JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

24 March 2011 *

In Joined Cases T-443/08 and T-455/08,

Freistaat Sachsen (Germany),

Land Sachsen-Anhalt (Germany),

represented by U. Soltész and P. Melcher, lawyers,

applicants in Case T-443/08,

Mitteldeutsche Flughafen AG, established in Leipzig-Halle (Germany),

Flughafen Leipzig-Halle GmbH, established in Leipzig-Halle,

represented by M. Núñez-Müller, lawyer,

applicants in Case T-455/08,

* Language of the case: German.

supported by

Federal Republic of Germany, represented by M. Lumma and B. Klein, acting as Agents,

Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV (ADV), represented by L. Giesberts, lawyer,

interveners,

v

European Commission, represented by K. Gross, B. Martenczuk and E. Righini, acting as Agents,

defendant,

APPLICATION for partial annulment of Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig-Halle Airport (OJ 2008 L 346, p. 1),

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas (Rapporteur) and A. Dittrich, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2010,

gives the following

Judgment

Background

1 The DHL group ('DHL') is one of the principal groups in the express parcels sector. It is 100 % owned by Deutsche Post AG.

2 After negotiating with several airports, DHL decided, in 2005, to move its European air freight hub from Brussels (Belgium) to Leipzig-Halle (Germany) from 2008.

3 Flughafen Leipzig-Halle GmbH ('FLH') is a subsidiary of Mitteldeutsche Flughafen AG ('MF'). MF holds a participation of 94 % in FLH. The other shareholders of FLH are Land Sachsen (5.5 %), and Landkreis Nordsachsen (0.25 %) and the town of Schkeuditz (0.25 %). The other shareholders of MF are Land Sachsen (76.64 %), Land Sachsen-Anhalt (18.54 %), and the cities of Dresden (2.52 %), Halle (0.2 %) and Leipzig (2.1 %). MF has no private sector shareholders.

4 On 4 November 2004, MF decided to build a new southern runway (the 'southern runway'). It was to be financed by a capital contribution of EUR 350 million to MF or FLH by their public shareholders (the 'capital contribution').

5 On 21 September 2005, FLH, MF and DHL Hub Leipzig GmbH signed a framework agreement (the 'Framework Agreement'). Under the Framework Agreement, FLH is obliged to construct the southern runway, and to honour further assurances for the duration of the agreement. Among those assurances is, inter alia, a guarantee of continuous air access, 24 hours a day and 7 days a week, on the southern runway and a guarantee that at least 90 % of DHL's air traffic could be carried out at any time using that runway. The framework agreement sets out what conditions FLH and MF guarantee to fulfil prior to the construction and operation of the new hub and subsequently for the operation of it. The framework agreement also includes other agreements on the terms of operation, airport fees, and the lease of land. With regard to guarantees subsequent to the operation of the new hub, the framework agreement provides that if FLH, after the entry into service of the hub, cannot fulfil the operating conditions which it contains, FLH and MF are required to compensate DHL Hub Leipzig for all damage and losses which it suffers. If DHL Hub Leipzig is substantially limited in its operations, it will also have the right to terminate the contract and claim compensation for all direct and indirect costs of moving to an alternative airport. If DHL Hub Leipzig had to relocate to another airport as a result of night flights being banned by the regulatory authorities, FLH could be liable to compensate DHL.

6 On 21 December 2005, Land Sachsen issued a comfort letter in favour of FLH and DHL Hub Leipzig (the 'comfort letter'). The letter is intended to guarantee FLH's performance of its financial undertakings during the period of the framework agreement and commits Land Sachsen to pay compensation to DHL Hub Leipzig if Leipzig-Halle Airport could no longer be used as intended.

7 On 5 April 2006, the Federal Republic of Germany notified the Commission, pursuant to Article 2(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), of the framework agreement and the comfort letter.

8 On 27 April 2006, the Commission requested further information to which the German authorities replied on 24 July 2006.

9 Meetings between the Commission services, FLH, MF, DHL, and the German authorities took place on 26 July and on 21 August 2006.

10 By letter dated 23 November 2006, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure under Article 88(2) EC. That procedure dealt with the framework agreement, the comfort letter and the equity contribution. That decision and the invitation to interested parties to submit their comments on the proposed aid were published in the *Official Journal of the European Union* of 2 March 2007 (OJ 2007 C 48, p. 7).

11 The Federal Republic of Germany transmitted its comments on 23 February 2007. The Commission received comments on the subject from interested parties. It transmitted the comments to the German authorities by letter dated 16 May 2007, giving them the opportunity to respond to the comments within one month. The Commission received the German authorities' observations by letter dated 13 June 2007.

12 At the request of the Federal Republic of Germany, meetings took place on 18 June 2007 and on 25 September 2007. Those meetings were followed by the dispatch by the German authorities of additional information, as requested by the Commission, on 19 October 2007 and on 7 and 18 December 2007, as well as on 17 March and 9 April 2008.

Decision

13 On 23 July 2008, the Commission adopted Decision 2008/948/EC on measures by Germany to assist DHL and Leipzig-Halle Airport (OJ 2008 L 346, p. 1, 'the Decision').

14 With regard to the capital contribution, the Commission considered, in the Decision, that the State aid, amounting to EUR 350 million, which Germany planned to grant to FLH for the construction of a new runway and related airport infrastructure was compatible with the common market under Article 87(3)(c) EC.

15 With regard to the Framework Agreement and the comfort letter, the Commission considered, that, on the one hand, the unlimited warranties granted by the Framework Agreement and, on the other, the comfort letter constituted State aid within the meaning of Article 87(1) EC because Land Sachsen, MF, and FHL hedged business

risks for DHL at terms which a private investor operating in normal conditions of a market economy ('a private investor') would not have accepted. As DHL has already benefited from the maximum amount of investment aid permissible under Article 87(3)(a) EC, the Commission considered that the unlimited warranties granted by the Framework Agreement and the comfort letter have to be considered as incompatible with the common market.

16 The operative part of the Decision reads as follows:

'*Article 1*

The State aid which [the Federal Republic of] Germany is planning to implement amounting to EUR 350 million in relation to the construction of a new runway and related airport infrastructure at Leipzig-Halle Airport is compatible with the common market under Article 87(3)(c) [EC].

Article 2

The State aid which [the Federal Republic of] Germany is planning to implement by granting the comfort letter in favour of DHL is incompatible with the common market. The aid may accordingly not be implemented.

Article 3

The State aid which [the Federal Republic of] Germany granted to DHL in the form of unlimited warranties (according to sections 8 and 9 of the Framework Agreement) is incompatible with the common market. These unlimited warranties granted by the Framework Agreement must accordingly be abolished.

Article 4

1. [The Federal Republic of] Germany shall recover the part of the aid referred to in Article 3 which has already been put at the disposal of DHL (i.e. the warranty fee for the period from 1 October 2007 until the abolition of the unlimited warranties).

…'

Facts subsequent to the Decision

17 On 18 and 27 November 2008, the shareholders of MF and FLH entered into agreements amounting to EUR 350 million for the financing of the southern runway.

18 By letter of 23 December 2008, the German authorities notified those agreements to the Commission.

19 That notification was registered under reference number 665/2008.

20 On 30 September 2009, following an exchange of correspondence and a meeting with the German authorities, the Commission adopted Decision C (2009) 7185, concerning State aid No 665/2008 (Germany — Leipzig-Halle Airport) in which it stated that the measure which had been notified did not constitute new aid within the meaning of Article 1(c) of Regulation No 659/1999. In substance, it considered, on the one hand, that since the German authorities had confirmed that the notification related to the same financing measures which had been approved by the Decision, that notification concerned aid which had already been authorised within the meaning of Article 1(b)(ii) of that regulation and, on the other hand, that the notification did not concern the alteration of existing aid within the meaning of Article 4(1) of the regulation.

Procedure

21 By applications lodged at the Court Registry on 6 October 2008, the applicants, Freistaat Sachsen, Land Sachsen-Anhalt, MF and FLH, brought the present actions.

22 By documents lodged at the Court Registry on 28 January 2009, the Federal Republic of Germany sought leave to intervene in the present cases in support of the form of order sought by the applicants.

23 By documents lodged at the Court Registry on 30 January 2009, the Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV (ADV) sought leave to intervene in the present cases in support of the form of order sought by the applicants.

24 By orders of 30 March 2009, the President of the Eighth Chamber granted the applications for leave to intervene submitted by the Federal Republic of Germany and ADV.

25 ADV lodged its statements in intervention on 11 May 2009. The Federal Republic of Germany did not lodge a statement in intervention within the prescribed period.

26 The applicants lodged their observations on ADV's statements in intervention on 26 May (Case T-455/08) and 27 May 2009 (Case T-443/08).

27 The Commission lodged its observations on ADV's statements in intervention on 29 July 2009.

28 By order of 24 June 2010, the President of the Eighth Chamber decided, after hearing the parties, to join the present cases for the purposes of the oral procedure.

29 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure.

30 At the hearing on 2 July 2010, in which the Federal Republic of Germany did not take part, the parties presented their oral arguments and replied to the Court's questions. On that occasion, they also produced a judgment of the Bundesgerichtshof (Federal Court of Justice; Germany) of 4 April 2003, which the Court decided to place on the file.

31 After hearing the parties' views on the matter at the hearing, the Court decided to join the present cases for the purposes of the judgment, in application of Article 50 of the Rules of Procedure.

Form of order sought

32 The applicants, supported by ADV, claim that the Court should:

— Annul Article 1 of the Decision in so far as the Commission finds that the capital contribution constitutes State aid for the purposes of Article 87(1) EC; and that that State aid amounts to EUR 350 million;

— Order the Commission to pay the costs.

33 The Commission contends that the Court should:

— Dismiss the action;

— Order the applicants to pay the costs.

34 It its observations on the statements in intervention submitted by ADV, the Commission also contends that the Court should order ADV to pay the costs of the intervention.

Admissibility

35 While not formally raising an objection of inadmissibility, the Commission submits that the action in Case T-443/08 is inadmissible on the ground that the applicants in that case have no interest in bringing proceedings and are not directly concerned by the Decision and have no interest in bringing proceedings, something which the applicants deny. In that context, the parties also disagree as to the legal consequences of the Decision.

36 The Court considers that the plea of inadmissibility on the ground of lack of interest in bringing proceedings should be considered first.

Arguments of the parties

37 First of all, with regard to the legal consequences of the Decision, the applicants in Case T-443/08 claim, first, that the classification of the capital contribution as State aid leads to it being null and void in German law. It follows from the case-law of the Bundesgerichtshof that a contract granting aid before the aid is notified is irreversibly

null and void pursuant to Paragraph 134 of the German Civil Code by reason of the fact that it infringes the third sentence of Article 88(3) EC. That nullity cannot subsequently be rectified by a Commission decision declaring the aid compatible with the common market or by a contractual confirmation of the void measure. In addition, and contrary to the Commission's statement, that nullity does not deprive the Decision of useful effect. The fact that such nullity is ordered has a dissuasive, and therefore, preventive effect, reinforcing the effectiveness of the prohibition on implementation laid down in Article 88(3) EC.

38 The applicants in Case T-443/08 set out, secondly, the consequences that the nullity of the capital contribution could have, particularly in regard to company law and insolvency. First of all, they state that, if the Decision was definitive, FLH and MF would risk insolvency. The nullity of the capital contribution implies high interest payments for the period between the grant of the aid and the Decision and a demand for reimbursement of the aid, in the amount of EUR 350 million. The latter demand could render FLH insolvent. With regard to the fact that European Union law does not require reimbursement of the aid in its entirety, the applicants in Case T-443/08 respond that that does not mean that such reimbursement is prohibited, since Member States can fulfil their obligations under European Union law by doing more than those obligations require. The insolvability of FLH could render MF insolvent since the latter is required, under German law, to cover the annual deficit of its subsidiary. The insolvency of MF could, in its turn, render other subsidiaries insolvent, having regard to the existence of contracts providing for the control and transfer of profits concluded between MF and those subsidiaries. Secondly, the applicants in Case T-443/08 point out that the insolvency of FLH could deprive Leipzig-Halle Airport of its operating licence. In accordance with German law, an operating licence is revoked where the conditions for the grant of the licence, which include the economic reliability of the operator, are no longer fulfilled. That would be the case if FLH was insolvent. Without an operating licence, the airport would be in danger of closing down, which would cause a large number of jobs to be lost. Thirdly, the applicants in Case T-443/08 envisage the possible consequences of the nullity of the capital contribution on the accuracy of the annual accounts adopted by FLH and MF and their rectification, as well as a possible infringement by their management of the obligation to declare those companies insolvent. Fourthly, they point out that the management of FLH and MF

could incur civil liability under German law by reason of the suspension of normal trading or the over-indebtedness of the company.

39 In the second place, the applicants in Case T-443/08 argue that they have an interest in bringing proceedings in the present case.

40 First of all, they argue that there is an interest in bringing proceedings when a Commission decision does not satisfy the requests of persons who took part in the administrative procedure. In the present case, the applicants in Case T-443/08 defended the view that financing of infrastructure does not constitute State aid, whereas the Commission considers it to be so. According to the applicants, the authorisation of aid is different from a finding that no aid has been granted. In addition, the classification of a measure as aid within the meaning of Article 87(1) EC is relevant because it gives the Commission a broad discretion to decide whether the measure is compatible with the common market within the meaning of Article 87(3) EC and to make authorisation subject to certain conditions. Finally, the fact that the Commission can, when authorising a measure, deprive persons concerned of all remedies is not compatible with the system of judicial remedies provided for in the treaties.

41 Secondly, the applicants in Case T-443/08 claim that the classification of the capital contribution as State aid entails substantial damaging consequences for them and that that situation can be remedied only by the partial annulment of the Decision.

42 They argue, first, in that regard, that, according to case-law, the classification of a measure as State aid constitutes a decision creating adverse effects. Thus, the annulment of a decision concerning, in particular, the classification of a measure as State aid could give rise to an interest, even if the aid is later found to be compatible with the common market. It is also clear from the case-law that an interest in bringing

proceedings can be recognised when the Commission decision seems initially to give an advantage but turns out later to be a disadvantage by reason of facts not contained in it. Finally, the specific character of the present case, compared to the most restrictive case-law, results from the unpredictable nature, arising from German law, of the consequences of an infringement of the obligation to notify the capital contribution (see paragraph 38 above).

43 Secondly, the applicants in Case T-443/08 claim that there is uncertainty as to the amount of the aid. Notwithstanding the fact that the Commission considers that the capital contribution of EUR 350 million does not entirely fall under the provisions governing State aid since certain expenditure is part of a public service task, it none the less states in Article 1 of the Decision that EUR 350 million in aid is compatible with the common market. The question of what part of that amount does not fall under the provisions governing State aid thus remains open. However, the nullity under national law of the capital contribution can apply only to that part considered to be State aid. In the absence of any indication, the persons concerned cannot know what amount falls under Article 87 EC and what is the extent of the consequences involved. According to the applicants in Case T-443/08, that creates legal uncertainty resulting directly from the Decision. Thus, in the absence of any indication in the Decision, the applicants in Case T-443/08 cannot obtain determination by the courts of the consequences which flow from that situation in German law and only a judgment of the Court will permit them to act subsequently in accordance with the rules in force.

44 With regard to the Commission's argument that their rights are not adversely affected, the applicants in Case T-443/08 point out that the classification of the capital contribution as State aid causes the contract underlying the contribution to be null and void, with the damaging consequences which flow from that situation. In addition, that classification implies an infringement of Article 88(3) EC and therefore a 'defect of illegality'. Moreover, that classification adversely affects the legal situation of the applicants in Case T-443/08 inasmuch as they will have to notify the Commission

of their future financing of airport infrastructure. In addition, the question whether such financing falls under the provisions of the EC Treaty and whether the Commission has the powers laid down in Article 88 EC also depends on that classification. Furthermore, first, the measures constituting State aid are subject to different rules from those which do not constitute State aid. Second, since the aid authorised was existing aid, any modification in the financing of infrastructures must be notified. Finally, the classification at issue has negative repercussions on the lawfulness of future aid by reason of the aggregation which it implies.

45 The Commission disputes the description of the legal consequences given by the applicants in Case T-443/08 and contends that they have no interest in bringing proceedings against Article 1 of the Decision.

Findings of the Court

46 It must be recalled that an action for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled. That interest must be vested and present and is evaluated as at the date on which the action is brought (Case T-141/03 *Sniace* v *Commission* [2005] ECR II-1197, paragraph 25, and Case T-136/05 *Salvat père & fils and Others* v *Commission* [2007] ECR II-4063, paragraph 34).

47 In the present case, the applicants in Case T-443/08 are seeking annulment of Article 1 of the Decision in so far as it states, on the one hand, that the capital contribution constitutes State aid within the meaning of Article 87(1) EC and, on the other hand, that the amount of that aid is EUR 350 million.

48 It must be recalled in that regard that, according to Article 1, the State aid which Germany is planning to implement, amounting to EUR 350 million, in relation to the construction of the southern runway and related airport infrastructure at Leipzig-Halle Airport is compatible with the common market under Article 87(3)(c) EC.

49 However, the mere fact that the Decision declares the aid compatible with the common market and thus, in principle, does not have an adverse effect on the applicants in Case T-443/08 does not dispense the European Union judicature from examining whether the Commission's finding has binding legal effects such as to affect those applicants' interests (Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, paragraph 38, and *Salvat père & fils and Others* v *Commission*, paragraph 46 above, paragraph 36).

50 First of all, the applicants in Case T-443/08 raise procedural arguments. In that context, they allege, first, that the Decision does not fulfil the requests they made during the administrative procedure. It must be recalled, in that regard, that, according to settled case-law, the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible for granting the aid (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 81; see also, to that effect, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 29). Undertakings that receive aid and the local authorities within that State which grant the aid are considered, in the same way as competitors of the recipients of the aid, only to be 'interested parties' in this procedure (Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 122), and this case-law confers on those interested parties concerned the role of information sources (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 125). Thus, the fact that the Decision does not correspond to the position put forward by the applicants in Case T-443/08 during the administrative procedure does not in itself produce binding legal effects such as

to affect their interests. In cannot therefore, in itself, be the basis of their interest in bringing proceedings.

51 Secondly, the argument that the classification of the capital contribution as State aid implies that the applicants in Case T-443/08 must notify future financing of airport infrastructures must be rejected. The obligation to notify measures constituting State aid flows directly from the EC Treaty and, in particular, Article 88(3) EC, and not from the Decision, which states that, having regard to the circumstances of the case, the measure at issue constitutes State aid.

52 Thirdly, with regard to the argument that the said classification permitted the Commission to exercise its powers under the provisions governing State aid and to examine the compatibility of the aid at issue, it must first be pointed out that the fact that the Commission, after classifying the measure at issue as State aid, was able to examine the compatibility of the measure with the common market is not, in itself, decisive in the context of an examination of an interest in bringing proceedings once the Commission has declared unconditionally that the said aid is compatible with the common market, which, in principle, cannot cause adverse effects, as is clear from the case-law cited in paragraph 49 above.

53 Also, the arguments put forward by the applicants in Case T-443/08 must be declared irrelevant in so far as they deal with the provisions governing an existing aid scheme and the obligations flowing therefrom and, in particular, the obligation to submit annual reports on that scheme. The capital contribution constitutes individual aid and not an aid scheme, with the result that, once approved, it cannot be regarded as an existing aid scheme. The provisions applicable to existing aid schemes and the obligations flowing therefrom are thus irrelevant in the present case.

54 Finally, this Court must dismiss the argument that the classification at issue could influence future aid by reason of the application of a rule against overlapping. The applicants in Case T-443/08 referred to no provision which, in regard to airport infrastructures, prohibits the overlapping in time of aid schemes. Moreover, neither the Communication from the Commission on the application of Articles 87 EC and 88 EC and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ 1994 C 350, p. 5, 'the 1994 Communication') nor the Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1, 'the 2005 Guidelines') contain a rule against overlapping in regard to State aid for airport infrastructures.

55 Fourthly, with regard to the argument that the Commission, by authorising a capital contribution, cannot deprive the applicants in Case T-443/08 of a right of action against the classification of the contribution as State aid, it must be recalled that the European Union is a union based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the EC Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the European Union legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraphs 38 and 39). However, in the present case, the applicants in Case T-443/08 are not in the least deprived of any effective judicial protection. Even if the present action is declared inadmissible, nothing would prevent them requesting the national courts, in the course of any proceedings before them in which they were called upon to accept the consequences of the alleged nullity of the capital contribution to which they refer, to make a reference for a preliminary ruling under Article 234 EC putting in issue the validity of the Decision

in so far as it finds that the measure in question is State aid (see, to that effect, *Sniace* v *Commission*, paragraph 46 above, paragraph 40 and the case-law cited) and in so far as it finds that the said aid is in the amount of EUR 350 million.

56 Secondly, the applicants in Case T-443/08 refer to the substantial damaging consequences entailed by the classification of the capital contribution as State aid. They rely in that regard, first, on the unforeseeable legal consequences which flow from that classification and, secondly, on the uncertainties in regard to the amount of the aid.

57 It must be stated, first, that that unforeseeable nature cannot be the basis of an interest in bringing proceedings on the part of the applicants in Case T-443/08.

58 It is clear from settled case-law that an applicant cannot rely upon future uncertain circumstances to establish his interest in applying for annulment of the contested act (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33; *Sniace* v *Commission*, paragraph 46 above, paragraph 26, and *Salvat père & fils and Others* v *Commission*, paragraph 46 above, paragraph 47).

59 The applicants in Case T-443/08 merely argue that, in accordance with the case-law of the Bundesgerichtshof concerning unlawful measures, the classification of the capital contribution as State aid renders it irreversibly null and void in German law and describe the 'possible' consequences thereof. However, they provide no evidence suggesting that the nullity relied on and its alleged consequences constitute an interest in bringing proceedings, within the meaning of the case-law, in the present case.

60 First of all, it must be recalled in that regard that, according to settled case-law, where aid has been granted to a recipient in disregard of the last sentence of Article 88(3) EC, the national court may be required, upon application by another operator and even after the Commission has adopted a positive decision, to rule on the validity of the implementing measures and the recovery of the financial support granted. It is apparent from the judgment of the Court of Justice in Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469 ('*CELF*'), paragraph 46, that, in such a case, European Union law requires the national court to order the measures appropriate effectively to remedy the consequences of the unlawfulness, but that, even in the absence of exceptional circumstances, European Union law does not impose an obligation of full recovery of the unlawful aid. In such a situation, pursuant to European Union law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness. Within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it, subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid. Therefore, in a situation where the unlawful putting into effect of aid is followed by a positive Commission decision, European Union law does not appear to preclude the recipient from, on the one hand, demanding the disbursement of aid payable for the future and, on the other hand, keeping aid received that was granted prior to the positive decision, subject always to the consequences arising from unlawfulness of aid disbursed prematurely, under the conditions set out in *CELF* (Case C-384/07 *Wienstrom* [2008] ECR I-10393, paragraphs 27 to 30, and the case-law cited).

61 In the present case, concerning, on the one hand, the alleged nullity of the capital contribution, it must be pointed out that, without there being any need to rule on the legal consequences in German law of the illegality of the capital contribution, the applicants in Case T-443/08 do not state in what way, beyond the alleged consequences which flow from that nullity (see paragraph 62 below), the nullity, as such, would affect their interests within the meaning of the case-law referred to in paragraph 46 above.

62 With regard, on the other hand, to the alleged consequences of nullity, the argument put forward by the applicants in Case T-443/08 must be rejected. The consequences referred to, even if proved, do not affect those applicants directly, but in fact affect FLH and MF. Moreover, as the latter stated in reply to a written question from the Court, it is they, and not the applicants in Case T-443/08, who had to pay interest on the capital contribution for the period between the grant of that contribution and the contested decision, in accordance with the judgment in *CELF*, as the Commission pointed out in its decision of 30 September 2009 (paragraph 20 above). The admissibility of an action for annulment brought by a natural or legal person is dependent upon the condition that the person concerned demonstrate a personal interest in the annulment of the contested decision (see order in Case T-78/98 *Unione Provinciale degli Agricoltori di Firenze and Others* v *Commission* [1999] ECR II-1377, paragraph 30). With regard to the fact, raised by the applicants in Case T-443/08, that they are shareholders of FLH and MF, and take part in naming their managers, there is nothing to show that that gives them an interest of their own, distinct from that of the recipient, in seeking annulment of the Decision. A person must show a legal interest in bringing proceedings separate from that of an undertaking which he partly controls and which is concerned by a European Union measure. Otherwise, in order to defend his interests in relation to that measure his only remedy lies in the exercise of his rights as a member of that undertaking which itself has a right of action (Case T-597/97 *Euromin* v *Council* [2000] ECR II-2419, paragraph 50).

63 In any event, it must be pointed out for the sake of completeness that the consequences referred to by the applicants in Case T-443/08 are future, hypothetical and uncertain, with the result that they cannot form the basis of their interest in bringing proceedings, in accordance with the case-law referred to in paragraph 58 above. In the first place, it must be pointed out that, in their application, the applicants in Case T-443/08 refer to the 'possible' consequences of the alleged nullity of the capital contribution under company law and the law on insolvency and not to consequences which are certain. With regard, first, to the risk that FLH might become insolvent, the abovementioned applicants consider that a demand to reimburse the aid 'could bring it about' and, as a consequence, bring about the insolvency of MF. However, when

questioned in that regard by the Court those applicants did not mention any action which had been brought before a national court for the purpose of obtaining reimbursement of the aid at issue and, indeed, such reimbursement is not required under European Union law, as is clear from the case-law referred to in paragraph 60 above. In addition, the applicants in Case T-443/08 adduced no evidence showing that payment of interest for the period between the grant of the aid and the Decision is capable of putting FLH or MF in danger of insolvency. The argument that insolvency could deprive Leipzig-Halle Airport of its operating licence must be rejected since the risk of insolvency has not been established. With regard to the consequences referred to regarding accounts, it is clear from the application that the legal situation in German law is uncertain, both in terms of case-law and of legal literature, and that the applicants in Case T-443/08 are referring only to situations, including the breach of the obligation to declare insolvency (see paragraph 38 above), which are hypothetical but which are not certain. Finally, with regard to the consequences in terms of civil liability, the applicants in Case T-443/08 mention no proceedings, brought before a national court, which implicate FLH, MF or their managers in that regard.

64 Finally, it must be stated that the case-law in regard to State aid to which the applicants in Case T-443/08 refer in order to justify the admissibility of their action is irrelevant to the present case. Thus, Case T-233/04 *Netherlands* v *Commission* [2008] ECR II-591, paragraph 41, concerned an action brought by a Member State against a decision of the Commission according to which the measure at issue in that case included State aid within the meaning of Article 87(1) EC which was considered to be compatible with the common market pursuant to Article 87(3) EC. It must be pointed out, first, that the second paragraph of Article 230 EC gives all Member States the right to contest the legality of decisions of the Commission by means of an action for annulment, without having to establish any legal interest in bringing proceedings, with the result that that judgment concerns a situation different from that which is being considered in the present case. Furthermore, contrary to the claim made by the applicants in Case T-443/08 in their reply, it is not clear from that judgment that the classification of the measure at issue as State aid is sufficient in itself to justify an interest in bringing proceedings where a Member State has notified the Commission

of a measure and asked it to rule that the measure does not constitute aid. Also, unlike the present case, the measure at issue in *Netherlands* v *Commission*, was an aid scheme, with the result that the Commission's decision involved a subsequent assessment of the provisions applying to existing aid schemes. Finally, also unlike the present case, the classification of the measure at issue in that case had consequences in regard to the application of rules prohibiting overlapping of State aid.

65 With regard to the judgment in Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, it must be emphasised that, like the matter at issue in that case, the classification of the capital contribution as State aid permitted the Commission to examine the compatibility of the measure with the common market. However, unlike the situation at issue in that judgment, the Commission, in the present case, authorised the capital contribution without imposing any conditions whatsoever.

66 With regard to the judgment in Case T-301/01 *Alitalia* v *Commission* [2008] ECR II-1753, it is sufficient to note that the effect of the Commission's decision classifying the measure at issue in that case as State aid was to make payment of the third instalment of that aid subject to authorisation by the Commission. That is not the situation in the present case.

67 Secondly, with regard to the uncertainties as to the amount of the aid at issue, it must be pointed out that, in so far as the determination of that amount could influence the recovery of the unlawful aid or the payment of interest, that would influence the situation of FLH and MF, which are the only ones who could be asked to repay the aid or pay interest, and does not directly influence the situation of the applicants in

Case T-443/08. Those uncertainties cannot therefore provide the basis for an interest in bringing proceedings.

68 It follows from all those considerations that the applicants in case T-443/08 have not established the existence of a vested and present interest in bringing proceedings against Article 1 of the Decision in so far as it states, first, that the capital contribution constitutes State aid within the meaning of Article 87(1) EC and, second, that the amount of that aid is EUR 350 million.

69 The action in Case T-443/08 must consequently be dismissed as inadmissible, without there being any need to consider the plea of inadmissibility raised by the Commission on the ground that the applicant is not directly concerned.

Substance

70 In support of their action in Case T-455/08, the applicants in that case ('the applicants') put forward eight pleas in law alleging in essence, first, an infringement of Article 87(1) EC, second, that FLH cannot be a recipient of State aid, third, that FLH cannot be classified as both a donor and a recipient of aid, fourth, a breach of the principles of non-retroactivity, legal certainty, the protection of legitimate expectations and equal treatment, fifth, a breach of primary European Law by the 2005 Guidelines, sixth, in the alternative, a breach of procedure, seventh, a breach of the division of powers laid down in the EC Treaty and, eighth, the contradictory and inadequate nature of the reasons for the determination of the amount of the alleged aid.

The first plea, alleging an infringement of Article 87(1) EC

Arguments of the parties

71 The applicants consider that the Commission is wrong to regard the financing of the southern runway as State aid.

72 First of all, the applicants claim that the concept of 'undertaking' within the meaning of Article 87(1) EC does not apply to regional airports, at least in regard to financing of airport infrastructure.

73 First, the construction of such infrastructure is not an economic activity but is a part of transport policy, economic policy and regional policy. Moreover, the Commission has accepted in the present case that the construction of the southern runway is political in nature (recitals 261 and 262 of the Decision). In addition, it is clear from the Commission communication of 24 January 2007, entitled, 'An Action-Plan for Capacity, Efficiency and Safety for airports in Europe' [COM (2006) 819 final] that the development of airports also corresponds to the interests of the European Union.

74 Secondly, the construction of the southern runway does not constitute an economic activity because a private investor would not engage in that activity. There is no possibility of the investment being profitable, since it is not possible to recover the cost of construction from the users of the airport by means of airport charges. That is so

because, according to the applicants, in Germany, such charges require authorisation from the airport authority of the Land in which the airport is located and private investors have no influence over their amount. Such charges cannot therefore be fixed freely by the operator in the light of economic considerations and in fact bear no relationship to investment costs. Consequently, the charges paid by users of airport infrastructures do not, as the Commission wrongly implies, constitute consideration for the construction of that infrastructure. Areas let for commercial purposes other than airline operations are irrelevant since the present case concerns the southern runway, which will be used exclusively for air operations.

75 According to the applicants, by considering that the transaction would not be profitable for a private investor, the Commission recognises that a regional airport such as Leipzig-Halle cannot be built solely by private investment, with the result that that activity does not constitute an economic activity but is a structural policy measure. The applicants add, in that regard, that, by assimilating without any distinction public airports to private undertakings, the Commission has misinterpreted their specific nature, which is marked by limited economic freedom of action. First of all, they have higher than average fixed costs in regard to installations, operating and staff. In addition, their freedom of action is limited by strict legal obligations and conditions. Finally, the cost of public infrastructure should, in principle, be borne by the community, which, indeed, the Commission has recognised, in particular in regard to ports. The Commission cannot apply different treatment to ports and to airports.

76 Thirdly, economic activity is not the principal purpose of airports and the fact that they compete does not allow the conclusion to be drawn that they constitute undertakings. Moreover, the Commission itself considers that a distinction must be drawn between the airport operator's various activities (recital 178 of the Decision), which

are not all economic in nature. In the present case, the investment relates only to infrastructure, in this instance, the southern runway. However, no private investor ever invested in that runway. The Commission did not take account of that fact but rather based its reasoning on a global vision of the airport, viewed as an undertaking.

77 The applicants add, in that regard, in their reply, that construction of airport infrastructure and operation of that infrastructure constitute two different activities in regard to each of which the Commission must adduce positive evidence that they are economic in nature, the need for that distinction having been confirmed, inter alia, by the judgment in Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643). In the present case, the Commission did not draw that distinction and, by deducing the economic nature of the construction of the southern runway from the economic nature of the operation of the airport, it failed to establish the economic nature of the construction project.

78 In addition, the Commission has produced no evidence of the impossibility of separating the activities involving the construction and operation of airport infrastructures. In that regard, the applicants challenge the argument that construction is a *sine qua non* of operation by arguing, in particular that the relevant question is whether the activities as such can be separated and not their nature. In any event, that is an erroneous argument inasmuch as there are numerous pre-conditions without which an economic activity cannot be engaged in and the putting into place of those preconditions does not automatically constitute an economic activity. The applicants challenge the Commission's claim that the operator of an installation must necessarily finance its construction by relying on specific examples (museums, public schools

or universities, motorway restaurants). The applicants also point out that construction and operations concern operators from different sectors. Moreover, they argue that the distinction between the construction, operation and use of infrastructure is a fundamental principle of the Commission's practice in the context of appraisals, in regard to the provisions governing State aid, of the financing of infrastructure by the public authorities. In the present case, the criteria for the application of that principle are fulfilled since all potential users have equal and non-discriminatory access to the southern runway, with the result that, if the said principle were applied, the capital contribution would not be subject to the rules governing State aid. Finally, the failure to distinguish between activities could lead to a general review of the infrastructure policy of the Member States, since the Commission could review the financing of infrastructure in all sectors in the light of the rules governing State aids. In that context, the applicants dispute the claim that if the financing of infrastructures were not considered aid, the Member States could permanently create new competitors, stating that the claim does not correspond to reality, since the construction of an airport is exceptional.

79 Secondly, the applicants point out that the construction of airports is not engaged in by private traders. There is not a single case in the European Union where private investors themselves have financed the construction of an airport or a substantial extension to one. Indeed, there is no decision in which the Commission considered that the private investor test was satisfied. On the other hand, the Commission recognised in Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ 2004 L 137, p. 1) that there is no case of an *ex nihilo* creation of a private airport without the involvement of public funds. The construction of airport infrastructure is thus one of those activities which are always engaged in by public bodies and must necessarily be engaged in by them. That activity cannot therefore be economic in nature by reason of the absence of a corresponding market.

80 The applicants point out first that, as regards the statement in recital 169 in the Decision that private investors have shown an active interest in investing in airports, the Commission does not say whether that interest relates to regional airports or large airports, or whether it relates to investment in pre-existing airports or airports not yet built. Moreover, it does not cite any example in support of its claims. In addition, it draws no distinction between investments in airports as a whole and investments in transport infrastructure as such, the latter being the only ones comparable to the present case.

81 Secondly, the applicants note that the Commission has produced no evidence of its claim, in recital 170 of the Decision, that there has been a change of attitude on the part of the public authorities regarding the contribution of private investment to airports.

82 Thirdly, the applicants challenge, on the basis of Decision 2004/93 and a university study from 2001 entitled 'Competition between Airports and the application of State aid rules' ('the 2001 study)', the Commission's claim that airports are to a large extent built with private money. That is erroneous, even if account is taken only of the situation in Germany. First of all, investment by private partners in airports, including those which offer international flights, is in the minority. Secondly, although some airports are, in part, privatised, private investors have not invested in their construction. Finally, attempts to operate regional airports privately have failed on several occasions. It is thus impossible in Germany to build a regional airport on a private basis, without public aid.

83 Fourthly, the applicants dispute the relevance of the examples of airport infrastructure built with private funds cited by the Commission, namely the airport in Ciudad Real (Spain), Terminal 5 at Heathrow Airport (United Kingdom) and the airports in Vienna (Austria) and Frankfurt-am-Main (Germany).

84 Thirdly, the applicants consider that the references in the 2005 Guidelines and the Decision to the judgment in Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, confirmed by the judgment in Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297 ('the *ADP* cases') are irrelevant. First of all, they do not deal with the construction of airport infrastructures but with airport operation. In addition, they do not deal with the interpretation of the concept of 'undertaking' within the meaning of Article 87 EC but concern an infringement of the prohibition on the abuse of a dominant position within the meaning of Article 82 EC. Finally, they concern the activity of a large international airport, which is different from that of regional airports such as Leipzig-Halle.

85 ADV supports the observations submitted by the applicants. First, it argues that the construction of airport infrastructure does not constitute an economic activity. Secondly, ADV claims that the separation between the exercise of its official powers as a public authority in the context of the financing of infrastructure and the exercise of economic activities in the context of the operation of that infrastructure is not in contradiction with the *ADP* cases. Thirdly, ADV points out that that functional separation is recognised in the case-law and the Commission's decision-making practice. Fourthly, ADV considers that public financing of projects in the general interest must remain possible.

86 The Commission disputes the arguments put forward by the applicants and the intervener.

Findings of the Court

87 It must be recalled that, for a measure to be classified as aid within the meaning of Article 87(1) EC, all the conditions set out in that provision must be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be likely to affect trade between Member States. Third, it must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. Fourth, it must distort or threaten to distort competition (Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraph 110 and case-law cited).

88 With regard to the concept of 'undertaking', it must be pointed out that, in the context of competition law, that concept covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107 and the case-law cited; see also Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25, and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 21).

89 According to settled case-law, any activity consisting in offering goods and services on a given market is an economic activity (*Cassa di Risparmio di Firenze and Others*, paragraph 88 above, paragraph 108 and the case-law cited; see also *FENIN* v *Commission*, paragraph 88 above, paragraph 25, and *MOTOE*, paragraph 88 above, paragraph 22)

90 It must also be borne in mind that State aid, as defined in the EC Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union judicature must in principle, having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls

within the scope of Article 87(1) EC. It follows that it is for the European Union judicature to check whether the facts relied upon by the Commission are substantively accurate and whether they establish that all the conditions justifying the classification of 'aid' within the meaning of Article 87(1) EC are fulfilled. Since a complex economic appraisal is involved here, it should also be noted that, according to settled case-law, in reviewing an act of the Commission which has necessitated such an appraisal, the Court must confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Joined Cases C-314/06 P and C-342/06 P *Chronopost* v *UFEX and Others* [2008] ECR I-4777, paragraphs 141 to 143).

91 Finally, since the concept of State aid must be applied to an objective situation appraised on the date on which the Commission takes its decision, it is the appraisals carried out on that date which must be taken into account in the conduct of the review referred to above (*Chronopost* v *UFEX and Others*, paragraph 90 above, paragraph 144).

92 It is in the light of those principles that the present plea, in which the applicants claim, essentially, that the Commission was wrong to regard the capital contribution as State aid within the meaning of Article 87(1) EC since, in regard to the extension of airport infrastructure, regional airports do not constitute undertakings within the meaning of that provision inasmuch as that activity is not economic in nature, must be considered.

93 First of all, it must be pointed out that, in operating Leipzig-Halle Airport, FLH is engaged in an economic activity. It is clear from the case-law that the management of airport infrastructure is an economic activity (*Ryanair* v *Commission*, paragraph 77 above, paragraph 88, and the case-law cited). That is confirmed in the present case

by the fact that FLH provides airport services for money, coming, in particular, from airport taxes, which must be regarded as remuneration for the provision of services rendered by the concession holder of the airport (*Ryanair* v *Commission*, paragraph 77 above, paragraph 90). The fact that FLH manages a regional airport and not an international airport does not alter the economic nature of its activity inasmuch as that activity consists of providing services for remuneration in the regional airport market. Furthermore, the existence of such a market is shown, in the present case, by the fact that Leipzig-Halle Airport competed with other regional airports, in particular with Vatry (France) to become DHL's European air freight hub, as can be seen, in particular, from recital 8 of the Decision. Moreover, the airport at issue in *Ryanair* v *Commission*, paragraph 77 above, was also a regional airport. Having regard to the case-law set out in paragraph 89 above, all of those factors allow the operation of Leipzig-Halle Airport by FLH to be classified as an economic activity.

94 Secondly, it must be stated that operation of the southern runway is part of FLH's economic activity. As is clear from recital 177 of the Decision, the southern runway is infrastructure which will be commercially exploited by FLH, since FLH will not make it available without charge to users in the common interest but will charge users for its use. In that regard, it must be pointed out that the airport fees will be the major source of revenue for financing the new southern runway, as the Commission stated in recital 15 of the Decision. The construction and development of that runway will thus permit FLH to increase its capacity and its economic activity as operator of Leipzig-Halle Airport.

95 Thirdly, it must be considered that, for the purposes of examining the economic nature of FLH's activities in the context of the public financing of the development of the southern runway, there is no cause to dissociate the activity of building or enlarging

infrastructure, in the event, the southern runway, from the subsequent use to which it is put and that the nature of the development activity must be determined according to whether or not the subsequent use of the infrastructure which has been built amounts to an economic activity (see, to that effect and by analogy, *FENIN* v *Commission*, paragraph 88 above, paragraph 26).

96 Runways are essential elements for the economic activities engaged in by an airport operator. The construction of landing and takeoff runways thus permit an airport to engage in its principal economic activity or develop that activity, where what is in question is the construction of an additional runway or the development of an existing runway.

97 The applicants are therefore wrong to argue that the economic nature of one activity leads to the conclusion that another activity is of an economic nature only on condition that the two activities are not dissociable and cannot be differentiated and that they must be engaged in by the same entity, and it is for the Commission to prove that those two criteria are met. Moreover, there is no support for that argument in the case-law.

98 It is true that all the activities of airport operators are not necessarily economic in nature. Activities which fall within the exercise of public powers are not of an economic nature justifying the application of the EC Treaty rules of competition (*MOTOE*, paragraph 88 above, paragraph 24 and the case-law cited). The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity engaged in by a given entity (*MOTOE*, paragraph 88 above, paragraph 25).

99 However, in the present case, since, having regard to their nature and purpose, the construction and development of the southern runway are not, in themselves, an exercise in public powers, which the applicants do not expressly claim, the Commission did not err when, for the purposes of assessing the economic nature of FLH's activities, it did not distinguish between the construction and development of the southern runway, on the one hand, and the operation thereof on the other. The allegation that the Commission recognised, in recital 178 of the Decision, the need to distinguish between the operator's various activities must be rejected since, in that recital, the Commission merely recalled to mind, essentially, the principles flowing from the case-law referred to in paragraph 98 above.

100 It follows from all the foregoing that, in so far as it operates the southern runway, FLH is engaging in an economic activity which cannot be dissociated from the activity of building that runway. The argument that the development of airport infrastructure does not constitute an economic activity must be rejected inasmuch as the economic nature of that activity cannot be considered separately from that of the operation of the infrastructure.

101 None of the applicants' arguments weaken that conclusion.

102 In the first place, the argument that the construction or development of the southern runway forms part of regional policy, economic policy and transport policy must be rejected. It is clear from settled case-law that, first, Article 87(1) EC does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27; Case C-241/94 *France* v *Commission* 1996] ECR I-4551, paragraph 20; and Joined Cases T-304/04 *Italie and Wam* v *Commission*, not published in the ECR, paragraph 63), and, second, that a subscription of capital by public authorities must be assessed in

the light of the private investor test, leaving aside all social, regional policy and sectoral policy considerations (Case T-20/03 *Kahla/Thüringen Porzellan* v *Commission* [2008] ECR II-2305, paragraph 242, and the case-law cited). Moreover, the fact that the construction and development of the southern runway the construction and operation of the infrastructure meets a clearly defined objective of general interest, and, in particular, regional development, has been accepted by the Commission and is a criterion of which it took account when assessing the compatibility of the aid with the common market, as can be seen from recitals 258 to 263 of the Decision.

103 It is true that it must be pointed out that, as is clear from point 12 of the 1994 communication, the Commission has considered, in the past, that the construction of infrastructure projects represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid.

104 However, it must be recalled that the question whether aid is State aid within the meaning of the Treaty must be determined on the basis of objective elements, which must be appraised on the date on which the Commission takes its decision (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 137, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others*, paragraph 90 above, paragraph 95), and, moreover, that, although the Commission is bound by the guidelines and notices that it issues in the field of State aid, that is so only to the extent that those texts do not depart from the proper application of the rules in the Treaty, since the texts cannot be interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or which contravenes the aims of those articles (see Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 65 and the case-law cited).

105 There have been developments in the airports sector, referred to in recitals 169 to 171 of the Decision, concerning, in particular, the organisation of the sector, and its economic and competitive situation. Furthermore, the *ADP* cases recognised, as of 2000,

that the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC, to which the rules of State aid apply and that was confirmed by the judgment in *Ryanair* v *Commission*, paragraph 77 above (paragraph 88).

106 Consequently, having regard to the case-law referred to in paragraph 104, the Commission was required, when it adopted the Decision, to take account of those developments and that interpretation and their implications for the application of Article 87(1) EC to financing of infrastructure related to airport operations, unless it is not to apply point 12 of the 1994 Communication. Having regard to the foregoing, therefore, the Commission did not err in considering, in recital 174 of the Decision, that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000.

107 In that context, it must be added that since it does not solely perform missions relating, in particular, to town and country planning policy or transport policy, but also, as has been pointed out, engages in an economic activity, an airport operator should finance, from its own resources, the costs of using or building the infrastructure it manages and which are the basis of its economic activity. Under those circumstances, the argument that the cost of public infrastructure should be borne by the community must be rejected. Furthermore, the fact that financing of infrastructure requires public resources is not, as such and of itself, relevant. It is only if the capital is made available to an undertaking, directly or indirectly, by the State in circumstances which correspond to normal market conditions that such aid from the public authorities can avoid being classified as State aid.

108 Secondly, the applicants' arguments concerning the alleged impossibility of dissociating the activities of construction and of operation of infrastructures must also be rejected.

109 It must be stated first that the allegation put forward by the applicants in their reply that the distinction between the construction, operation and use of infrastructure is a fundamental principle of the Commission's practice, including in areas other than airports, the criterion for application of which is fulfilled in the present case, must be rejected since the criterion for the application of this alleged fundamental principle, as set out by the applicants (paragraph 78 above), is irrelevant in the present case. As the Commission pointed out, the fact that the use of infrastructure is available to all users on an equal and non-discriminatory basis cannot be a relevant criterion making it possible to exclude the existence of aid in favour of users of the infrastructure at issue. On the other hand, it does not make it possible to determine whether, as in the present case, the public financing of that infrastructure constitutes aid in favour of the operator of that infrastructure. In addition, and without it being necessary to rule on the existence of the alleged practice, it must be held that that practice cannot, in any event, call into question the finding in paragraph 100 above that FLH is engaging in an economic activity which cannot be dissociated from the activity of building the said runway. Since State aid is a legal concept which must be interpreted on the basis of objective factors (see, to that effect, *Chronopost* v *UFEX and Others*, paragraph 90 above, paragraph 141), it cannot depend on a subjective assessment by the Commission and must be determined independently of all the institution's previous practice.

110 Secondly, the specific examples provided by the applicants, such as the operation of a cafeteria in a museum or of a motorway restaurant do not lead to the conclusion that operation, on the one hand, and construction, on the other, must be analysed separately. The examples do not distinguish between the principal activity and the secondary activities subordinate to it. Thus, the principal activity of a museum is not to operate a cafeteria and that of a motorway operator is not to operate a motorway restaurant. On the other hand, the objective of building a landing runway is linked to the principal economic activity of an airport, namely the provision of airport services.

111 Thirdly, the argument that construction and operation are engaged in by different operators in different sectors does not affect the need to consider the nature of the activity which is preparatory to the exercise of an economic activity together with the nature of that activity by reason of the links between the two activities, inasmuch as the construction and development of the runway are conditions precedent to its operation. In any event, in the specific context of the capital contribution, the bodies at issue are the same since the recipients of the contribution for the construction of the southern runway, MF and FLH (the latter being owned by the former), are also going to operate it.

112 Fourthly, with regard to the argument that the Commission has not proved that the construction and operation of airport infrastructures are indissociable from each other, it must be pointed out that when activities are not in the nature of an exercise of public powers, the Commission cannot be obliged to prove the economic nature of all parts of the activities of an undertaking when those parts are included in the general economic activity of the undertaking and are linked to each other. In such a case, the Commission can simply set out the reasons why it considers that the undertaking is engaging in an economic activity and state the reasons why it considers that the parts of the activity at issue are included in the said activity.

113 In any event, it must be pointed out that, having regard to the developments mentioned in recitals 169 to 171 of the Decision, the Commission stated in recital 172 of the Decision that it is no longer possible to consider the construction and operation of airports as a task carried out by an administration, which in principle is outside the ambit of review of State aid. It must therefore be found that it follows from recital 177 of the Decision that the Commission classified FLH as an undertaking within the meaning of Article 87(1) EC on the basis of the fact that the infrastructure at issue is operated on a commercial basis by FLH and is therefore commercially exploitable infrastructure. Under those circumstances, it must be considered that the Commission has adduced sufficient facts to support the link between the development and

operation of the southern runway in the context of the classification of the capital contribution as State aid.

114 Thirdly, with regard to the arguments claiming that the construction of airports is not engaged in by private operators and that construction of the southern runway does not constitute an economic activity because a private investor would not engage in that activity, due to its unprofitable nature, it must be pointed out that, as is clear from the foregoing, the development of the southern runway is an activity directly connected with the management of airport infrastructure, which is an economic activity.

115 In addition, the fact that an activity is not engaged in by private operators or that it is unprofitable are irrelevant criteria in regard to the classification of that activity as an economic activity. For the purposes of that classification, it is not expressly required by the case-law (see paragraph 89 above) that the activity in question should be engaged in by private operators or that it is profitable. The same is true indeed of the classification as an undertaking (see paragraph 88 above).

116 Those arguments must be rejected as immaterial.

117 Fourthly, with regard to the arguments questioning the relevance of the *ADP* cases, it must first of all be pointed out that the concepts of 'undertaking' and 'economic activity' are identical in all branches of competition law, be it the provisions addressed to undertakings or the provisions addressed to the Member States, since all those provisions contribute to the attainment of a single objective, namely the objective referred to in Article 3(g) EC of establishing a system ensuring that competition in the internal market is not distorted. Thus, the case-law referred to in paragraph 88 above concerns the concept of 'undertaking' in the context of competition law, without distinguishing between provisions addressed to undertakings and those addressed to the Member States. Moreover, as the Commission has pointed out, the Court of Justice

itself has employed, in the context of State aid, the concept of 'undertaking' applied in the context of cartels (see, in that regard, *Cassa di Risparmio di Firenze and Others*, paragraph 88 above, paragraph 107). Therefore, the fact that the *ADP* cases concern the application of Article 82 EC rather than Article 87 EC is of no consequence. For the same reason, the applicants' arguments challenging the relevance of *FENIN* v *Commission*, paragraph 88 above, must be rejected.

118 Next, even though the *ADP* cases concerned a major international airport, they were confirmed by the judgment in *Ryanair* v *Commission*, paragraph 77 above, which dealt with a regional airport.

119 Finally, although the case-law in question does not deal with construction of infrastructures, it is none the less true that that fact does not call into question the foregoing conclusions, which are based on the indissociable nature of the activity of managing and operating of an airport from that of the construction or development of its infrastructures.

120 It follows from all the foregoing that the Commission correctly considered that the capital contribution constituted State aid within the meaning of Article 87(1) EC.

121 The first plea in law must therefore be dismissed in its entirety.

The second plea, alleging that FLH cannot be the recipient of State aid

Arguments of the parties

122 The applicants claim that FLH cannot be the recipient of State aid since it is a vehicle for public investment ('single purpose vehicle', 'SPV'). They argue that even though FLH is a private law legal person, distinct from the public authorities which own it, the sole objective which its creation was intended to attain and its sole purpose is the management of the public infrastructure at Lepizig-Halle Airport. FLH thus was created solely to manage that airport and to carry out the operations necessary for that purpose. It should therefore be regarded as an SPV. The applicants reply to the Commission's argument that FLH carries out a multitude of tasks by arguing that the Commission has overlooked the fact that the construction of infrastructure at an airport must be considered separately from its operation.

123 The applicants point out that the Commission has accepted, in regard to State aid, that SPVs may be created having only public shareholders, such as fund management companies. According to the applicants, those SPVs are created by the public authorities for a single purpose and are given the capital resources necessary for them to be managed in the public interest. They therefore act autonomously in regard to third parties but not in regard to the public authorities which make funds available to them. Thus, notwithstanding the fact that public capital has been made available to them, which they must manage, those companies are not classified by the Commission as recipients of State aid. According to the applicants, FLH's situation is similar to that of those companies, since it is required to make airport infrastructure available to potential users in an open and non-discriminatory manner. FLH does not have the

role of a businessman in regard to such infrastructure, which has been entrusted to it not for free use, but to be operated in the name, and according to the instructions of, the shareholders.

124 Thus, according to the applicants, once Land Sachsen and its associates chose to give the task of developing the southern runway to FLH, they were required to provide it with the financial means necessary to do so. As a shareholder, the State was also required to do so by German law. Therefore, the finance provided by the State as owner of the SPV for the purpose of providing infrastructure does not constitute State aid within the meaning of Article 87(1) EC. That application is in accordance with the *ADP* cases, which do not deal with the provision of infrastructure to airport operators but with the actions of those operators in regard to third parties. In any event, even if it is considered that an airport is a trader on the market in regard to third parties, that does not mean that the company in charge of the infrastructure must also be regarded as an undertaking in its relationship with its owners, in the present case the public authorities.

125 The applicants add that the considerations concerning control of FLH show that the Commission's approach is incorrect. FLH is 100 % owned by the public authorities. If those authorities had themselves built and managed the airport, the financing of infrastructure would not have been considered State aid but merely the financing, within the administration, of a public service task. According to the applicants, the same is true when the public authorities entrust that task to an independent legal entity created solely for that purpose, in the present case, FLH. The applicants rely in that regard on Commission Decision C (2001) 2967 of 5 October 2001 concerning State aid NN 86/2001 (Ireland — Aer Rianta).

126 Finally, the applicants consider that, by taking the view that it had authority to review the measures adopted by the public authorities, the Commission exceeded the powers conferred on it. Since no powers have been conferred on the European Union,

administrative organisation, according to the first and second paragraphs of Article 5 EC, remains within the competence of the Member States, including in regard to the application of European Union law. Thus, the Member States are free to decide whether their infrastructures are to be managed directly by a public authority or by an undertaking created for that purpose. According to the applicants, if such an undertaking were regarded as a recipient of State aid, that would deprive the Member States of the possibility of creating operating companies. That would therefore influence the administrative structures of the Member States, something which is not within the powers conferred on the Commission.

127 The Commission rejects the applicants' arguments.

Findings of the Court

128 It must once again be recalled that, in the context of competition law, the concept of 'undertaking' covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (*Cassa di Risparmio di Firenze and Others*, paragraph 88 above, paragraph 107 and the case-law cited). In this regard, it must be stated that, save for the reservation in Article 86(2), Article 87 EC covers all private and public undertakings and all their production (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 11).

129 It must also be pointed out that the existence or otherwise of legal personality distinct from that of the State, conferred by national law, does not prevent the existence of financial relations between the State and its organs carrying on economic activities (see, to that effect, Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 13)

and consequently, the possibility that those organs might receive State aid within the meaning of Article 87(1) EC.

130 Thus, just as it cannot be accepted that the rules on State aid can be circumvented merely through the creation of autonomous institutions charged with allocating aid (Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 23), it cannot be tolerated that the mere fact of creating an SPV could exempt the latter from those rules. It must be considered whether that body carries on an economic activity and may therefore be classified as an undertaking and whether it obtained a transfer of State resources (see, to that effect, *France* v *Commission*, paragraph 24).

131 That interpretation is confirmed by the Commission's assessments in regard to investment vehicles and investment funds, to which, indeed, the applicants themselves refer. As is clear from the Guidelines on state aid to promote risk capital investments in small and medium-sized enterprises (OJ 2006, C 194, p. 2), the Commission does not exclude the possibility that an investment fund or investment vehicle could be regarded as an undertaking benefiting from State aid. On the contrary, it considers, in the first paragraph of point 3.2 of those guidelines, that it is necessary to consider whether that might be the case. In the fifth paragraph of that point, the Commission indicates that, in general, it considers that an investment fund or an investment vehicle is an intermediary vehicle for the transfer of aid to investors and/or enterprises in which investment is made, rather than being a beneficiary of aid itself. However, it does not exclude the possibility that such could be the case in certain situations, as is clear from the fifth paragraph of point 3.2 of the Guidelines, in particular, under certain conditions and where there are measures involving direct transfers in favour of the investment vehicle or the existing fund with numerous and diverse investors and having the character of an independent enterprise.

132 In the present case, as is clear from consideration of the first plea in law, FLH engages in an economic activity and must, consequently, be regarded as an undertaking within the meaning of Article 87(1) EC, active in the airport market. It is also common ground that it received public financing in the form of the capital contribution granted directly to FLH by public bodies. Under those circumstances, and without it being necessary to rule on the question whether FLH is an SPV, the argument alleging that FLH cannot be regarded as the recipient of the capital contribution by reason of the fact that it is an SPV must, in the light of the principle referred to in paragraph 130 above, be rejected. The same is true in regard to the argument based on the fact that, if the German authorities had themselves built and managed the airport, the financing of infrastructure would not have been considered State aid.

133 Decision C (2001) 2967, referred to by the applicants (see paragraph 125 above), does not provide support for their argument. That decision deals, in particular, with the change of ownership of an airport, which was transferred from the State to a management company, which did not, in the particular case, constitute State aid inasmuch as the Commission considered that Article 87 EC did not prevent the Member States from using State resources to create and own an undertaking. On the other hand, that decision does not support the conclusion that a transfer of State resources to an undertaking set up by the public authorities to manage an airport is exempt, on that ground alone, from being classified as State aid.

134 It follows from the foregoing that the applicants are wrong to argue that FLH could not be the recipient of State aid. The complaint alleging that, by considering that it had authority to review measures adopted by the public administration, the Commission exceeded the powers conferred on it falls under the first complaint raised under the seventh plea in law, to which it is remitted.

135 Subject to that proviso, the second plea must be rejected.

The third plea, alleging that FLH cannot be classified as both a donor and a recipient of State aid

Arguments of the parties

136 The applicants claim that the Decision is contradictory since FLH is regarded both as a recipient and a donor of aid. The Commission considered that FLH was, on the one hand, the recipient of the capital contribution and, on the other, the donor of aid to DHL in the context of the Framework Agreement. Those two functions are irreconcilable. The Commission's decision-making practice in regard to risk capital shows that they are mutually exclusive, since the donor of the aid can only grant or transfer the aid to another undertaking.

137 The applicants point out that, if the Commission's argument that a private investor would not have given the unlimited warranty in favour of DHL is well founded, that shows that FLH does not act like an undertaking in the marketplace. FLH could thus, if it wished, grant aid but could not, at the same time, be the recipient of aid. In addition, the argument that FLH granted aid shows that it is not an undertaking within the meaning of Article 87(1) EC. An undertaking does not grant aid, since aid, by nature, is a non-repayable subsidy and no undertaking would provide goods or services without consideration.

138 As for the Commission's argument that it separately considered the various measures at issue, the applicants reply that the fact that the Commission did not, in reality, make the necessary distinctions results from the fact that it erroneously concluded, on the basis of the economic nature of the operation of the airport, that construction

of infrastructure was an economic activity. By linking those two activities, it placed FLH in the double role of donor and recipient of the aid, whereas that double function is logically excluded.

139 The Commission denies the applicants' arguments.

Findings of the Court

140 It must first be pointed out that FLH was the recipient of the capital contribution, which was regarded as State aid within the meaning of Article 87(1) EC, as is apparent from recitals 165 to 224 of the Decision.

141 It must also be pointed out that, according to recitals 225 to 252 of the Decision, DHL received unlimited warranties pursuant to Sections 8 and 9 of the Framework Agreement and to the comfort letter, which constitute aid within the meaning of Article 87(1) EC granted by Land Sachsen, MF and FLH. It must be pointed out, in particular, that the Framework Agreement was concluded between FLH and MF, on the one side, and DHL, on the other.

142 It must be stated that the Commission considered that FLH was the recipient of State aid, in this case, the capital contribution, as well as, indeed, one of the bodies which granted other State aid, namely the warranties flowing from the Framework Agreement and the comfort letter.

143 None the less, since the State aid at issue is distinct and was examined separately in the Decision, it cannot be considered, as the applicants claim, that the classifications as recipient and donor of aid are incompatible in the present case. As is clear from the case-law referred to in paragraph 128 above, a public undertaking can be the recipient of aid once the undertaking is active in the marketplace. However, nothing prevents the said undertaking from also granting aid by way of a separate measure. Thus, aid can be granted, not only directly by the State, but also by public or private bodies which the State establishes or designates with a view to administering the aid (see, to that effect, *France* v *Commission*, paragraph 130 above, paragraph 23 and the case-law cited). The State is perfectly capable, by exercising its dominant influence over public undertakings, of directing the use of their resources in order, as occasion arises, to finance specific advantages in favour of other undertakings (see, to that effect, *France* v *Commission*, paragraph 130 above, paragraph 38). The applicants are therefore wrong to claim that undertakings within the meaning of Article 87 EC cannot grant aid and that FLH must either be attached to the State or regarded as an undertaking.

144 It must be added that, contrary to the applicants' claim, the Commission's decision-making practice in regard to risk capital does not show that the functions of recipient and donor of aid are incompatible. No part of that practice allows it to be considered that the Commission excluded unconditionally that the beneficiary of a measure constituting State aid could, at the same time, be the donor under another measure which also constitutes State aid. In fact, it is clear in substance from the decisions referred to by the applicants and from the Guidelines on state aid to promote risk capital investments in small and medium-sized enterprises that the Commission examines, in each case and in the light of the specific characteristics of each measure envisaged, if there could be State aid at the level of investors, at the level of the investment fund and at the level of the undertakings being invested in. Moreover, in its decision of 29 May 2007 concerning State aid No 732/2006 (Netherlands — Risk capital scheme 'Bio-Generation Venture Fund'), the Commission considered that it could not be excluded

that there was aid at the level of the fund and at the level of the undertakings being invested in.

145 In the light of the foregoing and of the fact that the aid measures at issue are distinct from each other, it must be considered that there is nothing to prevent FLH being, on the one hand, as a public body, the donor of the aid received by DHL by way of the Framework Agreement and the comfort letter but also, as an undertaking active in the airports market, being the recipient of State aid, in the present case the capital contribution. It is clear from consideration of the first and second pleas in law that the Commission was correct to consider, on the one hand, that FLH engages in an economic activity and constitutes an undertaking within the meaning of Article 87(1) EC and, on the other hand, that it is the recipient of State aid in the form of the capital contribution. In addition, there is nothing which calls into question the fact that, as a signatory of the Framework Agreement, FLH must be regarded as the donor of the aid related to it or calls into question the Commission's assessment, set out in recital 227 of the Decision, that the framework agreement and letter of comfort are financed by State resources and the decisions to grant them are imputable to public authorities. Nor do the applicants deny that in this case.

146 It follows that, contrary to the applicants' claim, the Decision is not contradictory in regarding FLH as both a recipient and a donor of aid. The Court also rejects the argument that once the Commission considered that a private investor would not have given the warranty given to DHL, FLH cannot be regarded as an undertaking operating in the marketplace, with the result that it could not be the recipient of aid.

147 Having regard to the foregoing, the third plea must be dismissed.

The fourth plea, alleging a breach of the principles of non-retroactivity, legal certainty, the protection of legitimate expectations and equal treatment

Arguments of the parties

148 The applicants claim that the application in the present case of the 2005 Guidelines infringes the principles of non-retroactivity, legal certainty, the protection of legitimate expectations and equality.

149 With regard, first, to the infringement of the principle of non-retroactivity, the applicants claim, first of all, that, contrary to the Commission's argument, the latter applied the 2005 Guidelines. That is clear from recital 30 of the Decision and from the contradictory nature, from several points of view, of that decision as regards references to the 2005 Guidelines (recitals 30, 174, 176 and 195).

150 The applicants then argue that the 2005 Guidelines cannot be applied since the relevant date for assessment of the grant of the capital contribution falls before the entry into force of the Guidelines. The Guidelines provide that they apply to aid granted after their publication on 9 December 2005, thereby expressly excluding the possibility of retroactive application. In the present case, it was following a decision of the board of directors of MF on 4 November 2004 that MF's shareholders decided to make the capital contribution available to FLH. The contribution was thus granted to FLH before the entry into force of the 2005 Guidelines, at a date when only the 1994 Communication was in force. Consequently, by applying the 2005 Guidelines to the capital contribution, the Commission infringed the principle of non-retroactivity.

151 The applicants add that, according to the case-law, new rules of which the Member State became aware at the draft stage are not to be applied retroactively. Thus, that is all the more reason why the 2005 Guidelines, which amended, one year after it was granted, the criteria for determining whether the capital contribution constitutes State aid, the draft of which was communicated to the Member States several months after the contribution had been granted, cannot have retroactive effect.

152 With regard, secondly, to the infringement of the principles of the protection of legitimate expectation and legal certainty, the applicants claim that, when the decision concerning the southern runway was adopted on 4 November 2004, it was not possible to foresee that the Commission would change its assessment of the provisions governing State aid as regards the financing of infrastructure at regional airports. The argument that financing could constitute State aid appeared only in 2005, that is to say, after the capital contribution had been granted. In fact, until the adoption of the 2005 Guidelines, the Commission had no consistent practice in that regard and there was a considerable lack of legal certainty. Even supposing that there was a practice, the German authorities or the applicants could not have become aware of it since the decisions at issue, in the first place, were published only on the Commission's internet site but not in the *Official Journal of the European Union* and, moreover, were not published in the German language and could not therefore be understood by the applicants. Under those circumstances, the applicants consider that the change in the interpretation of Article 87(1) EC was not foreseeable.

153 The applicants also point out that that development could not have been deduced from the Commission's decision-making practice, the case-law or the 2001 study. In that regard, they point out in particular that, although the *ADP* cases extended the scope of the rules concerning State aid to all measures taken in the airports sector, the Commission should have, from that time, withdrawn the 1994 Communication or amended it so as to ensure legal certainty. However, that was not done, with the result that, before the Decision, the case-law could not be interpreted as meaning that the construction of regional infrastructure was subject to the provisions governing aid but that the principles of the 1994 Communication continued to apply. The applicants reply to the fact, raised by the Commission, that, before the adoption of the

2005 Guidelines, the German authorities were informed of the measures concerning the construction and development of regional airports (State aid No 644i/2002), that the Member States regularly notify measures for reasons of legal certainty, even where they consider that they are not State aid measures. It cannot therefore be concluded from that notification that, before committing themselves to the financing of the southern runway, the German authorities started from the proposition that that financing could be State aid.

154 Finally, the applicants claim that, since the 2005 Guidelines lay down detailed rules for their application in time, the Commission, by applying them at a date before their entry into force, infringed its own assessment criteria, with which it had undertaken to comply and on compliance with which economic operators and the Member States should be able to count. In that regard, they state, in their reply, that by making the capital contribution subject to the rules governing State aid even though it could not apply the 2005 Guidelines, the Commission infringed the 1994 Communication and therefore, the principle that the administration is bound by its own acts. The Commission is bound by the guidelines which it adopted as long as they are not contrary to primary legislation. At the date of the decision concerning the capital contribution, the case-law did not require application of the provisions governing State aid to measures concerning airport infrastructure, as the Commission has confirmed.

155 With regard, thirdly, to the infringement of the principle of equality, the applicants argue that many European airports have received public aid for the construction and adaptation of infrastructure. Having regard to the principle of equality, FLH cannot

be the only one concerned by the Commission's change of policy whereby it applied the rules on State aid to regional airports.

156 The Commission denies the applicants' arguments.

Findings of the Court

157 With regard, first, to the complaint based on infringement of the principle of non-retroactivity, it must be held that, as regards the classification of the capital contribution as State aid within the meaning of Article 87(1) EC, there is nothing in the Decision which leads to the conclusion that the Commission applied the provisions of the 2005 Guidelines.

158 With regard, first, to the 'undertaking' and economic activity criterion, the Commission pointed out in recital 175 of the Decision that it is clear from the *ADP* cases that the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC, to which the rules of State aid apply. Given the recent developments in the sector, the Commission considered, as indicated in recital 174 of the Decision, that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000, the year in which the General Court delivered judgment in *Aéroports de Paris* v *Commission*, paragraph 84 above. The Commission therefore concluded, in recital 176 of the Decision, that from the date of that judgment the State aid rules should apply in this sector, emphasising that that did not constitute retroactive application of the 2005 guidelines inasmuch as the Court of Justice had simply clarified the concept of State aid.

159 That approach must be approved since the interpretation which the Court of Justice gives of a provision of European Union law is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force (Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 159, and the case-law cited).

160 It follows that, with regard to the assessment of the economic activity criterion, the Commission was entitled to implement the principles flowing from the *ADP* cases by applying them to the circumstances of the present case, in particular as regards the financing of airport infrastructures and that does not constitute retroactive application of the 2005 Guidelines.

161 In addition, no recital in the Decision concerning the 'undertaking' and economic activity criteria states explicitly that the Commission applied the 2005 Guidelines retroactively and, indeed, recital 176 states the contrary. It must be pointed out in that regard that the reference to the Guidelines in recital 30 of the Decision concerns the assessment in the course of the preliminary investigation of the compatibility of the capital injection with the common market and not classification of it as State aid. Similarly, the statement in recital 174 of the Decision that, given the developments in the sector, the approach adopted in the *ADP* cases has since been 'extended' by the Commission in its 2005 Guidelines to all kinds of airports does not show that the Commission applied the Guidelines in the present case inasmuch as that reference merely states that the Guidelines codified the legal situation existing since the above-mentioned case-law by clarifying some of its implications, particularly as regards regional airports.

162 With regard, secondly, to the economic advantage criterion, the Decision does not state that the 2005 Guidelines were applied. On the contrary, it states in recital 195 that the applicability of the private market investor test does not arise from the 2005

Guidelines but from the development of case-law and the decisions of the Commission, an aspect of the Decision which, indeed, the applicants do not deny.

163 Finally, with regard to the criteria of imputability to the State, specificity, distortion of competition and effect on trade between Member States, the Decision contains nothing which indicates that the Commission applied factors concerning those criteria appearing in the 2005 Guidelines and, indeed, the applicants do not claim otherwise.

164 It follows from the foregoing that, with regard to the classification of the capital injection as State aid within the meaning of Article 87(1) EC, the Commission did not apply the 2005 Guidelines. It must be added that since the applicants do not challenge the Decision in regard to the assessment of the compatibility of the capital contribution with the common market, there is no need, in the framework of the present proceedings, to consider whether the Commission applied the 2005 Guidelines retroactively when making that assessment.

165 In the light of the foregoing, the complaint alleging retroactive application of the 2005 Guidelines to the construction and financing of the southern runway must be rejected.

166 With regard, secondly, to the complaints relating to the infringement of the principle of the protection of legitimate expectations and legal certainty, it is sufficient to point out that, since the Commission did not apply the 2005 Guidelines to the classification of the capital contribution as State aid, those complaints must be rejected. They are based on the erroneous premiss that the Guidelines were applied retroactively.

167 In any event, those complaints do not appear to be well founded. The *ADP* cases, from which it follows that the operation of an airport is an economic activity, date from 2000. In addition, the judgment in *Ryanair* v *Commission*, paragraph 77 above, which concerns the situation before the adoption of the 2005 Guidelines, confirmed the *ADP* cases in the context of the operation of a regional airport. Furthermore, it is clear from Commission Decision SG (2001) D/286839 of 13 March 2001 concerning State aid N 58/2000 (Italy — Promotion of the Piedmont airport system) that, at that date, the Commission did not exclude the possibility that a measure in favour of the development of regional airport infrastructure might constitute State aid. In that decision, which, contrary to what the applicants claim, also concerned the financing of airport infrastructure, the Commission considered, essentially, in particular in recital 17, that although the measure in question must be regarded as State aid, it was compatible with the common market under Article 87(3)(c) EC. Finally, it must be pointed out that if the German authorities notified State aid N 644i/2002 in 2002 for reasons of legal certainty, as the applicants state (see paragraph 153 above), it is because they envisage the possibility that the measures in question, which are intended to improve regional airport infrastructure, could constitute State aid. Furthermore, in the context of the procedure concerning that aid, the Commission, on the basis of the *ADP* cases, informed the German authorities on 30 June 2003, essentially, that it was not certain that 'aid for the construction and development of regional airports could be … regarded as a general infrastructure measure which is irrelevant for the purposes of State aid'.

168 Under those circumstances, the applicants are wrong to argue that, at the date of the decision concerning the construction of the southern runway, in December 2004, it could not be foreseen that the assessment of measures financing regional airport infrastructure in regard to the provisions governing State aid would change. The same applies to the allegation concerning the fact that the argument that financing of the construction of regional airports could constitute State aid appeared only in 2005, after the capital contribution had been granted.

169 It follows from the foregoing that the complaints alleging an infringement of the principle of legitimate expectations and legal certainty must be dismissed.

170 With regard, thirdly and finally, to the complaint alleging an infringement of the principle of equality, it must be pointed out that the fact that financing of regional airport infrastructure could constitute State aid concerns all airports from 2000, with the result that FLH cannot be regarded as the sole airport operator concerned by that change, as the applicants claim. The fact that airports had received financing before that date does not call into question the fact that, from then on, the financing of all regional airport infrastructure could be examined in the light of the provisions governing State aid.

171 The complaint alleging an infringement of the principle of equality must therefore be dismissed.

172 Having regard to all of the foregoing, the fourth plea in law must be dismissed.

Fifth plea, alleging an infringement of primary law by the 2005 Guidelines

Arguments of the parties

173 The applicants consider that the 2005 Guidelines infringe primary law for two reasons.

174 First of all, the 2005 Guidelines are factually inexact inasmuch as the construction and development of airport infrastructures does not constitute an economic activity. The Guidelines are thus contrary to primary law and cannot constitute a sufficient legal basis for the Decision.

175 Secondly, the 2005 Guidelines are contradictory and, consequently, infringe the principles of clarity and legal certainty. Point 12 of the 1994 Communication, which states that the construction of infrastructure projects represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid, has not been withdrawn. It is thus not possible to know to what extent construction and alteration of airport infrastructure is covered by the provisions governing State aid.

176 In that regard, the applicants point out that, by considering that the 2005 Guidelines 'amplify' the 1994 Communication, the Commission admits that it did not wish to call into question the principle laid down in the latter, to which it refers, moreover, in the 2005 Guidelines. However, the Commission called that principle into question inasmuch as the 2005 Guidelines apply to all airport activities, including construction of infrastructure. In addition, the Guidelines contradict the 1994 Communication inasmuch as they state that '[a]ny airport operator engaging in an economic activity … should finance the costs of using or building the infrastructure it manages from its own resources'. Pointing out that the Commission relies in that regard on the *ADP* cases, the applicants recall that those cases stated that a major international airport may be regarded as an economic activity but said nothing about regional airports. According to the applicants, since the Commission does not seem to have wanted to exclude construction of infrastructure from its control, as was the case under the

1994 Communication, the 2005 Guidelines are contradictory. If the Commission considered that financing of the construction or development of regional airport infrastructure constitute State aid, it should have expressly withdrawn the 1994 Communication and adopted a new one.

177 The applicants consider that the Commission's statements that point 12 of the 1994 Communication was set aside and annulled by the 2005 Guidelines are erroneous. Points 18 and 19 of the 2005 Guidelines do not explicitly clarify their relationship with the 1994 Communication. According to the applicants, the 2005 Guidelines are confusing since, on the one hand, they do not specifically annul point 12 of the 1994 Communication and, on the other, they set that provision aside. That contradiction makes the 2005 Guidelines inapplicable to the financing of infrastructure and confirms that they infringe Article 87 EC.

178 Finally, with regard to the argument that the Decision is not based on the 2005 Guidelines, the applicants recall that the Commission has in practice applied them (see paragraph 149 above).

179 ADV supports the applicants' observations. In its view, the 2005 Guidelines are not applicable. It argues in that regard that the Commission cannot determine, in the Guidelines, the constituent elements of State aid, in the present case the existence of an economic activity, in violation of primary law.

180 The Commission rejects the arguments put forward by the applicants and ADV.

Findings of the Court

181 As was pointed out when examining the fourth plea, since the Commission did not apply the 2005 Guidelines to the classification of the capital injection as State aid within the meaning of Article 87(1) EC, the present plea is without effect.

182 By this plea, which is similar to an objection of illegality, the applicants argue, on the one hand, that the 2005 Guidelines are factually inaccurate inasmuch as the construction and installation of airport infrastructures does not constitute an economic activity and, moreover, that the Guidelines are contradictory and, consequently, infringe the principles of clarity and legal certainty as regards the application of the provisions of State aid to the financing of airport infrastructure. However, since the Guidelines were not applied in that regard in the present case, the applicants' complaints in that regard are irrelevant.

183 Under those circumstances, the fifth plea must be dismissed.

The sixth plea, alleging a breach of procedure

Arguments of the parties

184 In the alternative, the applicants consider that the Commission did not apply the proper procedure. They argue that, as regards regional airports like Leipzig-Halle,

there was no market at the time of adoption of the decision to develop the southern runway in 2004. Those airports did not engage in an economic activity and did not compete with other airports. In addition, even supposing that the regional airports are now in competition, that there is a market and that the provisions governing State aid are therefore applicable, that is, in any event, a recent development, as the Commission admits in the 2005 Guidelines. Consequently, even if the capital contribution is regarded as State aid, it must in any event be classified as existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999. Consequently, since the Commission did not apply, in the present case, the procedure laid down in that regulation for existing aid, in particular Articles 17 to 19 thereof, the Decision is vitiated by a breach of procedure.

185 The Commission's claim that Articles 17 to 19 of Regulation No 659/1999 is applicable only to aid schemes and not to individual aid, if correct, would lead to the conclusion that it should not have reviewed the measure at issue in the present case. On the one hand, there were no appropriate measures within the meaning of Article 88(1) EC and, moreover, the Commission was not entitled to review an individual existing aid measure pursuant to Regulation No 659/1999.

186 The Commission contends that the present plea should be dismissed.

Findings of the Court

187 It must be recalled that the EC Treaty establishes different procedures according to whether the aid is existing or new. Whereas new aid must, under Article 88(3) EC, be notified in advance to the Commission and cannot be implemented before the

procedure has culminated in a final decision, existing aid may, under Article 88(1) EC, be duly implemented as long as the Commission has not found it to be incompatible (*Banco Exterior de España*, paragraph 128 above, paragraph 22, and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 148). Existing aid may therefore only be the subject, should the situation arise, of a decision of incompatibility producing effects for the future (*Alzetta and Others* v *Commission*, paragraph 147).

188 In accordance with Article 1(b)(v) of Regulation No 659/1999, existing aid is 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State'. That concept of 'evolution of the common market' can be understood as a change in the economic and legal framework of the sector concerned by the measure in question. Such a change can, in particular, be the result of the liberalisation of a market initially closed to competition.

189 In the present case, it must be pointed out, as is clear from recitals 174 and 176 of the Decision, that, having regard to the development of the airports sector and the *ADP* cases, the Commission considered that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000. Moreover, it is clear from Decision SG (2001) D/286839 (see paragraph 167 above) that the Commission envisaged in 2001 that financing airport infrastructures could constitute State aid. The German authorities also envisaged that possibility, inasmuch as they notified State aid N 644i/2002 in 2002 and, in addition, the Commission, in the context of the procedure concerning that aid, informed the German authorities in 2003 of its doubts as to whether the measures at issue could constitute general infrastructure measures (see paragraph 167 above).

190 The capital contribution was granted in November 2004, that is to say, at a time when the Commission had already made known that it considered that such financing could constitute State aid.

191 With regard to the applicants' argument that, as regards regional airports like Leipzig-Halle, there was no market at the time of the decision to develop the southern runway, since those airports did not engage in an economic activity and did not compete with each other, it is sufficient to recall that, in the context of the first plea in law, it was established that FLH is engaged in an economic activity and it competes with other airports (see paragraph 93 above) and to note that nothing suggests that that was not the case when the capital contribution was granted. The development referred to by the Commission in the 2005 Guidelines took place prior to the decision to finance the southern runway in 2004. In point 5 of those Guidelines, the Commission refers to a development which took place 'in recent years'. Furthermore, the Commission already referred to that development in 2001 in Decision SG (2001) D/286839, in particular in recital 11.

192 Under those circumstances, it cannot be considered that the capital contribution did not constitute aid at the time at which it was granted but became aid later as a result of the development of the common market.

193 It follows from the foregoing that the capital contribution was not existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999.

194 It must be added that, although it is true that the Decision does not specifically reply to the argument that the German authorities raised during the formal examination

procedure that the capital contribution constituted existing aid (recital 70 of the Decision), the fact remains that the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraphs 63 and 64, and the case-law cited). In the present case, the Decision contained the elements necessary, in particular in recitals 174 to 176, to understand the reasons why the aid cannot be regarded as existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999.

195 In the light of the foregoing, the sixth plea in law must be dismissed.

The seventh plea, alleging a breach of the division of powers laid down in the EC Treaty

Arguments of the parties

196 The applicants claim that, by its interpretation of the concept of 'undertaking', the Commission is infringing primary law inasmuch as it makes subject to review as State aid State measures which are not subject to such review.

197 First of all, the applicants claim that the Commission has infringed the powers of the Member States. Since the measures are regional and economic policy measures, the Member States have exclusive powers in regard to the construction of infrastructure and the Commission has no powers whatever in that domain. However, through the broad definition of an 'undertaking' in the 2005 Guidelines, the Commission makes such measures subject to the competition rules, in regard to which powers have been conferred on it. They have thereby granted themselves a new power of review permitting them to examine, and even reject, projects carried out by the Member States. That power is even greater than that exercised by the German administrative courts. Consequently, by defining the concept of State aid in such a way that it impinges on the powers of the Member States, as is clear, in particular, from recital 261 of the Decision, the Commission has infringed the principle of subsidiarity. In addition, since it is not in a position to provide better supervision at the level of the European Union than that which could be carried out at national level, the Commission is also infringing the second paragraph of Article 5 EC. In that regard, the applicants state that the guarantee of access without discrimination for users of infrastructure does not justify supervision by the Commission. On the one hand, such access is guaranteed by the public service obligation and, moreover, charges are subject to authorisation by the public authorities after consultation with users and in accordance with the principle of equality.

198 Secondly, the applicants consider that the Commission cannot use the Guidelines to enlarge, in a binding manner, the criteria laid down in Article 87(1) EC. The Guidelines are appropriate measures within the meaning of Article 88(1) EC or recommendations with the meaning of the fifth paragraph of Article 249 EC, which must comply with European Union law. By extending the concept of 'undertaking' in the 2005 Guidelines to all types of airports, it exceeded that limit and infringed Article 88(1) EC.

199 ADV supports the applicants' observations. According to ADV, the division of powers provided for in European Union law does not allow the construction of airport infrastructure to be made subject, systematically, to the rules governing State aid.

200 The Commission rejects the arguments put forward by the applicants and ADV.

Findings of the Court

201 First of all, it must be emphasised that the second subparagraph of Article 7(1) EC requires each institution to act within the limits of the powers conferred upon it by the EC Treaty.

202 It must also be recalled that the intention of the EC Treaty, in providing through Article 88 EC for aid to be kept under constant review and supervised by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the European Union judicature, by means of an appropriate procedure which it is the Commission's responsibility to set in motion. Articles 87 EC and 88 EC thus reserve a central role for the Commission in determining whether aid is incompatible (Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraphs 9 and 14).

203 In the present case, with regard first, to the complaint that the Commission infringed the powers of the Member States, it must be pointed out that, as is clear from consideration of the first plea in law, the Commission did not err when it considered that the capital contribution constituted State aid within the meaning of Article 87(1) EC. Consequently, it had power under Article 87(2) and (3) to assess the capital

contribution in accordance with the case-law referred to in the preceding paragraph. It thus cannot have infringed the powers of the Member States in that regard.

204 With regard to the allegation that regional and economic policies, of which the development of the southern runway is part, are within the exclusive jurisdiction of the Member States, it must be stated that, even if that were true, the consequence of that fact would not be to deprive the Commission of its power to supervise State aid pursuant to Articles 87 and 88 EC where financing granted under such policies constitutes State aid within the meaning of Article 87(1) EC.

205 Finally, with regard to the fact that the Commission is unable to provide better supervision than that exercised at national level as is required by the second paragraph of Article 5 EC, it must be said that that argument is irrelevant since it is established that the Commission had the power under the EC Treaty to supervise the measure at issue in the present case since the measure in question was State aid.

206 The first complaint must therefore be rejected. For the same reasons, the Court must also reject the complaint put forward in the second plea in law that, by considering that it had authority to review the measures adopted by the public authorities, the Commission exceeded the powers conferred on it inasmuch as the Member States are free to decide whether their infrastructure is to be managed directly by a public authority or by an undertaking created for that purpose.

207 With regard, secondly, to the complaint alleging that the Commission cannot use the Guidelines to enlarge the criteria laid down in Article 87(1) EC, it is sufficient to recall that, in the present case, the Commission did not apply the 2005 Guidelines to the classification of the capital contribution as State aid.

208 In any event, contrary to the applicants' claim, such guidelines do not constitute appropriate measures with the meaning of Article 88(1) EC. On the one hand, the appropriate measures envisaged by that article refer to measures required by the progressive development of, or by the functioning of, the common market which the Commission is to propose to the Member States in the context of the constant review all systems of aid existing in those States. In the present case, the capital contribution constitutes individual new aid and not an existing aid scheme. Moreover, it is clear from the nature and content of the 2005 Guidelines that they constitute, for the Commission, a policy for the exercise of its discretion in regard to State aid in the airports sector in which it itself limits that discretion. The Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as frameworks, communications or guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the EC Treaty. Where the Commission adopts guidelines which are consistent with the EC Treaty and are designed to specify the criteria which it intends to apply in the exercise of its discretion, it itself limits that discretion in that it must comply with the indicative rules which it has imposed upon itself (see, to that effect, Case T-27/02 *Kronofrance* v *Commission* [2004] ECR II-4177, paragraph 79 and the case-law cited). As is clear, essentially, from consideration of the first plea in law, nothing suggests that by extending the concept of 'undertaking' to airports, including regional airports, the Commission exceeded its powers.

209 The second complaint must also therefore be rejected and, consequently, the seventh plea in law must be dismissed in its entirety.

The eighth plea, alleging the contradictory and inadequate nature of the reasons for the determination of the amount of the alleged aid

Arguments of the parties

210 The applicants claim that the Decision is contradictory. On the one hand, it fixes the amount of the alleged aid at EUR 350 million (article 1) and, on the other hand, it states that certain expenditure forming part of a public service task, assessed at EUR 108.2 million, cannot be regarded as State aid within the meaning of Article 87(1) EC (recital 182 *et seq*.). That contradiction has serious legal consequences for the applicants. Pursuant to case-law, they must pay interest on the amount of aid in respect of the period between the time it is granted and the time it is authorised, whereas that is not so in regard to expenditure forming part of a public service task. In the present case, the difference amounts to about EUR 25 million. In addition, that contradiction prevents the applicants and their associates from classifying future infrastructure financing in a legally correct manner since, in the Decision, the Commission classifies as State aid compensatory amounts paid in respect of a public service task, thereby making them subject to the obligation to notify.

211 The applicants consider that the contradictory nature of the Decision must entail its annulment and the question even arises whether, by reason of the seriousness of the irregularity in it, it must not be regarded as legally non-existent. In addition, they consider that the contradictory statements in the Decision constitute an error in the statement of reasons for the decision and therefore constitute an infringement of Article 253 EC, which must also entail the Decision's annulment. On the one hand, the applicants, as well as Land Sachsen and the Federal Republic of Germany, should be able to determine, on the basis of the Decision, what part of the measure at issue is to

be classified as State aid and what part is to be classified as a compensatory measure which does not constitute aid and, moreover, the Court is unable to exercise its powers of review due to the contradictory nature of the Decision.

212 The applicants reply to the Commission's argument that it could leave the classification of the expenditure forming part of a public service task in suspense that the Commission expressly calculated the amount of the alleged aid in Article 1 of the contested decision but did not deduct the compensatory payments whose existence it recognised. Consequently, the question whether the applicants were able to calculate the amount of the alleged aid is not of primary importance.

213 The applicants argue that the case-law holding that it is sufficient for the decision to include information enabling the recipient to work out the amount of the aid himself, without overmuch difficulty, does not exclude the complaint alleging that the Decision is contradictory. In addition, that case-law deals solely with negative decisions and not positive decisions, with the result that it is irrelevant. In any event, it supports the applicants' argument since the Decision does not contain non-contradictory statements which would permit the person to whom it is addressed or the applicants to determine the amount of the aid without overmuch difficulty. Consequently, even a national court could not perform the tasks assigned to it but would have seek the help of the Commission. However, that possibility would not correct the contradictory nature of the contested Decision.

214 The argument that the compensatory payments were raised at a late stage of the proceedings does not justify the adoption of a contradictory decision. On the one hand, the applicants had no influence in that regard and, moreover, the statements at issue were joined to the file months before the adoption of the Decision and could therefore have been taken into account. Even if those arguments had been submitted shortly before the adoption of the Decision, the Commission was none the less required to

carry out the procedure in accordance with the required formalities and therefore, if necessary, carry out additional research, since it was bound by no time-limit.

215 The Commission contends, first, that it was entitled to leave the calculation of the expenditure forming part of a public service task in suspense in the Decision since that calculation did not influence the outcome of its investigation. Thus, whatever might be the acceptable part of the expenditure which the German authorities refer to for the financing of such tasks, it would not have raised any objection to that financing. It thus did not have to determine in a definitive manner the extent to which that financing did not constitute State aid or constituted authorised aid.

216 The Commission also recalls that, according to case-law, no provision of European Union law requires it, when it orders restitution of aid declared incompatible with the common market, to fix the precise amount of aid to be reimbursed. It is sufficient if its decision contains information that would permit the person to whom it is addressed to determine that amount himself without overmuch difficulty. Even if, in the case of illegal aid, it is not obligatory for the precise amount of the aid to be set out in the decision, such a requirement cannot arise in the case of a positive decision.

217 Furthermore, the Commission points out that the German authorities alleged only at a late stage of the procedure that a considerable part of the public financing was for tasks falling within the exercise of public powers. A complete analysis of the calculation of costs submitted by those authorities would thus have delayed the Decision.

218 In addition, the Commission acknowledges that, according to case-law, when it authorises illegal aid, national courts are required to order payment of interest for the period between the grant of the aid and its authorisation by the Commission. To perform that task, those courts must be able to calculate the part of the illegal aid which is compatible with the common market. However, in such a case, they could obtain assistance from the Commission pursuant to the principle of mutual assistance flowing from Article 10 EC and the Notice on cooperation between national courts and the Commission in the State aid field (OJ 1995 C 312, p. 8). Thus, in accordance with the division of powers between the national courts and the Commission laid down in the case-law, it is sufficient for the Commission to indicate the relevant criteria, as it did in the Decision. On the other hand, it cannot be required to establish in detail, in its positive decision, what part of the total amount granted is aid which is illegal but compatible with the common market or to fix the amount of interest to be recovered on account of the premature grant of the aid.

219 Under those circumstances, the Decision is not contradictory since the Commission can restrict itself to stating the maximum amount of the aid granted which is compatible with the common market, namely EUR 350 million, without having to determine in a definitive manner the extent to which certain parts of that amount could be regarded as not constituting aid.

220 The Commission adds that, by interpreting the Decision in the light of its recitals, it is clear that it authorised aid in a maximum amount of EUR 350 million for the development of the southern runway. A complete reading of the Decision leaves no doubt as to the content of the operative part. The applicants' difficulties thus do not concern the interpretation of the Decision but the question whether, in the context of possible proceedings before the national courts, the Commission would have to calculate precisely what part of the contribution did not constitute State aid. However, the Commission rejects such a possibility by reason of the division of powers between

the European Union judicature and the national courts and by reason of the case-law that, even in the case of a negative decision, it is not obliged to quantify the amount of aid to be reimbursed.

221 Finally, given that, in its decision to open the formal investigation procedure, it considered whether FLH was an undertaking and, consequently, that Article 87(1) EC applied, and that it referred to the private investor applicability test, the Commission challenges the argument that the applicants made the corresponding information available before the adoption of the Decision. If it had dealt with that question at that stage of the procedure, the procedure would have been delayed. With regard to the comment that it is not bound by restrictive time-limits, the Commission points out that, in principle, it tries to give its decision in the shortest possible time.

Findings of the Court

222 It should be borne in mind that a contradiction in the statement of the reasons on which a decision is based constitutes a breach of the obligation laid down in Article 253 EC such as to affect the validity of the measure at issue if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a result, the enacting terms of the decision are, wholly or in part, devoid of any legal justification (Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 85).

223 In addition, only the operative part of an act is capable of producing binding legal effects (see, to that effect, Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21, and Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraph 67).

224 It must be pointed out that, according to Article 1 of the Decision, the State aid which Germany is planning to implement, amounting to EUR 350 million, for the purposes of the construction of the southern runway and related airport infrastructure at Leipzig-Halle Airport is compatible with the common market under Article 87(3)(c) EC.

225 It must be noted that in recital 12 of the Decision, the Commission stated that in the opening of the investigative procedure the Commission calculated that the construction of the new southern runway would be financed by about EUR 350 million of public capital contributions. In addition, after recalling in recital 180 of the Decision that the financing of functions such as security and public order or of infrastructure directly related to them does not constitute State aid, the Commission accepted, in recital 182 of the Decision, that, in the present case, certain costs fall within the public policy remit. These costs relate to security and police functions, fire and public safety measures, operational safety, German Weather Service and German Air Traffic Control. The Commission concluded, in recital 183 of the Decision, that, to the extent that they fall within the public policy remit, the costs in question cannot amount to State aid within the meaning of Article 87(1) EC. In that regard, it considered that even if it were to accept the German authorities' argument that none of the costs should be considered as State aid, that assessment would have no effect on the outcome of the present case and that even if those costs amounted to state aid, they would be authorised aid. Therefore, the Commission considered that it did not have to reach a definitive conclusion on this question.

226 Under those circumstances, it must be stated that, although it accepts, in recitals 182 and 183 of the Decision, that certain costs connected with the capital contribution fall within the public policy remit and cannot therefore be regarded as State aid within the meaning of Article 87(1) EC, the Commission none the less

considered, in Article 1 of the Decision, that the entire capital contribution constituted State aid.

227 It is true that no provision of European Union law requires the Commission, when it orders restitution of aid declared incompatible with the common market, to fix the precise amount of the aid to be reimbursed. It is sufficient for the decision to include information enabling the recipient to calculate that amount himself, without overmuch difficulty (see, to that effect, Case 102/87 *France* v *Commission*, [1988] ECR 4067, paragraph 33).

228 However, without it being necessary to consider whether such a principle also applies where the Commission declares aid compatible with the common market, it must be considered that, where it decides to state, in the operative part of a decision, an amount of State aid within the meaning of Article 87(1) EC, the Commission must indicate the correct amount.

229 The correctness of the amount of unlawful aid stated by the Commission in the operative part of a final decision finding that the aid is compatible with the common market within the meaning of Article 87 EC is all the more important as it is likely to affect the amount of interest that the recipient can be required to pay. Pursuant to European Union law, national courts before which proceedings might be brought are required to order the recipient of the aid to pay interest in respect of the period of illegality (*CELF*, paragraph 60 above, paragraph 55). The amount of that interest depends, inter alia, on the amount of the State aid as such. The interest in question must be calculated on the basis of the total amount of the State aid within the meaning of Article 87(1) EC and not merely on the amount of the unlawful aid regarded as compatible with the common market. Indeed, in the present case, the applicants stated at the hearing that they paid interest in respect of the period of illegality on the full amount of EUR 350 million mentioned in Article 1 of the Decision.

230 The amount of the State aid referred to in Article 1 of the Decision appears to be incorrect having regard to the reasons stated in recitals 182 and 183 since, as has been pointed out, it is clear from those recitals that the amounts falling within the public policy remit do not constitute State aid and must therefore be deducted from the total amount of the capital contribution, namely, EUR 350 million, which has been classified as State aid.

231 The Commission's argument that the German authorities alleged only at a late stage of the procedure that a considerable part of the public financing was for tasks falling within the exercise of public powers must be rejected. On the one hand, it is explicitly stated in recital 183 of the Decision that the Commission deliberately considered that it did not need to rule on the question whether the financing of certain expenditure could constitute State aid on the ground that, even supposing that that was so, it would be authorised aid. On the other hand, it did not plead the late communication of information. Moreover, as the applicants pointed out and as is clear from Article 13(2) of Regulation No 659/1999, the Commission, when dealing with unlawful aid such as that at issue in the present case, is not restricted by any time-limit, whether binding or non-binding, in adopting its decisions.

232 The Commission's argument that, by interpreting the Decision in the light of its recitals, it is clear that it authorised aid in a maximum amount of EUR 350 million for the development of the southern runway must also be rejected. As is clear from the foregoing, the relevant question in the present case is not to determine the amount of the aid compatible with the common market but to determine the amount of the aid as such. A combined reading of recitals 182 and 183, as well as Article 1 of the Decision, reveals a contradiction, pointed out in paragraph 226 above, with the result that the Commission is wrong to consider that the Decision leaves no doubt as to the contents of its operative part. In any event, since the operative part of the Decision is clear and unequivocal inasmuch as it fixes the amount of the aid at issue at EUR 350 million, there is no need to interpret the operative part in the light of the statement of reasons for the Decision. Only where there is a lack of clarity in the terms used in the operative part of a decision should reference be made, for the purposes of interpretation, to

the statement of reasons contained in the decision (Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, paragraph 31).

233 It follows from the foregoing that Article 1 of the Decision must be annulled in so far as it fixes at EUR 350 million the amount of State aid which the Federal Republic of Germany intends to grant to Leipzig-Halle Airport for the construction of a new southern runway and related airport infrastructure.

Costs

234 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Furthermore, the first subparagraph of Article 87(3) of the Rules of Procedure provides that where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs. Finally, according to the first and third subparagraphs of Article 87(4) of the Rules of Procedure the Member States and institutions which have intervened in the proceedings are to bear their own costs and the Court may order an intervener to bear his own costs.

235 In the present case, since the applicants in Case T-443/08 have been unsuccessful, they must be ordered, in addition to bearing their own costs, to pay the costs incurred by the Commission, in accordance with the form of order sought by the Commission.

236 Since the applicants in Case T-455/08 have been partially unsuccessful, the Court will make an equitable assessment in the circumstances of the present case by holding that each principal party is to bear its own costs.

237 Finally, in accordance with the first and third subparagraphs of Article 87(4) of the Rules of Procedure, ADV and the Federal Republic of Germany are to bear their own costs in Cases T-443/08 and T-455/08.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Joins Cases T-443/08 and T-455/08 for the purposes of judgment;

2. Dismisses the action in Case T-443/08 as inadmissible;

3. Annuls Article 1 of Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig-Halle Airport in so far as it fixes at EUR 350 million the amount of State aid which the Federal Republic of Germany intends to grant to Leipzig-Halle Airport for the construction of a new southern runway and related airport infrastructure;

4. **Dismisses the remainder of the action in Case T-455/08;**

5. **Orders Freistaat Sachsen and Land Sachsen-Anhalt to bear their own costs and to pay the European Commission's costs in Case T-443/08;**

6. **Orders Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH to bear their own costs;**

7. **Orders the Commission bear its own costs in Case T-455/08;**

8. **Orders the Federal Republic of Germany and Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV (ADV) to bear their own costs in Cases T-443/08 and T-455/08.**

Delivered in open court in Luxembourg on 24 March 2011.

[Signatures]

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