenues from the financing of the airport’s losses would outweigh the losses incurred with an appropriate profit margin.
- (219) Therefore, the Commission concludes that the airport would not have obtained such an economic advantage under normal market conditions.

<sup>(43)</sup> 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.

<sup>(44)</sup> Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

<sup>(45)</sup> Case C-482/99 *France v Commission* (*Stardust Marine*) [2002] ECR I-4397, paragraph 69.

<sup>(46)</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>(47)</sup> Case 40/85 *Belgium v Commission* [1986] ECR I-2321.

<sup>(48)</sup> *Stardust Marine*, paragraph 71.

<sup>(49)</sup> Case C-124/10P *European Commission v Électricité de France (EDF)* [2012], not yet published, paragraph 85.

## 7.2.4. SELECTIVITY

- (220) Article 107(1) of the Treaty provides that in order to be defined as State aid a measure must favour ‘*certain undertakings or the production of certain goods*’.
- (221) The Commission notes that this financing of capital costs was paid only to FD. Thus, it is selective within the meaning of Article 107(1) of the Treaty.

## 7.2.5. DISTORTION OF COMPETITION AND EFFECT ON TRADE

- (222) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in the internal market, the latter must be regarded as affected by that aid. In accordance with settled case law <sup>(50)</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.
- (223) As set out in recitals 184 to 186 the operation of an airport constitutes an economic activity and competition takes place between airports to attract passengers and airlines. Therefore, FD competes with other undertakings on a market open to competition. The economic advantage which FD received strengthens its position vis-à-vis its competitors on the European market of providers of airport services.
- (224) Dortmund airport currently serves approximately 1,9 million passengers per year. As noted in Table 1 Dortmund airport is located within one hour’s travel time by car and less than 100 km from Düsseldorf airport, Münster/Osnabrück airport and Paderborn/Lippstadt airport and within two hours’ drive from three other airports. There are international flights from Dortmund airport, among them also to destinations served by Münster/Osnabrück airport and Paderborn/Lippstadt airport (Palma de Mallorca, Munich and Antalya).
- (225) In light of these facts, it must be considered that public funding to FD distorts or threatens to distort competition and has at least a potential effect on trade.

## 7.2.6. EXISTING AID AND NEW AID

- (226) In the light of recitals 176 to 178, the Commission considers that the 1991 PLTA was irrevocably signed in 1991, prior to the General Court judgment in *Aéroports de Paris*, so that public authorities could legitimately consider that the 1991 PLTA did not constitute State aid.
- (227) During the formal investigation procedure, Germany clarified that the 1991 PLTA was unlimited in time and not substantially amended since then. The Commission observes that indeed the amendments of the 1991 PLTA in 1999 and 2008 did not lead to the modification of the loss coverage mechanism and nature of the 1991 PLTA.
- (228) Normally, the Commission cannot put into question individual aid measures definitely adopted before the *Aéroports de Paris* judgment. In the present case, however the 1991 PLTA is covering the annual losses of FD for an unlimited period of time and an unlimited amount, and thus, it is an aid scheme within the meaning of Article 1 (d) of Regulation (EC) No 659/1999.
- (229) According to Article 108(1) of the Treaty TFEU and Article 17 of Regulation (EC) No 659/1999 the Commission can propose appropriate measures for existing aid schemes. In addition, according to point 83 of the 2005 Aviation Guidelines <sup>(51)</sup> the Commission invited Member States to amend their existing schemes relating to State aid to airports to conform to these guidelines by 1 June 2007 at the latest. Member States were asked to confirm their acceptance in writing. Should a Member State fail to act according to its commitment, the existing aid becomes unlawful aid after the date set in the appropriate measures and is subject to recovery.

<sup>(50)</sup> Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

<sup>(51)</sup> See footnote 7.

- (230) Germany accepted the appropriate measures by letter dated 30 May 2006. Accordingly, Germany had to ensure that the aid scheme conformed to the 2005 Guidelines by 1 June 2007 the latest. As from that date onward, the public financing granted to FD under the 1991 PLTA no longer constituted existing aid.
- (231) Consequently, the Commission will limit its assessment to the period starting as from 1 June 2007.

#### 7.2.7. INTERMEDIATE CONCLUSION

- (232) For the reasons set out in recitals 184 to 231, the Commission concludes that the contributions by DSW21 to the capital costs for investments at Dortmund airport that were decided after the *Aéroports de Paris* judgment and incurred as from 1 June 2007, constitute State aid within the meaning of Article 107(1) of the Treaty.

#### 7.2.8. LAWFULNESS OF THE AID

- (233) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and may not put the proposed measures into effect until the notification procedure has resulted in a final decision.
- (234) Since the contributions at stake have been granted without prior approval by the Commission, Germany has not respected the prohibition of Article 108(3) of the TFEU.

### 7.3. MEASURE 3 — AID NATURE OF NERES

#### 7.3.1. ECONOMIC ADVANTAGE AND APPLICATION OF THE MEO PRINCIPLE

- (235) In order to determine whether FD granted an advantage to the airlines benefiting from NERES, the Commission has to examine whether in similar circumstances an airport operating under normal conditions of the market economy and guided by prospects of profitability in longer term would have entered into same or similar commercial arrangement as FD. The existence of an advantage can normally be excluded if (a) the price charged for airport services corresponds to the market price; or (b) if it can be demonstrated through an *ex ante* analysis that the schedule of charges is expected to incrementally contribute to the profitability of the airport and is part of overall strategy leading to profitability in the long term. Moreover, the airport infrastructure must be open to all airlines (this includes infrastructure more likely to be used by certain categories of airlines, such as low-cost carriers or charters).
- (236) According to the *Charleroi judgement* <sup>(52)</sup> when assessing the measures in question the Commission has to take into account all the relevant features of the measures and their context. In other words, the Commission has to analyse the expected impact of NERES on FD, taking into account all relevant features of the measure in question.
- (237) The Court declared 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>(53)</sup>.
- (238) In order to be able to apply the MEO test the Commission has to place itself at the time when NERES was adopted. The Commission must also base its assessment on the information and assumptions which were at the disposal when NERES was adopted.

<sup>(52)</sup> Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, paragraph 59 ('*Charleroi judgement*').

<sup>(53)</sup> See footnote 48.

## 7.3.2. PROFITABILITY ANALYSIS OF NERES

- (239) At present the Commission considers the *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with airlines.
- (240) In this respect, 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.
- (241) The Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test 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.
- (242) 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 schemes). Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport must be taken into account. Such incremental costs may encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs. In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test.
- (243) When assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long-term.
- (244) NERES was eligible to all airlines using the airport that fulfilled its conditions in terms of passenger volume and introduction of new routes. It is not an arrangement specific to an airline or a group of airlines. Therefore, it is an overall scheme of airport charges as referred to in point 63 of the 2014 Aviation Guidelines. The relevant costs and revenues that are incremental to NERES are those that FD expected to incur by applying NERES as compared to applying another alternative scheme of charges. Until the introduction of NERES, the 2000 scheme of charges was generally applicable. Hence, at the time of the introduction of NERES, FD faced with the following three choices: (i) to maintain the 2000 scheme with higher airport charges as a generally applicable scheme to all users; or (ii) to introduce NERES with lower airport charges than those set out in the 2000 scheme.
- (245) Due to the major extensive construction of its infrastructure before 2000, FD is characterised with a high level of fixed costs, both fixed investment costs and operating costs. Its highly developed infrastructure requires a high proportion of the operating costs, which does not vary by modification of the number of airlines or passengers.
- (246) Before deciding upon the application of NERES, FD made a financial and traffic forecast for the options with and without NERES, applying different sets of assumptions as base-, worst- and best-case scenarios. In any of the scenarios FD had to count with a sharp decrease in the number of passengers and the use of its capacity, if the 2000 scheme of charges were to apply. The consequence would have been continuous operating losses throughout the forecasted period. The incremental effect of NERES as an overall scheme of airport charges has been compared to these alternative scenarios.
- (247) FD estimated the positive financial effect of the introduction of NERES. In this regard, Table 24 summarises the incremental profitability results of NERES. It shows the expected differences in terms of number of passengers, costs, revenues and results of FD as compared to alternative scenarios. These results are specifically due to the introduction of NERES.

Table 24

**Incremental profitability of NERES 2004-2009 (EUR thousands)**

	2004	2005	2006	2007	2008	2009
Incremental costs	2 119	8 916	11 422	16 047	20 031	21 980
Incremental revenues	3 254	10 218	12 868	17 345	21 505	23 511
Incremental profit	1 135	1 303	1 446	2 278	4 459	4 451
<b>Net Present Value <sup>(1)</sup></b>	<b>EUR 10,7 million</b>					

<sup>(1)</sup> The nominal discount rate was estimated in the Ecorys study commanded by the Commission at 8,4 %.

- (248) The net present value (NPV) of the incremental profits of NERES in 2004-2009 was expected to be EUR 10,7 million.
- (249) Table 24 shows that as from the first year of its introduction as well as throughout its whole application NERES was expected to contribute positively to the profitability of FD. Its incremental revenues due to the introduction of NERES were expected every year to be higher than its incremental costs. A positive incremental contribution was expected independently of the base-, worst- and best-case scenarios.
- (250) The Commission observes, that given the high fixed costs and the very limited incremental costs relating to the provision of services pursuant to NERES, these forecasts were not sensitive to the assumptions regarding the overall traffic development.
- (251) Germany also provided *ex post* data (as presented in Table 25 and Table 26) regarding the costs and revenues which it considers as incremental to the presence of airlines at Dortmund airport between 2000 and 2011 (including the period prior to the introduction of NERES). Germany considered only marketing expenses (as presented in Table 25) as directly attributable operating costs to airlines. According to Germany no investments and therefore no capital costs (depreciation and interests relating to the investments) are attributable to any of the airlines present at the airport.
- (252) These data (up to the year 2004) was available when the decision was taken to introduce NERES and to admit airlines to the scheme. Based on these incremental revenues and on the absence of incremental costs, the airport was in a position to offer discounts and other incentives to airlines in order to maintain or to increase the number of passengers at the airport. As far as the revenue generated by the airlines covers the incremental costs of the airport, including also cost such as discounts and incentives, it contributes positively to the overall profitability of the airport.
- (253) The Commission observes that the achieved incremental revenues and costs led indeed to a positive contribution of the contracts to the profitability of the airport during the application of NERES between 2004 and 2009.
- (254) The Commission further notes that when assessing airport/airline arrangements, it should also assess the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport which leads to profitability at least in the long-term. In this respect, the Commission has to take into account the factual evidence that was available, and the developments that could reasonably be expected, at the time when the NERES schedule of charges was adopted. In particular the prevailing market conditions, notably the market changes induced by the liberalisation in the air transport market, the market entry and development of low-cost carriers and other point-to-point carriers, changes in the organisational and economic structure of the airport industry as well as the degree of diversification and complexity of the functions undertaken by airports, the enhancement of the competition between airlines and airports, the uncertain economic environment due to the changes in the prevailing market conditions or any other uncertainty in the economic environment have to be taken into account.

- (255) Table 15 shows the expected operating result (using EBITDA), which was part of the *ex ante* forecasted scenarios prepared for the decision-making linked to the adoption of NERES. It took into account the retreat of the full service companies from Dortmund airport and the further development of the low-cost airlines, which were the main growth generator in this region.
- (256) Table 15 also shows that FD was expected to return to profitability at the EBITDA-level three years after the introduction of NERES.
- (257) The scheme was expected to yield a positive incremental profit from the first year onward, even if it would have attracted a lower number of passengers than expected. Also the Ecorys study commissioned by the Commission confirmed that it had been reasonably expected that a MEO would choose to implement the NERES scheme. According to Ecorys, the alternative to close the airport would be more costly. Given the positive contribution to the profitability of the airport, the Commission can also observe that NERES was introduced in view of a strategy to reach profitability at long-term. Consequently, the scheme complies with MEO principle.
- (258) Finally, the Commission notes that the airport infrastructure use as well as the NERES scheme of charges were open to all interested airlines without undue discrimination.

### 7.3.3. CONCLUSION

- (259) In view of the conducted incremental profitability calculation, the Commission concludes that the introduction of NERES 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 NERES were covered by the revenues stemming from the introduction of NERES (from aeronautical and non-aeronautical activities) 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 these airlines. Furthermore, NERES was to be considered as part of an overall strategy of the airport to lead to profitability at least in the long term. Finally, the infrastructure as well as the scheme of charges is also open to all interested airlines.
- (260) Thus, the Commission concludes that NERES does not confer an economic advantage on the airlines that they would not have obtained under normal market conditions. Therefore NERES does not constitute State aid within the meaning of Article 107(1) of the Treaty.

## 7.4. MEASURE 4 — AID NATURE OF NEO

### 7.4.1. ECONOMIC ADVANTAGE AND APPLICATION OF THE MEO PRINCIPLE

- (261) In the light of the considerations set out in Section 7.3.1, in order to determine whether NEO granted an advantage to the airlines benefiting from it, the Commission has to examine whether in similar circumstances an airport operating under normal conditions of the market economy and guided by prospects of profitability in longer term would have entered into same or similar commercial arrangement as FD. At present the Commission considers *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with airlines.
- (262) In addition, according to the *Charleroi judgement* <sup>(54)</sup>, the Commission has to analyse the expected impact of NEO on FD, taking into account all relevant features of the measure in question.
- (263) In order to be able to apply the MEO test the Commission has to place itself at the time when NEO was adopted. The Commission must also base its assessment on the information and assumptions which were at the disposal when NEO was adopted.

<sup>(54)</sup> See footnote 52.

## 7.4.2. PROFITABILITY ANALYSIS OF NEO

- (264) With regard to the *ex ante* incremental profitability assessment of NEO, 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.
- (265) The Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test 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.
- (266) 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 schemes). Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport must be taken into account. Such incremental costs may encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs. In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test.
- (267) When assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term.
- (268) NEO applies to all airlines using the airport. It is not an arrangement specific to an airline or a group of airlines. This is underlined by the fact that during the application of NEO, airlines could enter and exit the airport without NEO being changed. Therefore it is an overall scheme of airport charges as referred to in point 63 of the 2014 Aviation Guidelines. The relevant costs and revenues that are incremental to NEO are those that FD expected to incur by applying NEO as compared to applying another alternative scheme of charges. Upon the expiry of the previous scheme NERES, the 2000 scheme would be applicable. Hence, at the time of the introduction of NEO, FD faced with the following three choices: (i) to introduce the 2000 scheme with higher airport charges; or (ii) to introduce NEO with lower airport charges then set out in the 2000 scheme, or (iii) to introduce a mixture of these two schemes ('mixed scheme').
- (269) Following to the major construction of its infrastructure before 2000, FD is characterised with a high level of fixed costs, both fixed investment costs and operating costs. Its highly developed infrastructure requires a high proportion of the operating costs, which does not vary by modification of the number of airlines or passengers.
- (270) Before deciding upon the application of NEO, FD made a financial and traffic forecast for different choices enumerated in recital 268, applying different sets of assumptions as base-, worst- and best-case scenarios. In any of the scenarios FD had to count with a sharp decrease in the number of passengers and the utilisation of its capacity, if the 2000 scheme or a mixed scheme of charges were to apply. The consequence would have been continuous operating losses throughout the forecasted period. The incremental effect of NEO as an overall scheme of airport charges has been compared to these alternative scenarios.
- (271) FD estimated the positive financial effect of the introduction of NEO as shown in Tables 16 and 17. In this regard Tables 16 and 17 summarise the incremental profitability results of NEO. The tables show the expected differences in terms of number of passengers, costs, revenues and results of FD as compared to alternative scenarios. These results are specifically due to the introduction of NEO.



- (272) Tables 16 and 17 show that as from the first year of its introduction as well as throughout its whole application NEO was expected to contribute positively to the profitability of the airport. Its incremental revenues due to the introduction of NEO were expected every year to be higher than its incremental costs. A positive incremental contribution was expected independently of the base-, worst- and best-case scenarios.
- (273) The Commission observes that, given the high fixed costs and very limited incremental costs relating to the provision of services under NEO, these forecasts were not sensitive to the assumptions regarding the overall traffic development.
- (274) Germany also provided *ex post* data (as presented in Tables 25 and 26) regarding the costs and revenues which it considers as incremental to the specific agreements with airlines at Dortmund airport between 2000 and 2011 (including the period prior to the introduction of NEO). Germany considered as directly attributable operating costs to airlines only marketing expenses (as presented in Table 25). According to Germany no investments and therefore no capital costs (depreciation and interests relating to the investments) are attributable to any of the airlines present at the airport.
- (275) These data (up to the year 2008) was available when the decision was taken to introduce NEO and to conclude specific agreements with airlines. Based on these incremental revenues, the airport could have expected that the revenue generated by the airlines would have covered their incremental costs, and hence contribute positively to the overall profitability of the airport.
- (276) The Commission observes that the achieved incremental revenues and costs lead indeed to a positive contribution of the contracts to the profitability of the airport.

Table 25

**Costs directly attributable to airlines**

Year	Operating costs directly attributable to an airline			Capital costs directly attributable to an airline		
	airline A [...]	airline C [...]	airline E [...]	airline A	airline B	airline C
2000	0	0	0	0	0	0
2001	0	0	0	0	0	0
2002	0	0	0	0	0	0
2003	0	0	0	0	0	0
2004	0	0	0	0	0	0
2005	200	0	0	0	0	0
2006	265	246	0	0	0	0
2007	668	369	597	0	0	0
2008	215	621	0	0	0	0
2009	349	951	233	0	0	0
2010	296	1 119	406	0	0	0
2011	337	962	334	0	0	0

Table 26

**Revenues directly attributable to airlines**

(TEUR)

Year	Aviation revenues per airline							
	airline A [...]	airline B [...]	airline C [...]	airline D [...]	airline E [...]	airline F [...]	airline G [...]	Others
2000	—	241	—	5 519	—	—	—	1 844
2001	—	3 732	—	7 540	—	—	122	3 299
2002	—	4 247	—	5 884	—	77	178	3 200
2003	—	7 651	—	2 169	—	105	168	3 120
2004	1 128	3 858	180	1 679	—	176	241	2 423
2005	2 954	1 928	707	558	—	195	202	1 912
2006	3 941	2 057	1 331	623	—	137	259	2 034
2007	3 756	1 882	1 574	502	542	246	265	1 152
2008	2 941	1 968	2 071	134	1 586	353	401	1 300
2009	1 864	2 089	2 801	—	1 272	373	474	561
2010	2 195	2 184	3 505	—	1 664	502	687	933
2011	2 162	1 926	3 629	—	1 408	732	391	1 047

(TEUR)

Non-aviation revenues per airline							
airline A [...]	airline B [...]	airline C [...]	airline D [...]	airline E [...]	airline F [...]	airline G [...]	Others
—	26	—	2 307	29	—	—	354
—	631	—	2 951	—	—	19	507
—	903	—	2 640	—	15	36	540
—	1 623	—	1 931	—	22	37	531
844	1 260	116	1 234	—	45	68	560
2 429	1 225	527	801	—	55	78	540
3 004	1 138	1 056	762	—	38	85	526
3 160	1 146	1 356	688	554	77	94	429
2 542	1 239	1 868	435	1 624	111	143	393
1 179	1 048	2 194	252	920	123	163	215

Main airlines: [...]

- (277) The Commission further observes that Wizz Air received the highest average marketing contributions per passenger among all companies. The Oxera study provided a very comprehensive analysis of the incremental costs, which considers more cost categories as incremental to presence of Wizz Air at the airport. Indeed, the Commission agrees that some of the costs included, such as some investment costs, are likely not to be incremental to the presence of Wizz Air at Dortmund airport. Nevertheless, the Commission notes that this study also shows an incremental positive contribution of Wizz Air's presence at the airport to the profitability of the airport.
- (278) Given that the methodology of Oxera can also be applied to the other airlines and as their specific benefits per passenger are lower than those of Wizz Air, it can be concluded that the other airlines were also incrementally profitable to the airport.
- (279) The Commission further notes that when assessing airport/airline arrangements, it should also assess the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport to lead to profitability at least in the long term. In this respect, the Commission has to take into account the factual evidence that was available, and the developments that could reasonably be expected, at the time when the NEO schedule of charges was adopted. In particular the prevailing market conditions, notably the market changes induced by the liberalisation in the air transport market, the market entry and development of low-cost carriers and other point-to-point carriers, changes in the organisational and economic structure of the airport industry as well as the degree of the diversification and complexity of the functions undertaken by airports, the enhancement of the competition between airlines and airports, the uncertain economic environment due to the changes in the prevailing market conditions or any other uncertainty in the economic environment have to be taken into account.
- (280) Table 15 and Table 19 show the expected operating result (using EBITDA), with and without adjustments for costs related to the public policy remit for the costs related to the historical investments. The table that includes the public policy remit was part of the *ex ante* forecasted scenarios prepared for the decision-making about the adoption of NEO. The adjusted Table 10 was reconstructed to account of the costs and revenues related to the public policy remit. NEO was prepared as a continuation of the strategy of concentrating on low-cost airlines, which was started by NERES. This took into account the retreat of the full service companies from Dortmund airport and the further development of the low-cost airlines, which were the main growth generator in the European region.
- (281) Table 15 shows that NEO was expected to diminish the airport's operating losses at EBITDA level over a medium term even when the reported costs included costs related to the public policy remit. Moreover, Table 19 shows the forecasted operating result at EBITDA level, when Germany deducted from the costs and revenues those items that it supposed to be outside the scope of State aid control as costs related to the public policy remit. Germany later confirmed that some to the costs that were deducted in Table 19 are not of public policy remit nature. Nevertheless, the Commission agrees that at its introduction NEO could have been considered part of the implementation of an overall strategy of the airport to lead to profitability at least in the long-term.
- (282) Finally, the Commission notes that the airport infrastructure use as well as the NEO scheme of charges were open to all interested airlines.

#### 7.4.3. CONCLUSION

- (283) In view of the conducted incremental profitability calculation, the Commission concludes that the introduction of NEO 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 NEO were covered by the revenues stemming from the introduction of NEO (from aeronautical and non-aeronautical activities) 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 these airlines. Furthermore, NEO was to be considered as part of an overall strategy of the airport to lead to profitability at least in the long term. Finally, the infrastructure as well as the scheme of charges is also open to all interested airlines.
- (284) Thus, the Commission concludes that NEO does not confer an economic advantage on the airlines that they would not have obtained under normal market conditions. Therefore NEO does not constitute State aid within the meaning of Article 107(1) of the Treaty.

## 7.5. COMPATIBILITY

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

- (285) Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) of the Treaty that State aid is not compatible with the internal market. The aid in question can only be assessed on the basis of Article 107(3)(c) of the Treaty, which stipulates that: ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’, may be considered to be compatible with the internal market.
- (286) In this regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the Treaty.
- (287) 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>(55)</sup> applies to unlawful investment aid to airports. In this respect, if the unlawful investment aid was granted before 4 April 2014, the Commission will apply the compatibility rules in force at the time when the unlawful investment aid was granted. 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>(56)</sup>.
- (288) According to the 2014 Aviation Guidelines, the Commission considers that the provisions of the notice on the determination of the applicable rules for the assessment of unlawful State aid should not apply to pending cases of unlawful operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period <sup>(57)</sup>.
- (289) The Commission has concluded that the 1991 PLTA constitutes an unlawful State aid scheme. Hence, the Commission will apply the 2005 Aviation Guidelines to investment aid granted before 4 April 2014 and the 2014 Aviation Guidelines to operating aid granted before 4 April 2014.

## 7.5.2. DISTINCTION BETWEEN INVESTMENT AND OPERATING AID

- (290) In view of the provisions of the 2014 Aviation Guidelines, the Commission has to determine whether the measure in question constitutes unlawful investment or operating aid.
- (291) According to point 25 (18) of the 2014 Aviation Guidelines investment aid is defined as ‘aid to finance fixed capital assets, specifically, to cover the capital costs funding gap’. Moreover, according to point 25 of the Guidelines investment aid can relate both to an upfront payment (that is to say cover upfront investment costs) and to aid paid out in the form of periodic instalments (to cover capital costs, in terms of annual depreciation and costs of financing).
- (292) Operating aid, on the other hand, means aid which covers 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’ <sup>(58)</sup>.

<sup>(55)</sup> OJ C 119, 22.5.2002, p. 22.

<sup>(56)</sup> Point 173 of the 2014 Aviation Guidelines.

<sup>(57)</sup> Point 172 of the 2014 Aviation Guidelines.

<sup>(58)</sup> Point 25 (22) of the 2014 Aviation Guidelines.

- (293) In the light of the definitions cited in recitals 291 and 292, it can be considered that the loss transfers that covered the amounts mentioned in the last column 7 of the Table 23 were all linked to particular investment projects, constitute investment aid to FD.
- (294) In contrast, the part of the annual loss transfers that was used to cover annual operating losses <sup>(59)</sup> of FD net of the costs included that fall within a public policy remit as established in recitals 190-207 constitute operating aid to FD.
- (295) Finally, the part of the loss compensation that covers losses of FD that are not already included in the EBITDA, minus costs falling within a public policy remit as established in recitals 190-207 constitute investment aid. The investment aid includes in particular the annual depreciation of assets and costs of financing.

#### 7.5.3. COMPATIBILITY OF INVESTMENT AID

- (296) According to point 61 of the 2005 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.
- (297) 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.
- (298) Germany asserts that the investment aid in favour of FD complies with all the compatibility criteria contained in the 2005 Aviation Guidelines.

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

- (299) The financing of FD's infrastructure serves to finance mainly the completion of the existing infrastructure aimed at ensuring a better flow of traffic at the airport without increasing its overall capacity. The investment aid contributed to steady flows of air traffic, which, according to the study prepared by Münster University contributed to the development of the surrounding region, and in particular, of the Ruhr area. Moreover, the airport provides for an important number of direct and indirect jobs as mentioned in recital 118.
- (300) The financing of the investments also contributed to the accessibility of the region. Dortmund airport is located in the Rhine-Ruhr Metropolitan Area, one of the most densely populated areas in Europe. Most of the passengers departing from Dortmund airport come from the Ruhr area with 5,2 million inhabitants. In this context, it is to be noted that there are three other airports with regular traffic within 100 km from the Dortmund airport: Düsseldorf, Paderborn/Lippstadt and Münster/Osnabrück airports.
- (301) However, FD is pursuing a different strategy than the neighbouring airports. It concentrates its activities on low-cost connections. More precisely, FD concentrates on destinations in the East of Europe (such as Turkey, Macedonia, Bulgaria, Serbia, Rumania, Ukraine, Hungary, Bosnia, Croatia, Poland, Lithuania, and Latvia). These destinations cover almost ¾ of all flights departing from Dortmund airport. None of the neighbouring airports offers these routes as regularly as FD. There are only four overlapping destinations between Dortmund airport on the one hand and Münster/Osnabrück and Paderborn/Lippstadt airports on the other, which concern Palma de Mallorca, Munich, Antalya and Burgas, during the summer season.

<sup>(59)</sup> Expressed in Earnings Before Interest, Taxes, Depreciation and Amortisation (hereinafter: EBITDA).

- (302) These elements indicate that Dortmund serves a different market segment from the neighbouring airport in terms of the type of traffic (point-to-point v low-cost connections) and the targeted destinations (eastern and south-eastern Europe).
- (303) Therefore, in spite of the existence of three other airports within 100 km distance, the financed investments at Dortmund airport contributed to the specific connectivity of the region, as well as to the regional development, which are objectives of common interest.
- (304) The Commission concludes that the investment aid served to enhance regional development and accessibility and that the infrastructure meets a clearly defined objective of common interest.

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

- (305) The financed investments did not lead to an increase in capacity of Dortmund airport. The constructed infrastructure was necessary for the airport in order to serve the connectivity and the development of the region.
- (306) Therefore, the Commission considers that the infrastructure in the case at stake was necessary and proportionate to the objective.

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

- (307) In 2008 the airport capacity of 2,5 million passengers per year was used at 93 %, after the decrease in 2009 due to the economic crisis and partial departure of some airlines the number of passengers was growing again and in 2013 the current infrastructure was used at 77 %.
- (308) Moreover the forecasts made in 2008 foresaw reaching the capacity limits of the airport already in 2017/2018.
- (309) The Commission therefore considers that there were satisfactory medium-term prospects for the use of the infrastructure.

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

- (310) The Commission examined whether all potential users of the infrastructure have access to the airport in an equal and non-discriminatory manner. In this regard, the Commission notes that the differentiation of airport charges pursuant to NERES and NEO as well as pursuant to the individual agreements is commercially justified (see Sections 7.3 and 7.4).
- (311) Hence, the Commission can conclude that the infrastructure is open to all users in an equal and non-discriminatory manner.

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

- (312) Within the standard catchment area of Dortmund airport (one hour's travelling time by car or 100 km) the airports Düsseldorf, Münster/Osnabrück and Paderborn/Lippstadt are also to be found. This region is one of the most densely populated areas as well as one of the richer regions in the Union.
- (313) The Commission observes that since 2004 the overall number of air passengers was growing in this region, except in 2009 during the aftermath of the financial crisis.

- (314) Moreover, since 2004 (that is to say the year of the introduction of NERES) Dortmund airport concentrated more strongly on low-cost traffic, whereas the other neighbouring airports followed a different strategy. Düsseldorf airport is an international and intercontinental hub, while Münster/Osnabrück and Paderborn/Lippstadt airports concentrate on feeder traffic to German hub airports, such as Frankfurt or Munich. Airlines serving all the three airports Dortmund, Münster/Osnabrück and Paderborn/Lippstadt account for less than 20 % of passengers in Dortmund.
- (315) About three quarters of the destinations from Dortmund airport are into eastern and south-eastern Europe. Only three destinations overlap between Dortmund airport, on the one hand, and Münster/Osnabrück and Paderborn/Lippstadt on the other. Dortmund airport therefore significantly differs from the neighbouring airports in terms of target airlines as well as geographical locations.
- (316) Moreover, the investments which received aid and were irrevocably decided after 2000 did not lead to the expansion of capacities at Dortmund airport, but rather concentrated on optimising the existing infrastructure and accessibility of the airport (see Table 3).
- (317) In the view of the abovementioned considerations, the Commission considers that trade is not affected to an extent contrary to the Community interest.

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

- (318) In the absence of investment aid, the level of economic activity of the airport would be significantly reduced since it were the investments that allowed the airport to increase the number of passengers as well as the revenues. The aid was necessary as it compensated only the costs actually incurred and as a lower amount would lead to lower levels of investment.

*Conclusion*

- (319) The Commission finally concludes that the investment aid under the 1991 PLTA compatible with the internal market pursuant to Article 107(3) of the Treaty.

**7.5.4. COMPATIBILITY PURSUANT TO SGEI RULES**

- (320) Germany and other interested parties argue that public funding relating to operating aid in favour of FD must be considered to be compatible with the internal market as compensation for the provision of a SGEI pursuant to Article 106(2) of the Treaty.
- (321) Article 106(2) of the Treaty states that 'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union'.
- (322) That Article provides for an exemption from the general prohibition of State aid contained in Article 107(1) of the Treaty to the extent that the aid is necessary and proportional to ensure the performance of the SGEI under acceptable economic conditions.
- (323) Prior to 31 January 2012, the Community framework for State aid in the form of public service compensation the 2005 SGEI Framework <sup>(60)</sup> and the 2005 SGEI Decision <sup>(61)</sup> represented the Commission's policy in applying the exemption in Article 106(2) of the Treaty.

<sup>(60)</sup> Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

<sup>(61)</sup> Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

- (324) The Commission notes that both these instruments require that the undertaking in question be entrusted with a genuine SGEI. The entrustment of the airport operator with public service missions must also be recorded in 'one or more official documents' containing, inter alia, the 'precise nature of the public service obligation' <sup>(62)</sup>.

#### *Genuine SGEI*

- (325) As regards, first, the question of whether the operation of Dortmund airport constitutes a genuine SGEI, the Commission recalls that for an activity to constitute an SGEI, that activity should exhibit special characteristics as compared with ordinary economic activities, and that the objective of general interest which is pursued cannot simply be that of development of certain economic activities or economic areas as provided for in Article 107(3)(c) of the Treaty <sup>(63)</sup>. In this light, the Commission considers that this can only be the case if part of the area served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development <sup>(64)</sup>.
- (326) The Commission considers that the area around Dortmund airport and in particular the Ruhr region is one of the most densely populated areas in the Union. Apart of Dortmund airport, the area is served by several airports located within a distance of less than 100 km from Dortmund airport. Moreover the area is well-connected by a dense motorway and railway network to the rest of Germany as well as to the Union. Therefore Dortmund airport does not serve an area which would otherwise be isolated from the rest of the Union.
- (327) The Commission therefore finds that the operation of Dortmund airport does not constitute an SGEI. To the extent that Germany considers that the operation of Dortmund airport amounts to an SGEI, it has made a manifest error in the definition of the SGEI. Accordingly the Commission finds that the public funding granted to FD amounting to operating aid cannot be considered as a SGEI compensation compatible with the internal market.

#### 7.5.5. COMPATIBILITY OF OPERATING AID UNDER THE 2014 AVIATION GUIDELINES

- (328) Section 5.2 of the 2014 Aviation Guidelines sets out the criteria that the Commission will apply in assessing the compatibility of operating aid with the internal market pursuant to Article 107(3)(c) of the Treaty. Pursuant to point 172 of the 2014 Aviation Guidelines, the Commission will apply these criteria to all cases concerning operating aid, including pending notifications and unlawful non-notified aid cases.
- (329) According to point 137 of the 2014 Aviation guidelines, in order for operating aid granted before the publication of these guidelines to be considered compatible with the internal market, the cumulative conditions of Section 5.1.2 of the 2014 Aviation Guidelines must be met, with the exception of points 115, 119, 121, 122, 123, 126 to 130, 132, 133 and 134.
- (330) Unlawful operating aid granted before the date of publication of the 2014 Aviation Guidelines may be declared compatible to the full extent of uncovered operating costs provided that the following conditions are met:
- (a) contribution to a well-defined objective of common interest: this condition is fulfilled, inter alia, if the aid increases the mobility of citizens of the Union and connectivity of the regions or facilitates regional development <sup>(65)</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>(66)</sup>;

<sup>(62)</sup> 2005 Aviation Guidelines, point 66. See also Article 4 2005 SGEI Decision.

<sup>(63)</sup> See Decision N 381/04 — France — Project for a high capacity telecommunications network in the Pyrénées-Atlantiques (Dorsal) (OJ C 162, 2.7.2005, p. 5).

<sup>(64)</sup> See 2014 Aviation Guidelines, point 72.

<sup>(65)</sup> Point 137, 113 and 114 of the 2014 Aviation Guidelines.

<sup>(66)</sup> Point 137 and 116 of the 2014 Aviation Guidelines.



- (c) appropriateness of State aid as a policy instrument: the aid shall be appropriate to achieve the objective and be less distortive than other policy instruments or aid instruments that would achieve the objective <sup>(67)</sup>;
- (d) incentive effect: this condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced <sup>(68)</sup>;
- (e) 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>(69)</sup>;
- (f) avoidance of undue negative effects on competition and trade <sup>(70)</sup>.

**(a) Contribution to a well-defined objective of common interest**

- (331) 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 citizens of the Union and connectivity of regions by establishing access points for intra-Union flights; or (ii) combats air traffic congestion at major Union hub airports; or (iii) facilitates regional development.
- (332) The Commission considers that the continuation of the operation of Dortmund airport increases the mobility of citizens of the Union and connectivity of regions by establishing an access point for intra-Union flights between the Ruhr area and other parts of Europe, mainly eastern Europe. In addition, the continuation of the operation of Dortmund airport facilitates regional development of the Ruhr area. Finally, it is foreseen that the operation and development of Dortmund airport will serve to decongest Düsseldorf airport when it will reach its capacity limits.
- (333) Furthermore, the likely effects on the traffic at the airports within the same catchment area have to be identified in order to prevent the duplication of unprofitable airports.
- (334) In this respect, the 2014 Aviation Guidelines define the catchment area as a geographic market boundary that is normally set around 100 km or around 60 minutes' travelling time by car, bus, train or high-speed train. At the same time, the 2014 Aviation Guidelines allow to deviate from the standard definition of the catchment area of a given airport in order to take into account the specificities of each particular airport. In this respect, the size and shape of the catchment area may vary from airport to airport, and depend on various characteristics of the airport, including its business model, location and the destination it serves.
- (335) Within the standard catchment area of Dortmund airport (one hour's travelling by car or 100 km distance) the following airports with regular connections exist:

Table 27

**Airports serving the same catchment area as Dortmund airport**

Airport	Distance	Travel time by car	Latest pax (million)
Münster/Osnabrück Airport	77,9 km	51 min	0,86
Düsseldorf Airport	76,8 km	56 min	21,2
Paderborn/Lippstadt Airport	74,1 km	44 min	0,79

<sup>(67)</sup> Point 137 and 120 of the 2014 Aviation Guidelines.

<sup>(68)</sup> Point 137 and 124 of the 2014 Aviation Guidelines.

<sup>(69)</sup> Point 137 and 125 of the 2014 Aviation Guidelines.

<sup>(70)</sup> Point 137 and 131 of the 2014 Aviation Guidelines.

- (336) All four concerned airports are in the Rhine-Ruhr metropolitan area with 11,4 million inhabitants. This is one of the most densely populated areas in Europe with the overall density of population over 300 inhabitants/km<sup>2</sup> and with areas with over 2 000 inhabitants/km<sup>2</sup>. Dortmund airport is in the centre of the Ruhr sub-area which counts 5,2 million inhabitants. It is usual in such a urban concentration to have several airports.
- (337) The BIP per capita (PPP) in the catchment area varies between 111 % and 137 % of the Union average and the disposable annual income per household is about EUR 20 000. Thereby the catchment area is one of the richer regions in the Union. The traffic at all four airports is predominantly outbound with a mixture of leisure and business travel.
- (338) According to Germany the actual catchment area of Dortmund airport does not correspond to the standard catchment area (1 h or 100 km). The passengers come to Dortmund airport predominantly from the Ruhr area with more than 5,2 million inhabitants. These are the immediate surroundings of Dortmund and areas to the East and the North of Dortmund. Therefore, the airport has a lesser competitive influence on Düsseldorf airport. In addition, on the basis of the traffic forecasts and market potential studies conducted in 2006, Münster/Osnabrück and Paderborn/Lippstadt airports were also expected to grow substantially in the medium term. The traffic development at these airports was impaired due to the financial and economic crisis starting in 2008. However, given the positive economic climate in Germany, in the medium term the traffic forecasts are expected to be met.
- (339) As concerns the **level and development of traffic**, between 2002 and 2008 the passenger traffic in the catchment area was growing. It is stagnating since then. In particular, at Dortmund airport the traffic increased from about 1 million to 2,3 million in 2008, then decreased in 2009 to 1,7 million. Since 2010 it increased progressively up to 1,9 million. A similar development can be observed at Düsseldorf, the closest airport to Dortmund. The traffic at Düsseldorf airport was constantly growing from about 16 million in 2000 to about 22 million in 2013, it experienced only a small correction in 2009 due to the financial and economic crisis. The traffic at Paderborn/Lippstadt airport was stagnating around 1,3-1,2 million passengers per annum between 2000 and 2007. Since 2008 (the year of the financial and economic crisis) the traffic has progressively decreased from 1,14 million in 2008 to about 800 000 in 2013. A similar development was also experienced at Münster/Osnabrück airport. The traffic at Münster/Osnabrück stagnated at about 1,6 million between 1999 and 2008, since then it decreased progressively to about 900 000 in 2013. The decrease in terms of passenger number at Münster/Osnabrück and Paderborn/Lippstadt airports in 2012 and 2013 can be partially explained by the restructuring of Air Berlin's network and the concentration of its activities at Düsseldorf airport.

Table 28

**Traffic development at the airports within the catchment area of Dortmund airport**

Changes in million pax p. a.	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Pax2013-Pax2001
Dortmund	- 0,07	0,03	0,16	0,56	0,28	0,14	0,17	- 0,61	0,03	0,06	0,09	0,02	0,86
Münster/ Osnabrück	- 0,10	0,00	0,00	0,00	0,05	0,05	- 0,02	- 0,19	- 0,06	- 0,01	- 0,32	- 0,14	- 0,74
Paderborn/ Lippstadt	- 0,04	0,03	0,03	0,03	- 0,07	- 0,03	- 0,10	- 0,16	0,02	- 0,03	- 0,14	- 0,04	- 0,5
Düsseldorf	- 0,65	- 0,45	0,96	0,25	1,08	1,24	0,32	- 0,36	1,19	1,36	0,49	0,40	5,83

- (340) When looking at the **business models and profiles** of the airports, FD concentrated since the introduction of NERES in 2004 on low-cost airlines. Today 13 airlines operate from Dortmund airport. Düsseldorf is a hub airport with also long and medium-range connections. It does not specialise in the low-cost segment, and is mainly served by medium-cost segment (Air Berlin) and full-service carriers. Düsseldorf airport offers 190 destinations in 50 countries served by 60 airlines in summer 2014. Many of these routes are long-haul destinations, such as Africa, Asia, the Caribbean, the USA and the Middle East.

- (341) Paderborn/Lippstadt airport and Münster/Osnabrück airport concentrated mainly on the connection to hubs and to holiday destinations in the Mediterranean region. Only Air Berlin, SunExpress, Germania and Tailwind serve Dortmund, Paderborn/Lippstadt and Münster/Osnabrück as well. Their contribution to the total number of passengers at Dortmund is below 20 %.
- (342) Looking at the degree of duplication of routes, the Commission notes that Dortmund concentrates on destinations in eastern Europe (Turkey, Macedonia, Bulgaria, Serbia, Rumania, Ukraine, Hungary, Bosnia, Croatia, Poland, Lithuania, Latvia) and these destinations cover almost 3/4 of all flights leaving from Dortmund airport. According to Germany, this corresponds to a specific demand from the area around of Dortmund. None of the airports in the catchment area of Dortmund airport offers regular routes to a number of these destinations in eastern Europe.
- (343) Overlapping destinations of Dortmund, Münster/Osnabrück and Paderborn/Lippstadt airports are Palma de Mallorca, Munich, Antalya, Burgas (which from Dortmund are only offered during the summer season).

Table 29

**Overlapping destinations of Dortmund, Münster/Osnabrück and Paderborn/Lippstadt airports**

Flights per day (average)	Dortmund	Münster/Osnabrück	Paderborn/Lippstadt
Palma de Mallorca	2	1 (5 on Sundays)	3 (hub)
Munich	3	5 (less during weekend)	4 (hub)
Antalya	1	1	3

- (344) The destinations in Table 29 are served from all of the regional airports due to the high local demand in the Rhine-Ruhr region.

As concerns the use of capacity, Dortmund airport has currently around 1,9 million passengers per annum and a capacity of 2,5 million. The airport is today operated at 76 % of its capacity. According to Germany, since 2010 the airport's passenger traffic grew by around 10 %. The operating aid did not lead to an expansion of the capacity but served the maintenance of the existing capacity. Moreover, the closest airport, Düsseldorf, is one of the most congested European airports and is expected to reach its absolute limits in medium-term (around 2020). Dortmund airport should therefore serve as a secondary airport to Düsseldorf.

- (345) Regarding the profitability of the airports in the catchment area, the Commission notes that all other airports within the catchment area of Dortmund, except Dortmund airport, are profitable at the operating level, thus the aid will not lead to a duplication of unprofitable airports.
- (346) The Commission therefore concludes that the compensation of operating losses contributes to a well-defined objective of common interest without leading to the duplication of unprofitable airports in the same catchment area.

**(b) Need for State intervention**

- (347) 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 this 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.
- (348) The Commission notes that Dortmund airport is a regional airport with approximately 1,9 million passengers per annum. 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.

**(c) Appropriateness of the aid measures**

- (349) According to Section 5.1.2(c) of the 2014 Aviation Guidelines, any measure of aid 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.
- (350) 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.
- (351) In the present case the aid amount was limited to the extent of uncovered operating losses, and was limited to the minimum necessary as it compensated only the costs that actually incurred. 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.
- (352) In view of the above, the Commission considers that the measure at stake was appropriate to reach the desired objective of common interest.

**(d) Incentive effect**

- (353) According to Section 5.1.2(d) of the 2014 Aviation Guidelines, the incentive effect for operating aid is present if it is likely that, in the absence of operating aid, the level of economic activity of the airport would be significantly reduced. This assessment needs to take into account the presence of investment aid and the level of traffic at the airport.
- (354) In particular the operating aid granted in the past served to maintain the airport operational. Without the aid, the airport would have to close down or its activity would be significantly reduced and it could not enhance regional development and accessibility. The aid amount was limited to the extent of actual operating losses, as it compensated only the uncovered operating costs actually incurred.
- (355) In view of the above, the Commission considers that the aid measure at stake had an incentive effect.

**(e) Proportionality of the aid amount (aid limited to the minimum necessary)**

- (356) 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.
- (357) In the present case, the aid amount was limited to the extent of uncovered operating losses, as it compensated only the uncovered operating costs actually incurred.
- (358) Therefore, the Commission considers that the operating aid amount in the case at stake 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**

- (359) According to Section 5.1.2(f) of the 2014 Aviation Guidelines, when assessing compatibility of operating aid, account will be taken of the distortions of competition and the effects on trade.
- (360) The increase of traffic at Dortmund airport is mainly due to the exploitation of local demand and not to taking over traffic from the other airports in the catchment area. Further arguments concerning the level of development of traffic, the differentiation between the airports and the degree of duplication or routes were developed in recitals 334 to 346.

- (361) In view of the above, the Commission considers that the undue negative effects on competition and trade between Member States are limited to the minimum.

#### 7.5.6. CONCLUSION

- (362) The Commission considers that the operating aid granted to FD in the period 2007-4 April 2014 does not lead to duplication of unprofitable airports in the catchment area. As all other compatibility criteria for operating aid are fulfilled, the aid can be deemed compatible with the internal market
- (363) In view of the above, the Commission concludes that the compensation of operating losses between 1 June 2007 and 4 April 2014 is compatible with the internal market on the basis of Article 107(3)(c) of the Treaty.
- (364) The Commission notes that Germany accepts the adoption of the Decision in the English language.

### 8. CONCLUSION

- (365) The Commission finds that Germany has unlawfully implemented the profit and loss transfer agreement has unlawfully implemented the profit and loss transfer agreement between 1 June 2007 and 4 April 2014 in breach of Article 108(3) of the Treaty on the Functioning of the European Union. However, the investment as well as the operating aid granted through that agreement are compatible with the internal market on the basis of Article 107(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The investment and operating aid granted to Flughafen Dortmund GmbH through the profit and loss transfer agreement concluded with DWS21 between 1 June 2007 and 4 April 2014 is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

#### *Article 2*

The NERES schedule of airport charges does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

#### *Article 3*

The NEO schedule of airport charges does not constitute State aid within the meaning of Article 107(1) Treaty on the Functioning of the European Union.

#### *Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 July 2014.

*For the Commission*  
Joaquín ALMUNIA  
Vice-President