

**COMMISSION DECISION (EU) 2018/1276****of 22 February 2018****on SA.31149 (2012/C) — Germany****Alleged State aid to Ryanair***(notified under document C(2018) 1034)***(Only the German text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) By letter dated 10 July 2007 ('the 2007 Opening Decision'), the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the Treaty with regard to the financing of Lübeck airport, the financial relations between Hansestadt Lübeck and Infratil Limited ('Infratil'), and the airport's financial relations with the airline Ryanair. The formal investigation procedure was registered under the case number SA.21877 (C 24/2007). A Corrigendum of the 2007 Opening Decision was adopted on 24 October 2007.
- (2) The 2007 Opening Decision was published in the *Official Journal of the European Union* on 29 November 2007 <sup>(2)</sup>. The Corrigendum was published on 7 December 2007 <sup>(3)</sup>. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.
- (3) On 28 January 2009, Schutzgemeinschaft gegen Fluglärm Lübeck und Umgebung eV ('SGF') <sup>(4)</sup> sent a complaint regarding case SA.21877, registered under the case number SA.27585.
- (4) On 22 June 2010 and 30 June 2010, SGF submitted a further complaint, alleging that further unlawful State aid had been granted by Germany in favour of Flughafen Lübeck GmbH ('FLG') and Infratil. This complaint was registered under the case number SA.31149.
- (5) By letter dated 22 February 2012 ('the 2012 Opening Decision'), the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the Treaty with regard to alleged State aid to FLG, Infratil, Ryanair, and other airlines using Lübeck airport <sup>(5)</sup>.
- (6) The 2012 Opening Decision was published in the *Official Journal of the European Union* on 10 August 2012 <sup>(6)</sup>. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.

<sup>(1)</sup> OJ C 241, 10.8.2012, p. 56.

<sup>(2)</sup> OJ C 287, 29.11.2007, p. 27.

<sup>(3)</sup> OJ C 295, 7.12.2007, p. 29.

<sup>(4)</sup> SGF is a non-governmental organisation registered under the rules of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17).

<sup>(5)</sup> Prior to the opening, the measures were investigated in cases CP 31/2009 (SA.27585) and CP 162/2010 (SA.31149).

<sup>(6)</sup> Commission Decision of 22 February 2012 on State aid SA.27585 and SA.31149 (2012/C) (ex NN/2011, ex CP 31/2009 and CP 162/2010) Alleged State aid to Lübeck airport, Infratil and airlines using the airport (Ryanair, Wizz Air and Others) — Germany — Invitation to submit comments pursuant to Article 108(2) of the Treaty (OJ C 241, 10.8.2012, p. 56).

- (7) The Commission joined the procedures SA.21877, SA.27585 and SA.31149 in 2014.
- (8) On 7 February 2017, the Commission adopted a final decision in cases SA.21877 and SA.27585, as well as in case SA.31149 <sup>(1)</sup>. As to the potential State aid in favour of Ryanair, that Commission Decision only assessed an agreement concluded between the airport operator and Ryanair in 2000. It indicated that, at the date of the Decision, the Commission did not have sufficient information in its file to assess whether later agreements, in particular those concluded in 2010, constituted State aid in favour of Ryanair. Those agreements therefore would be assessed in a separate decision <sup>(2)</sup>.
- (9) A request for information concerning two side letters concluded between FLG and Ryanair in 2010 and an Oxera report of 6 February 2015 <sup>(3)</sup> was sent to Germany on 27 July 2017. Germany requested an extension of the deadline to reply which the Commission granted on 2 August 2017. The requested information was provided on 20 September 2017.
- (10) On 22 September 2017, a request for information was sent to Ryanair and forwarded to Germany. Subsequently, information was submitted by Ryanair and Oxera on 6 October 2017. On 24 October 2017, the Commission forwarded the documents received from Ryanair to Germany, inviting Germany to comment.
- (11) The Commission refers to recitals 1 to 61 of Decision (EU) 2017/2336 as regards the procedure in cases SA.21877, SA.27585 and SA.31149.

## 2. DETAILED DESCRIPTION OF THE MEASURES

### 2.1. Background of the investigation and context of the measures

#### 2.1.1. Airport facts and passenger development

- (12) Lübeck airport is situated approximately 73 kilometres from the City of Hamburg, in Schleswig-Holstein, Germany.
- (13) The airport itself defines its catchment area as the metropolitan areas of the City of Hamburg and Öresund (Greater Copenhagen/Malmö).
- (14) According to a market study carried out by the airport in 2009 <sup>(4)</sup>, the majority of the (outbound) passengers at Lübeck airport came from Hamburg (namely 47,20 %). Hamburg airport is located 78 kilometres from Lübeck airport, about 65 minutes travelling time by car.
- (15) Until 2000, Lübeck was an airport depending on aviation revenues generated by charter flights and general aviation. In 2000, the airport changed its business model to an airport for low-cost carriers where revenues are generated through a combination of aviation and non-aviation activities. From that date, the vast majority of the flights at Lübeck airport were undertaken by Ryanair which operated about 90 % of the traffic in 2010.
- (16) Lübeck airport was originally operated by FLG, which was a limited liability company, with Hansestadt Lübeck as its sole shareholder. It was first privatised in 2005 but then bought back by Hansestadt Lübeck in 2009. A public vote of the citizens of Hansestadt Lübeck ensured the survival of the airport in April 2010, approving further investments for the airport until a new private investor would enter the company. A new private investor was found in 2012. The ownership of the airport has changed several times in recent years.
- (17) The passenger traffic at the airport increased from 48 652 passengers in 1999 to 697 559 passengers in 2009. It gradually declined afterwards contrary to the expectations of the airport, which had expected passenger numbers to increase to 2,2 million by 2015.

<sup>(1)</sup> Commission Decision (EU) 2017/2336 of 7 February 2017, SA.21877 (C 24/2007), SA.27585 (2012/C) and SA.31149 (2012/C) — Germany — Alleged State aid to Flughafen Lübeck GmbH, Infratil Limited, Ryanair and other airlines using the airport (OJ L 339, 19.12.2017, p. 1).

<sup>(2)</sup> See recital 186 of Decision (EU) 2017/2336.

<sup>(3)</sup> Oxera report, Economic Market Economy Operator Principle (MEOP) Assessment: Lübeck airport, 6 February 2015.

<sup>(4)</sup> Take-Off Konzept — Flughafen Lübeck GmbH, 21 December 2009, p. 23.

- (18) At the date of this decision, no airline is operating from Lübeck airport. Neither scheduled nor charter flights are on offer.

#### 2.1.2. The 2000 Agreement

- (19) FLG signed an Air Services Agreement ('ASA') with Ryanair in May 2000 ('the 2000 Agreement') that specified the airport charges payable by Ryanair as well as the marketing support payable by the airport. The 2000 Agreement was scheduled to start on 1 June 2000 and to continue until 31 May 2010.
- (20) For the route to Stansted, the agreement included the following costs and revenues:

Table 1

#### Costs and revenues involved in the 2000 Agreement from FLG's perspective

	< 18 turnarounds per week	≥ 18 turnarounds per week
<b>FLG costs:</b>		
Marketing support — costs per arriving passenger	EUR [...] (*)	EUR [...]
	Until 31 May 2005	From 1 June 2005
<b>FLG income:</b>		
Ryanair payable fees per plane	EUR [...]	EUR [...]
Ryanair payable fees per arriving passenger	EUR [...]	EUR [...]
<i>Ryanair net payable fees per arriving passenger (fees minus marketing support)</i>	<i>EUR [...]</i>	<i>EUR [...]</i>
<b>Other:</b>		
Fee on turnover per ticket sold by FLG	[...]	[...]
Commission on turnover rental car booked by FLG	[...]	[...]
Security fee (paid by Ryanair to appropriate government body)	EUR [...]	EUR [...]
(*) Confidential information.		

#### 2.2. Potential State aid granted by the airport operator FLG to Ryanair

- (21) In March and October 2010, Ryanair and FLG signed two side letters to the 2000 Agreement mentioned above (collectively, 'the 2010 Agreements' or 'the 2010 Side Letters').
- (22) The first side letter signed on 29 March 2010 ('Side Letter No 1') covered the period from 28 March 2010 until 30 October 2010. It constitutes a prolongation of the 2000 Agreement, which would have ended in May 2010, and introduced a new marketing fee of EUR [...] per passenger to be paid by FLG in return for a temporary marketing event organised by Ryanair. This new marketing fee had to be paid in addition to the marketing fee specified in the 2000 Agreement of EUR [...] per passenger (below 18 turnarounds per week) or EUR [...] per

passenger (above 18 turnarounds per week). Since more than 18 turnarounds per week were carried out by Ryanair, a total of EUR [...] was to be paid by FLG to Ryanair for the duration of the agreement. As all other conditions from the 2000 Agreement were maintained, passenger service fees per departing passenger to be paid to FLG amounted to EUR [...] and ramp handling charges per turnaround amounted to EUR [...].

- (23) On 31 October 2010, after the end of the contract period of Side Letter No 1, a second side letter was signed ('Side Letter No 2'). Side Letter No 2 did not maintain the conditions of Side Letter No 1, but returned to the schedule of marketing payments as stated in the 2000 Agreement, extending its terms for three years until 1 November 2013.
- (24) On the day that Side Letter No 1 was entered into, namely on 29 March 2010, FLG also signed a marketing services agreement with Airport Marketing Services Limited ('AMS'), a fully-owned subsidiary of Ryanair. That marketing services agreement covered the period from 29 March 2010 to 30 October 2010 and set out the advertising services to be provided by AMS on the website [www.ryanair.com](http://www.ryanair.com), in return for a sum of EUR [...] to be paid by FLG.

### 2.3. Scope of the investigation

- (25) The 2000 Agreement between FLG and Ryanair was part of Decision (EU) 2017/2336. Therefore, this Decision is limited to Side Letter No 1 and Side Letter No 2 concluded in 2010.

### 2.4. Grounds for initiating the procedure

- (26) The Commission was concerned that the 2010 Agreements conferred a selective advantage to Ryanair and therefore constituted State aid within the meaning of Article 107 of the Treaty.

## 3. COMMENTS FROM GERMANY

- (27) Germany took the view that the 2010 Agreements did not distort or threaten to distort competition and did not affect trade between Member States, since Lübeck airport was a small regional airport and since it was not in competition with Hamburg airport and other airports.
- (28) As regards Side Letter No 1, Germany submitted that it was in line with market conditions and did not entail an advantage for Ryanair. Germany argued with reference to the *Helaba I* case <sup>(1)</sup>, that there was no advantage when other operators of regional airports offered Ryanair similar conditions. Germany further argued that this was proven by Ryanair's comparator analysis.
- (29) Germany argued that low-cost carriers, such as Ryanair and Wizz Air, have fewer demands with regards to ground handling services and infrastructure services. Firstly, at Lübeck airport fewer check-in counters were needed because check-in with Ryanair is available to passengers online. Secondly, there were no passenger buses. Thirdly, since walking distances are shorter at Lübeck airport, the time for Ryanair airplanes on the ground was shorter. Fourthly, there were no transfer flights and fewer pieces of luggage per person, which meant that there did not have to be facilities for such purposes. Fifthly and finally, since the flight crew often took charge of cleaning in the airplane, there was less demand for ground cleaning services.
- (30) As regards Side Letter No 2, Germany pointed out that this agreement was an extension, without substantial changes, of the 2000 Agreement. Germany took the view that the 2000 Agreement complied with the Market Economy Operator test.
- (31) Furthermore, Germany is of the opinion that the alleged advantages in favour of Ryanair could not be imputed to the State based on the ruling in *Stardust Marine* <sup>(2)</sup>. According to Germany, FLG acted with autonomy and without any exertion of influence by the State. Germany stated that FLG was not integrated into the structures of the public administration. In addition, Germany stated that the supervision by the public authorities of the management of FLG was limited to aviation and public remit matters and did not include business management activities.

<sup>(1)</sup> Judgment of the General Court of 3 March 2010, *Bundesverband deutscher Banken v Commission* ('Helaba I'), T-163/05, ECLI:EU:T:2010:59.

<sup>(2)</sup> Judgment of the Court of Justice of 16 May 2002, *France v Commission* ('Stardust Marine'), C-482/99, ECLI:EU:C:2002:294.

#### 4. COMMENTS FROM INTERESTED PARTIES

##### 4.1. Flughafen Lübeck GmbH

- (32) FLG stated that the measures were not imputable to Germany, since the agreements were negotiated by it autonomously.

##### 4.2. Ryanair

- (33) Ryanair argued that the 2010 Agreements were not imputable to the State.
- (34) Furthermore, Ryanair argued that there was no selectivity, since the 2010 Agreements were merely short side letters extending the duration of the existing arrangements under the 2000 Agreement. The only new element was a commercially negotiated adjustment to the marketing support.
- (35) Ryanair stated that the contract with FLG was entered into on the basis of economic considerations. Lübeck airport was seen as a viable secondary airport to Hamburg airport and Lübeck itself was regarded as a valuable cultural destination. Even though Ryanair could not offer a business plan to substantiate its decision to start services at Lübeck airport, Ryanair emphasised that such a business plan was not generally required for a private sector investor. Ryanair explained that its services from Lübeck airport were discontinued because of commercial considerations, including cost increases and a yield lower than anticipated (as a consequence of economic recession).
- (36) Ryanair stated that regional airports in the Union are in a difficult market position. Therefore, airport revenues from both aeronautical and non-aeronautical activities had to be taken into consideration, which is referred to as the 'single-till approach'. Since contracts with Ryanair typically promise a large number of passengers, such business relations often help to raise the airport's recognisability and to attract other airlines as well as retail outlets and other service providers. In addition, Ryanair stated that there was strong evidence that the increased number of passengers would lead to a rise in non-aeronautical revenues.
- (37) Ryanair argued that, from a Market Economy Operator viewpoint, any commercial offer would normally be an improvement over the existing situation, as long as it expected marginal benefits to exceed its marginal costs. Furthermore, Ryanair argued that it had to be considered that Ryanair has significantly reduced needs compared to other airlines given its business model and operational efficiency.
- (38) Ryanair conducted a comparison between airports of comparable size and situation as Lübeck airport. Comparator airports are Bournemouth Airport, Grenoble Airport, Knock Airport, Maastricht Airport, Nîmes Airport and Prestwick Airport. A comparison of charges paid by Ryanair at the comparator airports showed that costs paid by Ryanair at Lübeck airport were higher in general than the average level at the comparator airports on both a per-passenger and a per-turnaround basis.
- (39) Ryanair submitted two Oxera reports evaluating the expected profitability of the 2010 Side Letters<sup>(1)</sup>. Both reports were based on a business plan, drawn up by Lübeck airport in 2010 prior to signing the 2010 Side Letters. The reports indicate that, under reasonable assumptions at the time when the 2010 Side Letters were signed, the agreements were both expected to be sufficiently profitable and an airport behaving in the manner of a Market Economy Operator would have been likely to offer similar terms. According to Oxera, this would even be the case if the marketing services agreement with AMS were to be considered jointly with the 2010 Side Letters and the costs but not the AMS-related revenues were included.
- (40) With regards to the marketing services agreement with AMS, Ryanair argued that such agreements are mutually beneficial due to the popularity of Ryanair's website and the consequent increases in international recognition, brand building and passengers, which was substantiated by another Oxera report of 26 September 2014.

<sup>(1)</sup> Oxera report, Economic MEOP Assessment: Lübeck airport, 6 February 2015; Oxera report, Response to the European Commission's request, 6 October 2017.

#### 4.3. Air Berlin

- (41) Air Berlin stated that the routes offered by Ryanair from Lübeck airport were in direct competition with those offered by Air Berlin at Hamburg airport. In particular, the destinations of London, Milan and Barcelona were concerned, since both airlines had them in their portfolio.
- (42) Air Berlin argued that the purpose of Ryanair's marketing strategy was to poach potential clients of, amongst others, Air Berlin. Due to the low prices of Ryanair, customers moved from Hamburg to Lübeck airport. Air Berlin claims that as a result of the State aid, Air Berlin suffered substantial economic losses. Air Berlin had to discontinue some of its flights due to the parallel offer by Ryanair at Lübeck airport. In addition, Air Berlin stated that it found it difficult to open new destinations from Hamburg airport as long as similar destinations were offered by Ryanair from Lübeck airport at excessively low prices.
- (43) Additionally, Air Berlin stated that the agreement with Ryanair was imputable to Germany. According to the articles of association of FLG, the supervisory board had to give its approval for charges resulting from the use of the airport (paragraph 12 of the articles of association). Four of the six members of the supervisory board were elected by Hansestadt Lübeck. Therefore, Air Berlin concluded that Hansestadt Lübeck could be held responsible.
- (44) According to Air Berlin, a further point of concern was the marketing services agreement between AMS and FLG, since the benefits from 'marketing support' appear to be unrelated to the actual marketing expenditures incurred by Ryanair.

### 5. COMMENTS OF GERMANY ON THIRD PARTIES' SUBMISSIONS

#### 5.1. Comments on Ryanair's submissions

- (45) According to Germany, Ryanair's submissions reveal that airport Lübeck acted in accordance with the Market Economy Operator principle.
- (46) Germany particularly highlights the usefulness of Ryanair's approach of proving the market conformity of the agreements through a profitability analysis and a comparator analysis.
- (47) According to Germany, the 2010 Side Letters were not imputable to the State since they were autonomously negotiated and entered into by FLG, without interference of Hansestadt Lübeck. Furthermore, with regard to Side Letter No 2, Germany pointed out that it merely constituted an extension of the 2000 Agreement, without containing any material change. Therefore, all arguments put forward in relation to the 2000 Agreement were relevant.
- (48) Germany stated that it does not understand why the marketing services agreement between FLG and AMS was included in the State aid investigation, since FLG did not spend any public funds in the framework of this agreement. The costs laid down in the marketing services agreement with AMS were covered by private sources, as the money came from the *Industrie- und Handelskammer Lübeck*, a representation of private companies in Lübeck. Moreover, Germany commented that the marketing services agreement with AMS could be regarded as conforming to market standards. This is supported by the observation that FLG was charged with lower costs than other airports with a similar agreement. What is more, the marketing agreement in question was based on the promise of Ryanair to expand its flight portfolio by two destinations.
- (49) Another point added by Germany is the function of Lübeck airport as a back-up airport for Hamburg airport and as a necessary transport infrastructure for northern Germany.

#### 5.2. Comments on Air Berlin's submissions

- (50) According to Germany, Air Berlin would have been granted the same advantages as Ryanair if it had fulfilled the same criteria concerning passenger numbers and flight frequency. Instead, Air Berlin refused any offer for negotiations with FLG, since it never intended to take up services at Lübeck airport. Air Berlin never objected to the conditions under which Ryanair operated at Hamburg airport. In addition, several airlines had complained (amongst others to the Commission) that Air Berlin had been benefitting from substantial State aid by the United Arab Emirates. Therefore, it cannot present itself as a victim vis-à-vis its main competitor Ryanair.

- (51) Germany disagreed with Air Berlin's comments concerning the existence of competition between Lübeck airport and Hamburg airport. In particular, Germany referred to the fact that Hamburg had 70 times as many passengers as Lübeck airport in 2000. The absence of complaints by other airports showed that there was no competition between the two airports.
- (52) Furthermore, Germany rejected Air Berlin's argument that there was an economic advantage for Ryanair. Germany stated that Air Berlin used inaccurate calculations and that the only test relevant for assessing whether an airport-airline agreement was market conform was the Market Economy Operator principle.

## 6. ASSESSMENT OF THE MEASURES

- (53) Article 107(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (54) The criteria laid down in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether a measure constitutes State aid, the following conditions have to be fulfilled:
- the beneficiary is an undertaking,
  - the measure confers an advantage,
  - the advantage is granted through State resources,
  - the advantage is selective, and
  - the measure distorts or threatens to distort competition and is liable to affect trade between Member States.

### 6.1. Economic activity and notion of undertaking

- (55) The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods or services on a given market is an economic activity.
- (56) Since Ryanair is a private company that provides air transport services for remuneration with the aim of making profits, Ryanair is an undertaking that is engaged in an economic activity. It is therefore an undertaking within the meaning of Article 107(1) of the Treaty.

### 6.2. Economic advantage

- (57) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention <sup>(1)</sup>.
- (58) Where an airport has public resources at its disposal, aid to an airline can, in principle, be excluded where the relationship between the airport and the airline is carried out in line with normal market conditions. This so-called 'Market Economy Operator test' ('MEO test') follows the basic concept that the behaviour of public authorities should be compared to that of similar private economic operators under normal market conditions to determine whether an agreement grants an advantage to its counterpart <sup>(2)</sup>.

#### 6.2.1. Preliminary remarks with regard to the MEO test

- (59) In accordance with point 53 of the 2014 Aviation Guidelines <sup>(3)</sup>, the existence of aid to an airline using a particular airport can, in principle, be excluded if the price charged for the airport services corresponds to the market price ('first approach' — comparison with the market price). A second approach is to demonstrate through an *ex ante* analysis — that is to say, an analysis founded on information available when the aid is granted and on developments foreseeable at the time — that the arrangement will lead to a positive incremental profit contribution for the airport and is part of an overall strategy leading to profitability at least in the long term ('second approach' — *ex ante* profitability analysis) <sup>(4)</sup>.

<sup>(1)</sup> See for example Judgment of the Court of Justice of 11 July 1996, *Syndicat français de l'Express international (SFEI) and Others v La Poste and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60.

<sup>(2)</sup> Ibid.

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

<sup>(4)</sup> See point 53 of the 2014 Aviation Guidelines.

- (60) As regards the first approach, the Commission does not consider that, at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports <sup>(1)</sup>. It therefore considers an *ex ante* incremental profitability analysis to be the most relevant approach for the assessment of arrangements concluded by airports with individual airlines.
- (61) It should be noted that, in general, the application of the MEO principle based on an average price on other similar markets may prove helpful if such a price can be reasonably identified or deduced from other market indicators. However, this method is of limited relevance for airport services, as the structure of costs and revenues tends to differ greatly from one airport to another. This is because costs and revenues depend on how developed an airport is, the number of airlines which use the airport, its capacity in terms of passenger traffic, the state of the infrastructure and related investments, the regulatory framework which can vary from one Member State to another, and any debts or obligations entered into by the airport in the past <sup>(2)</sup>.
- (62) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As can be seen in this case, commercial practices between airports and airlines are not always based exclusively on a published schedule of charges. Rather, these commercial relations vary to a great extent. They include sharing risks with regard to passenger traffic and any related commercial and financial liability, standard incentive schemes and changing the spread of risks over the term of agreements. Consequently, one transaction cannot really be compared with another based on a turnaround price or price per passenger.
- (63) In addition, benchmarking is not an appropriate method to establish market prices if the available benchmarks have not been defined with regard to market considerations or the existing prices are significantly distorted by public interventions. Such distortions appear to be present in the aviation industry, for reasons explained in points 57 to 59 of the 2014 Aviation Guidelines:

'Publicly owned airports have traditionally been considered by public authorities as infrastructures for facilitating local development and not as undertakings operating in accordance with market rules. Those airports' prices consequently tend not to be determined with regard to market considerations and in particular sound *ex ante* profitability prospects, but essentially having regard to social or regional considerations.

Even if some airports are privately owned or managed without social or regional considerations, the prices charged by those airports can be strongly influenced by the prices charged by the majority of publicly subsidised airports as the latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.

In those circumstances, the Commission has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. This situation may change or evolve in the future [...].

- (64) Moreover, as the Union courts have recalled, benchmarking by reference to the sector concerned is merely one analytical tool amongst others to determine if a beneficiary has received an economic advantage which it would not have obtained in normal market conditions <sup>(3)</sup>. As such, while the Commission may use that approach, it is not obliged to do so where, as in this case, it would be inappropriate.
- (65) Ryanair essentially argued that the MEO test can be applied based on a comparison with the commercial arrangements of other European airports. In particular, it compared charges paid by Ryanair at Bournemouth, Grenoble, Knock, Maastricht, Nîmes and Prestwick airports with the charges paid by Ryanair under the agreements at Lübeck airport. However, this comparison study did not assess whether the sample of benchmark airports fulfilled all the criteria spelled out in the 2014 Aviation Guidelines, as it only assessed traffic volumes, type of airport traffic and prosperity of the surrounding area <sup>(4)</sup>.

<sup>(1)</sup> See point 59 of the 2014 Aviation Guidelines.

<sup>(2)</sup> See recitals 88 and 89 of Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/08 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p. 24).

<sup>(3)</sup> See, as regards benchmarking by reference to profitability (as opposed to pricing) in the sector, judgment of the General Court of 3 July 2014, *Kingdom of Spain and Others v Commission*, joined cases T-319/12 and T-321/12, ECLI:EU:T:2014:604, paragraph 44.

<sup>(4)</sup> For further criteria to be assessed, see point 60 of the 2014 Aviation Guidelines.



- (66) In recital 296 of its 2012 Opening Decision, the Commission compared the charges laid down in the 2010 Side Letters with the charges at Hamburg airport, which led to doubts as to the market conformity of the charges laid down in the 2010 Side Letters. The Commission notes that traffic volume in Lübeck was much lower than in Hamburg airport. In fact, Hamburg was the airport with the most traffic in northern Germany. Hamburg was used for all segments of air transport, whereas Lübeck was specialised in low-cost carriers which required fewer check-in counters and facilities for transfer passengers, no passenger buses, less baggage-handling personnel and facilities, less cleaning personnel, and allowed for a shorter turnaround time. Consequently, Hamburg airport was not sufficiently comparable to Lübeck airport.
- (67) In the light of those considerations, the Commission takes the view that the approach generally recommended in the 2014 Aviation Guidelines for applying the MEO test to relationships between airports and airlines, namely the *ex ante* incremental profitability analysis, must be applied to this case <sup>(1)</sup>.

#### 6.2.2. Timeframe of the assessment

- (68) The Commission considers that the appropriate timeframe for assessing the profitability of arrangements between airports and airlines is typically the time horizon of the agreement itself. As airlines are able to adapt their operations in a short timeframe and as the specific contents of possible future agreements usually cannot be predicted, a private airport operator would usually not assume that the specific terms of an agreement will continue beyond its agreed duration <sup>(2)</sup>.
- (69) The 2010 Side Letters were not concluded at the same time but more than six months apart from each other, and they cover different periods of time. Furthermore, their content differs in so far as only Side Letter No 1 contains an additional marketing payment of considerable size connected to a temporary marketing event.
- (70) The Commission therefore considers that the agreements exist independently from each other and that the profitability of each side letter needs to be assessed separately, over its agreed duration <sup>(3)</sup>.
- (71) The Court of Justice declared in the *Stardust Marine* judgment that, '[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation <sup>(4)</sup>.'
- (72) For the purpose of assessing the agreements in question, both the existence and the amount of possible aid in the agreements therefore have to be assessed in the light of the situation prevailing at the time they were signed and, more specifically, in the light of the information available and developments foreseeable at the time.

#### 6.2.3. Assessment of Side Letter No 1

- (73) According to the *Charleroi* judgment <sup>(5)</sup>, when assessing the measures in question, the Commission has to take into account all the relevant features of the measures and their context. It needs to be established whether, when setting up an arrangement with an airline, the airport is capable of covering all the costs stemming from the arrangement, over the duration of the arrangement, with a reasonable profit margin on the basis of sound medium-term prospects <sup>(6)</sup>.

<sup>(1)</sup> See points 61 and 63 of the 2014 Aviation Guidelines.

<sup>(2)</sup> See for example Commission Decision (EU) 2015/1227 of 23 July 2014 on State aid SA.22614 (C 53/07) implemented by France in favour of the Chamber of Commerce and Industry of Pau-Béarn, Ryanair, Airport Marketing Services and Transavia (OJ L 201, 30.7.2015, p. 109).

<sup>(3)</sup> See also judgment of the General Court of 15 September 1998, *BP Chemicals Limited v Commission* ('BP Chemicals'), T-11/95, ECLI:EU:T:1998:199, paragraphs 170 and 171; Recitals 14 to 33 of Commission Decision of 19 December 2012 on State aid SA.35378 (2012/N) — Germany — Financing of Berlin Brandenburg Airport (OJ C 36, 8.2.2013, p. 10).

<sup>(4)</sup> Judgment of the Court of Justice of 16 May 2002, *France v Commission* ('Stardust Marine'), C-482/99, ECLI:EU:C:2002:294, paragraph 71.

<sup>(5)</sup> Judgment of the General Court of 17 December 2008, *Ryanair Ltd v Commission* ('Charleroi'), T-196/04, ECLI:EU:T:2008:585, paragraph 59.

<sup>(6)</sup> See point 63 of the 2014 Aviation Guidelines.

- (74) This is to be measured by the difference between the incremental revenues expected to be generated by the agreement and the incremental costs expected to be incurred as a result of the agreement, the resulting cash flows being discounted with an appropriate discount rate.
- (75) This approach is justified by the fact that an airport operator may have an objective interest in concluding a transaction with an airline, regardless of any comparison with the conditions offered to airlines by other airport operators, or even with the conditions offered by the same airport operator to other airlines.
- (76) The Commission also notes in this context that price differentiation is a standard business practice. Such differentiated pricing policies should, however, be commercially justified.
- (77) When assessing the incremental profitability of the agreement, it is appropriate to take only into account the incremental costs and revenues generated over the duration of the agreement, that is to say from 28 March to 30 October 2010.
- (78) In line with this approach, Oxera provided an *ex ante* calculation of the incremental profitability of the 2010 Side Letters <sup>(1)</sup>. In its calculations, Oxera takes into account all incremental traffic, and all costs and revenues relating to Ryanair's operation at Lübeck airport. As the 2000 Agreement would have ended in May 2010, the Commission finds this to be sound.
- (79) The Oxera analysis is based on the terms of the agreements between FLG and Ryanair, actual financial data of FLG, as well as *ex ante* projections from a business plan submitted by Germany, drawn up by FLG on 10 March 2010 <sup>(2)</sup>. This business plan covers the *ex ante* passenger numbers as well as the expected costs and revenues of Lübeck airport for the period 2010 to 2015. The business plan was originally prepared in December 2009 and then later revised by adjusting the traffic scenario from the original plan downwards and by adding two additional scenarios. Oxera's analysis of incremental costs and revenues is based on the data of this revised version of the business plan dated 10 March 2010, as it was drawn up closer to the date of signing the 2010 Agreements.
- (80) The plan distinguishes between three scenarios:
- Best case: the assumption is that traffic will increase significantly over the period due to the expectation that Ryanair will establish a base at the airport. Consequently, the plan assumes an increase of non-aeronautical revenues and an expansion of non-aeronautical services,
  - Middle case: it is assumed that business will continue as before, namely in line with the data available for 2010, the year of the business plan, and
  - Worst case: it is assumed that the airport will close by 2012, with passenger numbers declining during 2010 and 2011.
- (81) While in the best-case scenario, the passenger numbers increase from [...] in 2010 to [...] in 2013 and lead to a corresponding increase of revenues, the passenger numbers stagnate in the middle-case scenario at [...], in line with the expected numbers for 2010. In the worst-case scenario, the passenger numbers drop rapidly in 2011 and any airport operations cease in 2012.
- (82) For the purpose of analysing the 2010 Agreements, Oxera found it not appropriate to adopt the worst-case projections of the business plan, as this scenario assumed that the public vote of the citizens of Hansestadt Lübeck in 2010 would decide in favour of closing the airport. Considering the positive outcome of the public vote ensuring further investments for the airport on 25 April 2010 (see recital 16) only one month after concluding Side Letter No 1, the Commission finds the assumption reasonable that both parties expected the airport to continue operations <sup>(3)</sup>. To ensure that the approach is conservative, Oxera based its analysis primarily on FLG's projections for the middle-case scenario.

<sup>(1)</sup> Oxera report, Economic MEOP Assessment: Lübeck airport, 6 February 2015; Oxera report, Response to the European Commission's request, 6 October 2017.

<sup>(2)</sup> Flughafen Lübeck — Fortschreibung des Takeoff-Konzepts inkl. Business- und Investitionsplanung, 10 March 2010.

<sup>(3)</sup> See Take-Off Konzept — Flughafen Lübeck GmbH of 21 December 2009. This assumption is also in line with a letter submitted by Ryanair addressed to FLG in 2009, stating different commitments of Ryanair with regard to a future cooperation.

- (83) Table 2 shows that the revenues stemming from the Side Letter No 1 were expected to exceed the incremental costs, leading to an annual surplus of EUR [...] in the scenario calculated by Oxera <sup>(1)</sup>.

Table 2

**Incremental profitability analysis of Side Letter No 1**

Profitability analysis of Side Letter 1 to Airport Service Agreement between Lübeck and Ryanair		
	<b>Note:</b>	
	Units	
Discount rate in use	%	[...]
Growth rate	%	2,70
Contract length	years	0,6
Probability of contract renewal	%	30
AMS marketing (2 = include upper case, 1 = include base case, 0 = exclude)	n/a	0
<b>Side Letter 1</b>		
Side Letter 1 effective as of	Date	28.3.2010
Side Letter 1 effective until	Date	30.10.2010
Proportion of 2010 in which this rebate was effective	%	59,5
Proportion of 2010 when agreement was in force in which this rebate was effective	%	77,8
<b>Marketing Payments</b>		
Per Dpax marketing rebate if 17 or fewer turnarounds per week:	EUR/DPAX	[...]
Per Dpax marketing rebate if 18 or more turnarounds per week:	EUR/DPAX	[...]
Cut-off number of turnarounds per week	ATM	18,00
Marketing rebate from Side Letter 1 (EUR per DPAX)	EUR/DPAX	[...]
Ryanair turnaround annualised	ATM	1 779
Ryanair turnaround per week	ATM	34
Marketing rebate (EUR per DPAX)	EUR/DPAX	[...]
<b>Profitability</b>		<b>2010</b>
Ryanair DPAX	DPAX	[...]
Total DPAX	DPAX	[...]
Ryanair ATMs	ATM	1 058
Total ATMs	ATM	1 160

<sup>(1)</sup> According to the Oxera report of 6 February 2015, the net present value of both side letters is also positive, if the projections are based on the best case scenario of the business plan.

## Profitability analysis of Side Letter 1 to Airport Service Agreement between Lübeck and Ryanair

**Revenues**

Passenger security charge	EUR/DPAX	[...]
Ramp handling charges	EUR TA	[...]
Passenger service fee	EUR/DPAX	[...]
Airport security charge	EUR/DPAX	[...]
Aeronautical revenues	EUR '000s	[...]
Non-aeronautical revenues	EUR '000s	[...]

<b>Total Revenue</b>	EUR '000s	[...]
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**Costs**

OPEX	EUR '000s	[...]
Marketing	EUR '000s	[...]
AMS marketing	EUR '000s	[...]
Depreciation	EUR '000s	[...]

<b>Total costs</b>	EUR '000s	[...]
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Net cash flow	EUR '000s	[...]
Terminal Value	EUR '000s	[...]
<b>Total cash flows</b>	EUR '000s	[...]

Number of years when cash flow is due	years	0,6
Discount factor	n/a	[...]
<b>NPV</b>	EUR '000s	[...]
<b>NPV</b>	EUR m	[...]

Source: Oxera report, Response to the European Commission's request, 6 October 2017

- (84) As the 2010 Agreements do not stipulate a specific traffic target for Ryanair, the forecast of airport traffic stems from FLG's projections for the year 2010, as expressed in the middle-case scenario of the business plan. The proportion of Ryanair traffic at the airport is expected to remain at 91 %, which reflects the average level of the three years prior to signing Side Letter No 1. Ryanair turnarounds have been calculated, assuming 189 available seats per aircraft and a load factor of 80 %. This is in line with Ryanair's 2010 load factor, which, according to Ryanair's annual report and financial statement of 2010, was 81 to 82 % at the time. The expected incremental passenger numbers for the duration of the agreement were calculated from the envisaged number of flights and extrapolated for the duration of Side Letter No 1.
- (85) Considering that the middle-case scenario of the business plan assumes no growth in passenger numbers, but bases its projections on already existing information for the year 2010, and noticing that the projected numbers are below the actual traffic numbers of the previous year 2009, the Commission finds this approach to be sound.
- (86) Furthermore, the Commission notes that the sensitivity analysis performed by Oxera shows that even when using Ryanair's actual *ex post* passenger numbers, the resulting net present value remains positive at EUR [...].
- (87) According to Commission practice, in order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non-aeronautical revenues stemming from the airline's activities must be

taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes ('single-till approach') <sup>(1)</sup>. Therefore, incremental revenues that a private Market Economy Operator would reasonably expect from the agreement include:

- (a) aeronautical revenues from passengers and landing charges paid by Ryanair; and
  - (b) non-aeronautical revenues from, for example, car parking, franchise shops, or directly operated shops.
- (88) Oxera takes into account the aeronautical revenues per passenger from the airport charges stipulated in Side Letter No 1 in connection with the 2000 Agreement, and multiplies them with the respective passenger numbers. In line with Commission practice, security fees have been excluded from the analysis, as they were passed on by FLG to the competent public authority <sup>(2)</sup>. Oxera submitted that for Side Letter No 1, the airport could have expected aeronautical revenues of EUR [...]. The Commission finds this result to be sound.
- (89) The non-aeronautical revenues per passenger are calculated based on the middle-case scenario of FLG's business plan. In line with the projections for the year 2010, it assumes that the non-aeronautical revenues will stay at approximately [...] of the aeronautical revenues <sup>(3)</sup>. They include, for example, revenues from shops and restaurants, and revenues from parking. Oxera estimates that revenues from non-aeronautical business amount to EUR [...].
- (90) Regarding the calculation of incremental costs, according to Commission practice, all costs incurred by the airport in relation to the airline's activities at the airport have to be taken into account. Such incremental costs may encompass all categories of expenses or marketing costs, such as incremental personnel and equipment costs induced by the presence of the airline at the airport <sup>(4)</sup>.
- (91) According to Commission practice, costs which the airport would have to incur anyway, independently from the arrangement with the airline, should not be taken into account in the MEO test <sup>(5)</sup>.
- (92) In line with this approach, Oxera takes into account incremental operating and marketing costs.
- (93) The marketing costs stem from the 2000 Agreement, which are maintained in Side Letter No 1, increased by the marketing payments during the period of validity of Side Letter No 1 between 28 March and 30 October 2010:

Table 3

**Schedule of marketing payments per departing passenger in Side Letter No 1**

Marketing payments per departing passenger if:

Fewer than 18 turnarounds per week

18 or more turnarounds per week

EUR [...]

EUR [...]

- (94) As the forecast of the number of turnarounds exceeded 18 per week, the marketing payments were based on the amount of EUR [...] per departing passenger. In order to calculate total marketing payments, these marketing payments were multiplied by the respective forecasts of the number of departing Ryanair passengers. The expected incremental marketing costs for the period March to October 2010 were calculated to amount to EUR [...].

<sup>(1)</sup> See point 64 of the 2014 Aviation Guidelines.

<sup>(2)</sup> Ibid.

<sup>(3)</sup> The Commission notes that this result assumes an increase of non-aeronautical revenues per passenger from approximately [...] of aeronautical revenues, which was taken as a basis for the 2000 Agreement, to approximately [...] in 2010. The Commission finds this assumption reasonable considering the growth of business at Lübeck airport after the year 2000.

<sup>(4)</sup> See point 64 of the 2014 Aviation Guidelines.

<sup>(5)</sup> See point 64 of the 2014 Aviation Guidelines; Commission Decision (EU) 2015/1226 of 23 July 2014 on State aid SA.33963 (2012/C) (ex 2012/NN) implemented by France in favour of Angoulême Chamber of Commerce and Industry, SNC-Lavalin, Ryanair and Airport Marketing Services (OJ L 201, 30.7.2015, p. 48); Commission Decision (EU) 2015/1584 of 1 October 2014 on State aid SA.23098 (C 37/07) (ex NN 36/07) implemented by Italy in favour of Società di Gestione dell'Aeroporto di Alghero So.Ge.A.AL S.p.A. and various air carriers operating at Alghero airport (OJ L 250, 25.9.2015, p. 38); Commission Decision (EU) 2016/2069 of 1 October 2014 concerning measures SA.14093 (C 76/2002) implemented by Belgium in favour of Brussels South Charleroi Airport and Ryanair (OJ L 325, 30.11.2016, p. 63).

- (95) Incremental operating costs were estimated on the basis of a regression analysis that identified the impact of a change in total passenger numbers on the airport's operating costs. However, as in the middle-case scenario, the annual forecast of operating costs varies from year to year but the passenger forecast does not, Oxera could not perform a regression analysis based on this scenario. Instead, Oxera calculated the incremental operating costs by using the average estimates from the best and the worst-case scenarios to ensure a conservative approach. Oxera estimated incremental operating costs of EUR [...].
- (96) Considering Ryanair's share of around 90 % of traffic at Lübeck airport at the time of the agreement, the Commission finds this approach to be sound.
- (97) There are no depreciation costs (investment costs) included in the calculations of the incremental profitability of Side Letter No 1.
- (98) For its calculations, Oxera used a discount rate of 2,24 %, which corresponds to the Commission's reference rate plus 100 basis points. The Commission considers that the discount rate of 10 % is likely to be closer to the weighted average of the costs of capital of a MEO than the reference rate plus 100 basis points. However, the Commission notes that a sensitivity check performed by Oxera shows that the net present value would still be positive at EUR [...] when using a 10 % discount rate.
- (99) In addition, Oxera performed a sensitivity check taking into account different scenarios, among others:
- (a) Calculating with a discount rate of 10 % (NPV positive at EUR [...]);
  - (b) Using Ryanair's actual *ex post* passenger numbers instead of the *ex ante* passenger numbers, which were assumed in the middle-case scenario of the business plan (NPV positive at EUR [...]);
  - (c) Using the operating costs derived from FLG's actual data of the years 2000 to 2010 instead of the costs assumed in the business plan (NPV positive at EUR [...]).
- (100) For the MEO test, only *ex ante* estimations based on data that were known and expected at the time of the decision making are relevant. The assessment based on *ex post* data can, however, serve to support the validation of the assumptions made to determine the *ex ante* expected revenues and costs.
- (101) According to Oxera, in all scenarios described above, the net present value remains positive.
- (102) Furthermore, Oxera carried out a further sensitivity analysis taking into account the marketing services agreement with AMS of 29 March 2010.
- (103) The Commission notes that Side Letter No 1 and the 2010 marketing services agreement between FLG and AMS were signed on the same date and have the same contractual period. AMS is a wholly-owned subsidiary of Ryanair and its directors are senior Ryanair executives. The Commission therefore considers Ryanair and AMS to constitute a single economic entity in the sense that AMS acts in accordance with the interests of Ryanair and under its control, and the profits it generates are destined for Ryanair, in the form of dividends or an increase in the value of the company. The Commission thus considers Side Letter No 1 and the 2010 marketing services agreement to be concluded between the same parties. Moreover, the 2010 marketing services agreement states that it is rooted in Ryanair's commitment to operate routes from/to Lübeck. Consequently, the Commission considers Side Letter No 1 and the 2010 marketing services agreement to be part of the same commercial transaction. The mere fact that FLG concluded the 2010 marketing services agreement with AMS and not with Ryanair cannot prevent a marketing services agreement and an airport services agreement concluded at the same time from being considered as forming a single transaction.
- (104) The Commission therefore believes that the profitability of both agreements should be considered jointly.
- (105) Oxera's risk analysis shows that if the payment of EUR [...] agreed to by FLG under the 2010 marketing services agreement with AMS is included in the calculation, the NPV remains positive at EUR [...]. The agreement with AMS has therefore only little influence on the profitability of Side Letter No 1.
- (106) After an in-depth assessment of the Oxera reports, the Commission takes the view that the presented results are reasonable and that the methodology used is sound. This finding is supported by the fact that the reports are solely based on *ex ante* information available at the time of signing the agreement. Furthermore, the sensitivity analysis performed by Oxera validates the assumption of a positive net present value.

- (107) The Commission therefore considers that Side Letter No 1 was likely to be profitable from an *ex ante* perspective. Similarly, as marketing measures are meant to attract more passengers, the agreement can also be considered to be part of the implementation of an overall strategy to lead to profitability at least in the long term.

#### 6.2.4. Assessment of Side Letter No 2

- (108) Taking into account the explanations under Section 6.2.2, a MEO would have assessed the incremental costs and revenues for the term of application of the agreement, namely from 31 October 2010 to 1 November 2013.
- (109) The calculations performed by Oxera regarding Side Letter No 2 follow the same methodology as the calculations for Side Letter No 1.
- (110) Table 4 shows that the revenues stemming from Side Letter No 2 were expected to exceed the costs, leading to an annual surplus of EUR [...] in the scenario calculated by Oxera.

Table 4

### Incremental profitability analysis of Side Letter No 2

Profitability analysis of Side Letter 2 to Airport Service Agreement between Lübeck and Ryanair		
	Note:	
	Units	
Discount rate in use	%	[...]
Growth rate	%	2,70
Contract length	years	3,0
Probability of contract renewal		30

### Side Letter 2

Side Letter 2 effective as of		31.10.2010
Contract start year	year	2010
Contract start date adjustment	%	17,0
Side Letter 2 effective until		1.11.2013
Contract end year	year	2013
Contract end date adjustment	%	83,6
Combined start date adjustment	%	76,4
Proportion of 2010 when agreement was in force	%	22,2

### Marketing Payments

Per Dpax marketing rebate if 17 or fewer turnarounds per week:	EUR/DPAX	[...]
Per Dpax marketing rebate if 18 or more turnarounds per week:	EUR/DPAX	[...]
Cut-off number of turnarounds per week	ATM	18,00

## Profitability analysis of Side Letter 2 to Airport Service Agreement between Lübeck and Ryanair

Ryanair turnaround annualised	ATM	1 779			
Ryanair turnaround per week	ATM	34			
Marketing rebate (EUR per DPAX)	EUR/DPAX	[...]			
<b>Profitability</b>		<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
Date adjustment	%	22	100	100	100
Ryanair DPAX	DPAX	[...]	[...]	[...]	[...]
Total DPAX	DPAX	[...]	[...]	[...]	[...]
Ryanair ATMs	ATM	302	1 779	1 779	1 487
Total ATMs	ATM	331	1 951	1 951	1 630
<b>Revenues</b>					
Passenger security charge	EUR/DPAX	0	0	0	0
Ramp handling charges	EUR/TA	[...]	[...]	[...]	[...]
Passenger service fee	EUR/DPAX	[...]	[...]	[...]	[...]
Airport security charge	EUR/DPAX	0	0	0	0
Aeronautical revenues	EUR '000s	[...]	[...]	[...]	[...]
Non-aeronautical revenues	EUR '000s	[...]	[...]	[...]	[...]
<b>Total Revenue</b>	EUR '000s	[...]	[...]	[...]	[...]
<b>Costs</b>					
OPEX	EUR '000s	[...]	[...]	[...]	[...]
Marketing	EUR '000s	[...]	[...]	[...]	[...]
AMS marketing	EUR '000s	0	0	0	0
Depreciation	EUR '000s	0	[...]	[...]	[...]
<b>Total costs</b>	EUR '000s	[...]	[...]	[...]	[...]
Net cash flow	EUR '000s	[...]	[...]	[...]	[...]
Terminal Value	EUR '000s	0	0	0	0
Total cash flows	EUR '000s	[...]	[...]	[...]	[...]
Number of years when cash flow is due	years	0,2	1,2	2,2	3,0
Discount factor	n/a	[...]	[...]	[...]	[...]
<b>NPV</b>	EUR '000s	[...]			
<b>NPV</b>	EUR m	[...]			

Source: Oxera report, Response to the European Commission's request, 6 October 2017



- (111) Oxera submitted that based on the charges stipulated in the 2000 Agreement and Side Letter No 2, the airport could have expected aeronautical revenues of a total of EUR [...]. With regard to non-aeronautical revenues, Oxera again relied on the information from the middle-case scenario of FLG's business plan which predicts the revenues to remain on the 2010 level, and estimated revenues of EUR [...].
- (112) Following the same approach, Oxera estimated the total incremental operating costs to be EUR [...]. The calculation of the marketing costs was based on the terms of the original 2000 Agreement, multiplied by the respective forecasts of the number of departing Ryanair passengers.
- (113) For the reasons mentioned in recitals 82 to 96 above, the Commission finds Oxera's approach to be sound.
- (114) The Commission notes that Oxera included investment costs in the calculation of Side Letter No 2, which consist of a passenger-related proportion of the depreciation costs. The costs are estimated by means of a regression analysis of the planned investments and the expected passenger numbers according to the business plan.
- (115) The Commission notes that according to the middle-case scenario of FLG's 2010 business plan, no investments were specific to Ryanair but could potentially be exploited by other airlines. This indicates that investment costs did not have to be included in the incremental costs of Side Letter No 2. In this respect, the Commission notes that Germany emphasised that FLG continuously attempted to attract other airlines and succeeded in this attempt as Wizz Air was also operating from the airport. The Commission further notes that the 2010 Agreements did not require FLG to make investments.
- (116) In the light of those considerations, the Commission concludes that it is unreasonable to attribute investments made at Lübeck airport to Side Letter No 2. However, the Commission also notes that even if investment costs were attributed to the agreement, the expected NPV was still positive amounting to EUR [...].
- (117) Furthermore, the sensitivity analysis performed by Oxera shows a positive NPV in the following scenarios:
- (a) Calculating with a discount rate of 10 % (NPV positive at EUR [...]);
  - (b) Using Ryanair's actual *ex post* passenger numbers instead of the *ex ante* passenger numbers, which were assumed in the middle-case scenario of the business plan (NPV positive at EUR [...]);
  - (c) Using the operating costs derived from FLG's actual data of the years 2000 to 2010 <sup>(1)</sup> instead of the costs assumed in the business plan (NPV positive at EUR [...]);
- (118) In this respect, the previous statements in recitals 98 to 101 apply also to Side Letter No 2.
- (119) The Commission therefore considers that Side Letter No 2 was likely to be profitable from an *ex ante* perspective. Similarly, in view of the clearly positive contribution, the agreement can also be considered to be part of the implementation of an overall strategy to lead to profitability in the long term.

#### 6.2.5. Assessment result

- (120) Based on the information provided, the Commission considers that FLG could have expected a positive incremental return on the 2010 Agreements with Ryanair.
- (121) Furthermore, it could be reasonably expected that Side Letter No 1 would be incrementally profitable even when taking into account the marketing services agreement with AMS.
- (122) The Commission therefore considers that FLG acted as a MEO when it concluded the 2010 Agreements with Ryanair. These agreements therefore do not confer an economic advantage that Ryanair would not have obtained under normal market conditions.

<sup>(1)</sup> According to Oxera, it was unable to obtain data from FLG that covers the period after 2010.

## 7. CONCLUSION

(123) The Commission concludes that the 2010 Side Letters do not confer an economic advantage on Ryanair. Therefore, neither Side Letter No 1 nor Side Letter No 2 constitutes State aid within the meaning of Article 107(1) of the Treaty,

HAS ADOPTED THIS DECISION:

### *Article 1*

The Side Letter No 1 of 29 March 2010 concluded between Ryanair Ltd and Flughafen Lübeck GmbH does not constitute State aid within the meaning of Article 107(1) of the Treaty.

### *Article 2*

The Side Letter No 2 of 31 October 2010 concluded between Ryanair Ltd and Flughafen Lübeck GmbH does not constitute State aid within the meaning of Article 107(1) of the Treaty.

### *Article 3*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 22 February 2018.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

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