

Official Journal of the European Union

L 89



English edition

Legislation

Volume 58

1 April 2015

Contents

II Non-legislative acts

DECISIONS

- ★ **Commission Decision (EU) 2015/506 of 20 February 2014 on the measures taken by Germany with regard to Flughafen Berlin-Schönefeld GmbH and various airlines — SA.15376 (C 27/07, ex NN 29/07) (notified under document C(2014) 868) ⁽¹⁾** 1
- ★ **Commission Decision (EU) 2015/507 of 16 September 2014 on the measure SA.23129 — (12/C) (ex 12/NN) (ex CP 141/2007) implemented by Germany (notified under document C(2014) 6411) ⁽¹⁾** 37
- ★ **Commission Decision (EU) 2015/508 of 1 October 2014 on the alleged infrastructure aid implemented by Germany in favour of Propapier PM2 GmbH — State aid SA.36147 (C 30/10) (ex NN 45/10; ex CP 327/08) (notified under document C(2014) 6847) ⁽¹⁾** 72

⁽¹⁾ Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/506**of 20 February 2014****on the measures taken by Germany with regard to Flughafen Berlin-Schönefeld GmbH and various airlines — SA.15376 (C 27/07, ex NN 29/07)***(notified under document C(2014) 868)***(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) ⁽¹⁾ thereof,

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

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

Whereas:

1. PROCEDURE

- (1) Between 2003 and 2006, the Commission received complaints from various parties according to which certain airlines and the manager of Berlin Schönefeld airport ('Schönefeld') may have received unlawful State aid with respect to their operations at that airport.
- (2) In a letter dated 17 August 2006, the Commission invited the Federal Republic of Germany ('Germany') to provide information on this matter. Germany complied with this request for information by letter dated 20 December 2006.
- (3) By letter dated 10 July 2007 ('the opening decision'), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') with respect to the aforementioned measures. At the same time, the Commission issued an information injunction under Article 10(3) of Council Regulation (EC) No 659/1999 ⁽³⁾ (with respect to all documents, data and information necessary for the Commission to be able to assess whether the measures in question constituted State aid.
- (4) Germany sent its observations to the Commission on 4 October 2007 and supplemented it with further documents on 3 March 2008.

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

⁽²⁾ OJ C 257, 30.10.2007, p. 16.

⁽³⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

- (5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 30 October 2007 ⁽⁴⁾. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.
- (6) The Commission received comments from several interested parties. On 16 January 2008 and 20 February 2008, the Commission passed these comments on to Germany. By letter dated 15 May 2008, Germany sent its observations on the comments of the interested parties. The Commission then requested further information on 31 August 2009. Germany complied with this request in three stages, on 28 September 2009, 12 October 2009 and 28 October 2009. On 4 April 2011, the Commission once again asked Germany for information. In response to this request, Germany sent new observations and further documents on 19 May 2011. On 10 October 2011, the Commission forwarded further submissions received from interested parties to Germany. Germany commented on those submissions on 7 November 2011. Following a further request for information by the Commission on 17 January 2012, Germany replied on 14 February 2012.

2. GENERAL CONTEXT

- (7) After the reunification of Germany in 1990, Berlin found itself in a very specific situation with respect to air traffic, as a consequence of having been divided into an eastern part and a western part for decades. The inner-city airports of Berlin Tegel Airport ('Tegel') and Berlin Tempelhof Airport ('Tempelhof') are located in what was West Berlin. The airport of Schönefeld is located in what was East Berlin on the border between the city of Berlin and the region of Brandenburg (*Land Brandenburg*).
- (8) Tempelhof was opened in 1923 and could only be used by small aircraft owing to its short runway. This airport could not be modernised easily because it is located on a listed historical site and surrounding residential areas made any expansion impossible. Tempelhof airport ceased operating on 30 October 2008.
- (9) Tegel was opened in 1948 to allow for airlift supplies into Berlin during the Cold War blockade. From 1968, many airlines moved their operations from Tempelhof to Tegel, as the Tempelhof site was not suitable for jet aircraft. Since 1975, Tegel has become Berlin's main passenger airport. In the early 1990s, Tegel began to reach maximum capacity at peak times. The only way to avoid significant capacity constraints in the long term was an extension of the runway and the construction of a larger terminal. However, this was not possible because this airport, like Tempelhof, is an inner-city airport surrounded by residential areas and access roads. Moreover, any increase in air traffic at Tegel would translate into increased noise pollution for local residents.
- (10) Schönefeld was opened in 1946 on the orders of the Soviet military administration in Germany. It initially served as a primarily military airport which was also used by commercial airlines, such as Aeroflot and, later, the East German airline Interflug. Until the change in Germany's political situation in 1990, Schönefeld airport was extended several times. Designed as a military airport, Schönefeld was not suited to the needs of modern commercial air traffic. Moreover, after the change in the political situation, the site was no longer in good conditions. Large investments had thus to be made in the 1990s to bring the site up to West European security standards. Furthermore, Schönefeld is more remote to the city centre than Tempelhof and Tegel and for that reason, was perceived as less attractive than these two airports at least by certain categories of passengers and airlines.
- (11) The three Berlin airports were originally operated by different companies for historical reasons. With the reunification of Germany, they were pooled within a single holding company, Berlin Brandenburg Flughafen Holding GmbH ('BBF'), jointly owned by the regions (*Länder*) of Berlin and Brandenburg (37 % each) and the German Federal Government (26 %). Until 2003, this holding company had two subsidiaries: Berliner Flughafen-Gesellschaft mbH ('BFG'), which operated Tegel and Tempelhof, and Flughafen Berlin-Schönefeld GmbH ('FBS'), which operated Schönefeld. In October 2003, BBF merged with FBS. FBS thereby became the owner of BFG. As of 1 January 2012, FBS was renamed Flughafen Berlin Brandenburg GmbH ('FBB').
- (12) In the light of the generally expected increase in air traffic to and from Berlin (see Table 1 below), partly due to Berlin's recovery of its role as the capital city of Germany, it became rapidly clear in the 1990s that there was a need for a more efficient utilisation of the existing airport capacity then spread over the Berlin agglomeration as a result of the city's past political division.

⁽⁴⁾ See footnote 2.

Table 1

Traffic at Berlin airports (million passengers)

Year	Schönefeld	Tegel	Tempelhof
1991	1,1	6,7	n.a.
1992	1,4	6,6	n.a.
1993	1,6	7	1,1
1994	1,8	7,2	n.a.
1995	1,9	8,2	n.a.
1996	1,8	8,3	n.a.
1997	1,9	8,6	n.a.
1998	1,9	8,8	0,9
1999	1,9	9,5	n.a.
2000	2,1	10,3	n.a.
2001	1,9	9,9	n.a.
2002	1,6	9,1	n.a.
2003	1,7	11,1	0,5
2004	3,3	11	0,4
2005	5	11,5	0,5
2006	6	11,8	0,6
2007	6,3	13,5	0,4
2008	6,6	14,5	0,4
2009	6,8	14,2	closed
2010	7,3	15,0	closed
2011	7,1	16,9	closed
2012	7,1	18,2	closed

Source: Data from Commission Decision in State aid case NN 25/09 (ex N 167/09) — Germany — Financing of Berlin Brandenburg International Airport (OJ C 179, 1.8.2009, p. 5), updated with data extracted from FBB annual reports.

- (13) Against this backdrop, the idea of one single airport for the Berlin-Brandenburg area was discussed immediately after the reunification of Germany. Based on forecasts of passenger numbers for the Berlin airports, it was assumed that an increase in air traffic could only be handled efficiently by a single airport that would be of a suitable size and properly equipped with modern technology.
- (14) The planning for the creation of the single Berlin airport started in January 1992. In that context, on 20 June 1993 it was announced that the area south of Schönefeld, as well as two other sites (Sperenberg Airfield and Jüterborg Airfield) were identified as possible locations for the new airport infrastructures. Tegel and Tempelhof were not considered potentially suitable due to the negative impact of these inner-city airports on local residents (in particular in terms of noise) and because they could not be extended to a sufficient extent to host the new single Berlin airport in any event. Schönefeld was eventually chosen because it is relatively close to, though outside,

the city centre, and has good connections by road and train. Consequently, it was decided to expand and modernise the existing Schönefeld airport, turn it into the main Berlin airport with the name Berlin-Brandenburg Willy Brandt ('BER'), and at the same time, close down Tegel and Tempelhof airports. This decision was formalised in an agreement signed by the German Federal Government and the Berlin and Brandenburg Regions (*Länder Berlin und Brandenburg*) on 28 May 1996.

- (15) The shareholders of BBF planned to develop the BER project through a private airport owner and operator. In 1997, it was decided to launch a privatisation process whereby all shares in BBF would be sold to a private investor, and a concession over the airport would be granted to the future buyer.
- (16) However, BBF's existing shareholders could reach an agreement with none of the bidders. This resulted in the public owners declaring in 2003 that the privatisation process had failed and that the project to develop BER would proceed with public shareholders ⁽⁵⁾.

3. DESCRIPTION OF THE MEASURES UNDER ASSESSMENT AND THEIR CONTEXT

3.1. The control and profit transfer agreement

- (17) BBF and BFG signed a control and profit transfer agreement (*Beherrschungs- und Gewinnabführungsvertrag*) on 6 August 1992. This contract was originally foreseen for a duration of 5 years, with tacit renewal for a new period of two years unless a party decides to terminate it with a one-year notice. A similar agreement was signed between BBF and FBS. Under German law, a control and profit transfer agreement between a company and its subsidiary is an agreement whereby the management of the subsidiary is controlled by the parent company and the subsidiary has the obligation to transfer its profits and losses to the parent company. In practice, as a result of such an agreement, the profits and losses of the parent company and its subsidiary are counted together and taxed accordingly. As a result of the control and profit transfer agreements concluded between BBF and its subsidiaries, these various companies were considered as a single taxable entity for corporate tax purposes.
- (18) In 2003, as a result of the merger between BBF and FBS, the rights and obligations of BBF under the control and profit transfer agreement of 6 August 1992 with BFG were taken up by FBS. Moreover, the control and profit transfer agreement between BBF and FBS ceased to have any relevance upon that merger. This agreement will not be further considered in this decision.
- (19) In practice, the control and profit transfer agreement of 6 August 1992 between BBF and BFG ('the control and profit transfer agreement') led to a compensation of the losses generated by the operation of Schönefeld by the profits generated by the operation of Tegel, at least in certain years.
- (20) Schönefeld airport indeed generated operating losses, at least until 2006, as illustrated by the following table, which provides the EBITDA ⁽⁶⁾ and EBIT ⁽⁷⁾ of the airport for the period from 2003 to 2006, on the basis of the costs and revenues that are directly linked to the operation of this airport:

Table 2

EBITDA and EBIT of the Schönefeld airport from 2003 to 2006

EBITDA/EBIT (EUR million)	2003	2004	2005	2006
EBITDA	[...] ⁽¹⁾	[...]	[...]	[...]
EBIT	[...]	[...]	[...]	[...]

⁽¹⁾ Marking of business secrets in the sense of the Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions I (OJ C 297, 9.12.2003, p. 6).

Source: Annex 19 to Germany's comments of 4 October 2007 following the opening of the formal investigation procedure.

⁽⁵⁾ See Frankfurter Allgemeine Zeitung (FAZ), 23.5.2003, No 119, p. 16 (<http://www.faz.net/aktuell/wirtschaft/unternehmen/luftfahrt-privatisierung-der-berliner-flughafen-endgueltig-gescheitert-1101944.html>).

⁽⁶⁾ Earnings before interest, taxes, depreciation and amortisation.

⁽⁷⁾ Earnings before interest and taxes.

- (21) However, the bad performance of the Schönefeld airport has not called into question the viability of the group encompassing FBS, BFG and, until 2003, their holding company BBF (the FBS group). The FBS group has consistently been able to generate sufficient own financial resources or find necessary financing on the market. To the Commission's knowledge, insofar as public funding was provided to the FBS group from sources external to it, this only occurred in relation to the financing of the BER project and was authorised by the Commission ⁽⁸⁾.
- (22) This situation is due in particular to the relatively good economic performance of Tegel, which mitigated the negative impact of the operating losses generated by Schönefeld on the FBS group. Between 1990 and 2005, Tegel, unlike Schönefeld and Tempelhof, was a modern airport, hosting the main international full-service carriers serving Berlin, and was perceived as the most attractive airports of the Berlin agglomeration at least by certain categories of passengers and airlines. Moreover, there has been overall an upwards trend in the passenger air traffic in Berlin between 1990 and 2005, which benefited the FBS group as a whole.
- (23) As can be seen in Table 1, the number of passengers per year at Tegel increased steadily in the 1990s and as of 2004. At Schönefeld, the number of passengers per year grew substantially in the first half of the 1990s (from 1,1 million to 1,9 million passengers from 1991 to 1995) but stagnated in the second half and declined between 2000 and 2003 (from 2,1 million to 1,7 million passengers per year). Between 1991 and 2003, the larger part of the traffic growth in Berlin, in absolute terms, was absorbed by Tegel, and not by Schönefeld. Indeed, whereas the number of passengers per year at Schönefeld increased by 600 000 over that period, it increased by 4,4 million at Tegel. The traffic continued to steadily grow at both airports between 2003 and 2012: as indicated in Table 1, the traffic grew by 417 % at Schönefeld (from 1,7 million to 7,1 million passengers per year), while it grew by 63 % at Tegel (from 11,1 million to 18,2 million passengers per year). Contrary to the period 1991-2003, the traffic growth in absolute terms was almost equally shared between the two airports, which means that in relative terms, Schönefeld's growth was much higher than Tegel's.

3.2. The schedules of airport charges at Schönefeld

- (24) In the 1990s, the FBS group tried to encourage airlines to move from Tegel, which was operating at close to full capacity to Schönefeld, which was under-utilised ⁽⁹⁾. The objective was to address the congestion problem at Tegel while optimising the use of Schönefeld's capacity. Airlines which were already operating from Tegel and Tempelhof as well as airlines which were not yet operating from a Berlin airport were contacted for that purpose. Several carriers showed interest but eventually did not move to Schönefeld for marketing reasons, in particular due to the lack of an anchor tenant ⁽¹⁰⁾ at Schönefeld and the fact that Schönefeld's infrastructures were not as modern as at Tegel, this disadvantage not being offset by attractive airport charges or other financial incentives. Overall, the attempt to shift traffic from Tegel to Schönefeld and to attract to Schönefeld carriers that were not previously

⁽⁸⁾ This provision of public funding was approved by the Commission as compatible aid. See Commission Decisions in State aid cases NN 25/09 (ex N 167/09) and SA.35378 (12/N) (OJ C 36, 8.2.2013, p. 10) — Germany — Financing of Berlin Brandenburg International Airport.)

⁽⁹⁾ Germany provided the following indications: (i) Schönefeld's capacity amounted to 4,5 million passengers per year in 2003-2004 and reached 7 million passengers per year in 2005 (to be compared with a traffic of 1,7 million, 3,3 million and 5 million passengers respectively in 2003, 2004 and 2005); (ii) Tegel's capacity amounted to 9,5 million passengers per year in 2003-2004 and reached 11,5 million passengers in 2005 (to be compared with a traffic of 11,1 million, 11 million and 11,5 million passengers respectively in 2003, 2004 and 2005). The capacity at an airport is difficult to measure because it depends on the maximum capacity of the various elements of the infrastructures, which are not always adequately measured in terms of a maximum number of passengers, but sometimes for instance in terms of a maximum number of aircraft movements. Moreover, when the number of passengers is the relevant measure, the maximum capacity takes the form of a cap on the maximum hourly passenger throughput, rather than a maximum number of passengers per year. This is because there are often large variations in the passenger throughput between peak and non-peak hours and days and there can be seasonal variations in the throughput. Therefore, the above indications cannot fully capture the capacity utilisation of Schönefeld and Tegel. Moreover, in certain cases, an airport can operate beyond its theoretical capacity (for example by handling more passengers than the maximum hourly throughput) but this may lead to sub-optimal conditions (long waiting times, delays etc.). It is however undisputed that over the period under assessment, Tegel was operating at close to full capacity and Schönefeld was under-utilised.

⁽¹⁰⁾ An anchor tenant is a leading carrier at an airport (in terms of traffic), whose prestige and name recognition attracts other airlines to the airport, thereby further increasing traffic.

flying from Berlin largely failed at that time. This is illustrated by the fact that as already indicated, whereas traffic at Tegel increased by 4,4 million passengers between 1991 and 2003, it increased by only 600 000 passengers at Schönefeld over the same period.

- (25) This triggered strategic reflections as regards the best way to improve the economic situation of Schönefeld pending the opening of the BER airport. The temporary closure of the airport was not considered as an option. The strategic reflections touched upon the level of the airport charges and how to set them in order to attract further traffic.
- (26) In Germany, airport infrastructure services provided to airlines are priced on the basis of each airport's schedule of charges as published in the *Nachrichten für Luftfahrer*, which is the German official journal for air transportation matters. Each airport prepares its schedule of charges and must notify it to the competent civil aviation authorities of the region (*Land*).
- (27) Since 2003, there have been different schedules of charges at Schönefeld. From 1 August 2003 to 30 April 2004, there was a common schedule of charges for Tegel, Tempelhof and Schönefeld ('the 2003 Schedule'). That schedule was perceived as insufficiently attractive to incentivise airlines to open new routes or increase frequencies from and to Schönefeld.
- (28) Against this backdrop, in 2003 FBS' shareholders commissioned a consultancy ([...] - 'the consultant') to develop a strategy that could improve Schönefeld's financial situation until the opening of BER and that could be implemented quickly.
- (29) The consultant's analysis revealed that there was a potential for a significant expansion of air traffic in Berlin, for a variety of reasons. The consultant estimated that Berlin's catchment area included up to 10 million potential passengers per year. The consultant identified a series of structural factors prone to an increase in air traffic. The main core factors were the presence of the headquarters of large multi-national companies, the fact that Berlin is Germany's largest university city and a centre for 'ethnic traffic' ⁽¹¹⁾ and the fact that it was viewed in the early 2000s as a developing capital city and a tourist 'honeypot' ⁽¹²⁾. The consultant also showed that, compared with other capital city airports, Berlin still had considerable potential in 2003 for the establishment and growth of a low cost carrier ('LCC') traffic.
- (30) At that time, LCC traffic was enjoying significant growth across Europe ⁽¹³⁾ and various analyses showed that LCC traffic was generated for the most part by new passengers and therefore could come in addition to traditional traffic. The consultant forecasted that the potential for additional LCC traffic at Schönefeld amounted to a growth of between 600 000 and 900 000 additional passengers per year in the short term, namely from 2003 to 2005, and 300 000 additional passengers per year in the medium term, namely from 2005 to 2010.
- (31) Furthermore, the consultant found that implementing a strategy consisting in attracting LCCs to Schönefeld would require only limited adaptations and no large-scale investment in infrastructures or significant modifications to existing infrastructures.
- (32) The consultant therefore recommended such a strategy ('the LCC Strategy'). It suggested to implement it via a combination of volume-based discounts to airport charges and financial incentives ⁽¹⁴⁾.
- (33) FBS decided to put in place and implement the LCC strategy and adopted a new schedule of charges ('the 2004 Schedule') to that effect. The 2004 Schedule was specifically designed for Schönefeld, unlike the 2003 Schedule. This new schedule, which was adopted on 30 April 2004 and applied as of 1 May 2004, foresaw the following types of charges:

(a) take-off and landing fees, based in particular on the maximum take-off weight of the aircraft;

⁽¹¹⁾ 'Ethnic traffic' is generated by residents originating from remote foreign countries that regularly use air transport to go back to their home countries or are visited by friends or relatives travelling from these countries also by air. Berlin hosts large groups of first and second-generation immigrants.

⁽¹²⁾ Berlin was at that time the third largest tourist destination in Europe, accounting for the greatest number of guest nights in Germany, and attracted a high proportion of day-trippers.

⁽¹³⁾ Europe's LCC traffic increased considerably in the early 2000s, driven by the profitable expansion of industry leaders Ryanair and easyJet as well as a number of new entrants.

⁽¹⁴⁾ A more detailed description of the consultant's assessment can be found in section 7.2.1.

- (b) passenger fees, based on the number of departing passengers and the destination of the flight;
 - (c) aircraft parking fees based on the maximum take-off weight of the aircraft and the duration of the use of parking areas.
- (34) Various financial incentive mechanisms were embedded in this schedule:
- (a) a 'passenger volume discount' whereby part of the passenger fees were reimbursed on the basis of the number of passengers transported, as follows:

Table 3

Passenger volume discounts according to the 2004 Schedule

Number of passengers per year	Reimbursement rate (%)
More than 50 000	5
More than 100 000	10
More than 150 000	15
More than 250 000	20

- (b) a 'growth incentive', made up of a 'destination incentive' and a 'frequency incentive' which were granted respectively for the opening of new routes from Schönefeld and the creation of additional frequencies on existing routes from Schönefeld. The destination incentive amounted to 80 % of the *Landegrundtarif* (defined as the sum of the applicable take-off and landing fees and passenger fees for the relevant aircraft movements) in the first year, 60 % in the second year, 40 % in the third year and 20 % in the fourth year. The frequency incentive amounted to 60 % of the *Landegrundtarif* in the first year and 40 % in the second year. A bilateral agreement between FBS and the airline was to be entered into to set the precise conditions.
- (35) The 2004 Schedule was subsequently amended in July 2005. This amendment ruled that airlines could receive the destination incentive if they opened new routes from the Berlin airport system, that is, routes to destinations that were not previously connected by direct flights with Berlin. By contrast, the destination incentive was previously open to new routes from Schönefeld even if the same destination was served by direct flights from other Berlin airports.
- (36) On 19 January 2006 a new schedule of charges ('the 2006 Schedule') was adopted and entered into force retroactively on 1 January 2006. In comparison with the 2004 Schedule, the frequency incentive was removed. The 2006 Schedule foresaw three main different financial incentives: a 'growth funding' ⁽¹⁵⁾ that is, an incentive linked to an increase in the number of passengers or freight tonnage by flight movement, a 'destination funding' awarded for the opening of a new direct route between Berlin and another destination, and a 'passenger volume discount'.
- (37) According to the 2006 Schedule, a carrier has to choose between the destination funding and the growth funding upon the opening of a new route from Berlin. The choice had to be made before the new route was to be opened and the carrier was to be bound by this one-off decision.
- (38) The destination funding was an incentive set to amount to 80 % of the *Landegrundtarif* in the first flight season following the opening of the new route, 60 % in the second season, 40 % in the third season, 20 % in the fourth season, and 10 % in the fifth season. Besides, airlines were obliged to repay the destination funding as follows if they exited from the new route before the end of the fifth flight season: 60 % of the *Landegrundtarif* due for the first flight season, 40 % for the second season, 20 % for the third season, 10 % for the fourth season, and 0 % for the fifth season.

⁽¹⁵⁾ This 'growth funding' concept differs from the 'growth incentive' existing under the 2004 Schedule.

- (39) As regards the growth funding, a carrier could benefit from it if it achieved an increase in the number of passengers or tonnage of cargo transported per flight movement compared with the previous year. The growth funding was set to be calculated on the basis of the magnitude of the achieved growth, according to formula laid down in the schedule, and translated into discounts to airport charges which were to be degressive over time. The growth funding was limited to a maximum of five years.
- (40) The 'passenger volume discount', for its part, was only slightly modified and extended compared with the 2004 Schedule. Under the 2006 Schedule, the passenger volume discount, from then on known as 'volume funding', consisted in a reimbursement from the take-off and landing fees as well as from the passenger fees according to the number of passengers transported. The reimbursement rates were set as follows:

Table 4

Volume funding: discounts according to the 2006 Schedule

Number of passengers per year	Reimbursement rate (%)
More than 50 000	5
More than 100 000	10
More than 250 000	15
More than 500 000	20
More than 1 million	30
More than 2 million	40

3.3. Individual agreements between FBS and certain carriers*3.3.1. The establishment of easyJet as an anchor tenant at Schönefeld*

- (41) In 2003, in the context of the implementation of the LCC Strategy at Schönefeld, FBS launched negotiations with easyJet Airline Company Ltd ('easyJet'), which was looking for a location for a new base in continental Europe. In return for attractive airport charges and other financial incentives, easyJet offered to base four aircraft at Schönefeld as of its first year of operation at that airport (2004), six aircraft in the second year and an additional aircraft every year from 2006 to 2009. According to Germany, FBS saw this as an opportunity to attract a well-established LCC as an anchor tenant at Schönefeld.
- (42) On 19 December 2003, FBS and easyJet concluded an agreement ('the 2003 easyJet agreement') reflecting the above-described terms. The agreement set a specific charge system for easyJet, which deviated from the applicable schedule of charge. It only sets charges defined as an amount per departing passenger. Moreover, it establishes a discount system based on the number of additional passengers carried by easyJet over the relevant year in comparison with the previous year. This specific discount system was later transposed into the 2006 Schedule under the name 'growth funding' (see recitals 36 and 39). In addition, FBS and easyJet agreed on a destination funding in the form of a one-off premium of EUR [...] for each new daily frequency put in place by easyJet. However, payments made on the basis of this system were discontinued in 2004. In total, 19 new daily frequencies created by easyJet were supported under that system.
- (43) FBS and easyJet originally concluded their agreement for a period of 10 years and provided easyJet with the option of extending the contract for a further 10 years. However, on 11 September 2007, FBS and easyJet entered into an amending agreement ('the 2007 easyJet amending agreement') which modified the duration and other conditions of the original agreement. This amending agreement stipulated that the 2003 easyJet agreement, as modified, would expire at the opening of BER, which was then planned for 2011. With respect to airport charges, the 2007 easyJet amending agreement contained a 'dynamic reference' to the airport's general schedule of charges⁽¹⁶⁾, as a result of which the schedule of charges applicable at Schönefeld, even if modified by FBS after the conclusion of the agreement, would apply to easyJet at any point in time.

⁽¹⁶⁾ This reference relates to the level of airport charges as well as to the discount system and other financial incentive mechanisms embedded in the schedule.

- (44) easyJet's traffic at Schönefeld increased very rapidly between 2003 and 2006. easyJet was even able to increase the number of aircraft based at Schönefeld quicker than laid down in its agreement with FBS. As a result, in 2006 Schönefeld became the largest base of easyJet outside the United Kingdom.
- (45) This is illustrated by the following table, which shows the development in easyJet's traffic at Schönefeld (both in absolute terms and as a percentage of the total number of passengers at Schönefeld) between 2004 and 2010.

Table 5

Development in easyJet's traffic at Schönefeld between 2004 and 2010

	2004	2005	2006	2007	2008	2009	2010
easyJet	1 003 387	2 355 251	2 811 568	2 921 241	3 218 851	2 887 114	2 971 263
Proportion of easyJet passengers in the total volume of passengers at Schönefeld	30 %	46 %	46 %	46 %	48 %	42 %	41 %

3.3.2. The establishment of other airlines at Schönefeld

- (46) In addition to establishing easyJet as an anchor tenant, FBS took steps to attract other LCCs. FBS managed to conclude individual agreements with the following LCCs: Germanwings GmbH ('Germanwings'), Ryanair Limited ('Ryanair'), Volare Airlines S.p.A. ('Volare'), V-Bird Airlines B.V. ('V-Bird'), Norwegian Air Shuttle AS ('Norwegian Air Shuttle'), Icelandair Reykjavik Airport ('Icelandair') as well as Aer Lingus Limited ('Aer Lingus'), which for the purposes of this decision will be considered as an LCC ⁽¹⁷⁾.
- (47) In the case of both Ryanair and Germanwings, two successive agreements were concluded, one in 2003 and one in 2004.
- (48) The agreements with Ryanair, Volare and V-Bird as well as the first agreement with Germanwings were concluded before the adoption and date of application of the 2004 Schedule (cf. recital 33). These agreements described the routes that were to be operated from Schönefeld and the corresponding frequencies. They foresaw financial incentives in the form of payments, defined specifically for each carrier, which were negotiated in order to convince these carriers to launch and expand operations at Schönefeld without waiting for the adoption of a new schedule of charges with embedded financial incentives. These payments were made conditional upon the airline carrying out at least a certain percentage of the scheduled flights corresponding to the operations foreseen in the agreement ⁽¹⁸⁾. The first agreement with Ryanair foresaw a payment of EUR [...] million over one year (the duration of the agreement). The agreements with V-Bird and Volare each foresaw a payment of EUR [...] million over three years, broken down into degressive annual instalments. The first agreement with Germanwings foresaw a payment in the form of a degressive discount to the applicable airport charges over a period of three years, as well as the financing by FBS of marketing activities for an amount of EUR [...] per year.
- (49) The other agreements, which were concluded upon or after the entry into force of the 2004 Schedule were in substance based on the same principles. They also described the routes that were to be operated from Schönefeld and the corresponding frequencies and allowed the carriers concerned to benefit from various financial incentives. However, they contained a 'dynamic reference' to the airport's general schedule of charges, as a result of which the schedule of charges applicable at Schönefeld, even if modified by FBS after the conclusion of the agreement, would apply to the carrier concerned at any point in time ⁽¹⁹⁾. The agreements contained clauses whereby the granting of certain incentives foreseen in the applicable Schedule was made conditional upon the airline carrying out at least a certain percentage of the scheduled flights corresponding to the operations described in the agreement. In addition,

⁽¹⁷⁾ See the overview of these individual agreements in Table 6.

⁽¹⁸⁾ For example, the payment of the contractually agreed grant to Germanwings was made conditional upon Germanwings carrying out at least [...] % of the scheduled flights corresponding to its planned operations.

⁽¹⁹⁾ The same approach was followed in the 2007 easyJet amending agreement (see recital 43).

some of these agreements foresaw that FBS would award grants to finance part of the marketing costs of the airlines concerned. For example, the agreement with Norwegian Air Shuttle foresaw a one-off payment by FBS of EUR [...] to finance substantiated marketing costs incurred by the carrier. Aer Lingus and Icelandair, were also offered one-off grants, of EUR [...] and EUR [...] respectively, to finance part of their marketing costs.

- (50) The following table provides an overview of the time-spans of these various agreements.

Table 6

Time-spans of the agreements between FBS and various LCCs

Airline/Agreement	Date of conclusion of the agreement	Period during which the agreement was set to apply ⁽¹⁾
Ryanair (first agreement)	31 March 2003	1 May 2003-30 April 2004
Ryanair (second agreement)	28 April 2004	1 May 2003-30 April 2008
Germanwings (first agreement)	14 October 2003 ⁽²⁾	26 October 2003-31 October 2006
Germanwings (second agreement)	23 December 2004	1 May 2004-30 April 2008
Volare	22 October 2003 ⁽³⁾	26 October 2003-31 March 2007 ⁽⁴⁾
V-Bird	3 November 2003 ⁽⁵⁾	3 November 2003-3 November 2007 ⁽⁶⁾
Icelandair	6 June 2004	6 June 2004-31 March 2009
Norwegian Air Shuttle	17 May 2004	29 March 2004-31 March 2009
Aer Lingus	13 May 2004	30 March 2004-31 March 2009

⁽¹⁾ Some of these agreements started to apply retroactively as of a date earlier than the date at which they were concluded. This is the case for example for the second agreement with Germanwings, which started to apply retroactively as of the date of application of the 2004 Schedule. This is also the case for the second Ryanair agreement, which superseded the first Ryanair agreement and started to apply retroactively on 1 May 2003, which is the date of application of the first Ryanair agreement.

⁽²⁾ An agreement between FBS and Germanwings had already been signed shortly beforehand (on 29 September 2003) and was due to apply as of 26 October 2003. However, it was superseded by the agreement of 14 October 2003 before it started to apply. Therefore, the agreement of 29 September 2003 has never applied.

⁽³⁾ On 22 October 2003, FBS and Volare signed two agreements, the 'main agreement' and a 'side agreement'. For the purposes of this decision, they will be regarded as one single agreement.

⁽⁴⁾ Volare however discontinued its operations at Schönefeld in 2004.

⁽⁵⁾ On 3 November 2003, FBS and V-Bird signed two agreements, the 'main agreement' and a 'side agreement'. For the purposes of this decision, they will be regarded as one single agreement.

⁽⁶⁾ V-Bird however discontinued its operations at Schönefeld in 2004.

Source: Annexes 16 and 20 to Germany's comments of 4 October 2007 following the opening of the formal investigation procedure.

- (51) Table 7 below illustrates the development in the traffic of the airlines concerned at Schönefeld between 2003 and 2010.

Table 7

Development of passenger numbers of the LCCs covered by the investigation over the period from 2003 to 2010

Development of passenger numbers of airlines with individual agreements 2003 to 2010								
	2003	2004	2005	2006	2007	2008	2009	2010
Germanwings	71 925	341 980	826 842	1 249 903	1 393 362	1 284 424	1 255 248	1 197 054
Ryanair	190 635	239 025	227 168	358 340	444 956	756 731	1 193 959	1 386 332
Norwegian Airshuttle AS	—	35 381	59 035	102 682	169 376	191 742	204 508	221 237

Development of passenger numbers of airlines with individual agreements 2003 to 2010								
	2003	2004	2005	2006	2007	2008	2009	2010
Aer Lingus	—	31 992	96 991	119 750	133 014	142 728	133 670	123 269
Icelandair	—	7 000	12 937	15 395	20 027	21 582	9 655	8 609
Volare	19 240	138 828	—	—	—	—	—	—
V-Bird	10 978	95 925	—	—	—	—	—	—
Total share of these airlines in the passenger traffic at Schönefeld	17 %	26 %	24 %	30 %	34 %	36 %	41 %	40 %

- (52) Overall, the implementation of the LCC Strategy led to a very sharp increase in the traffic at Schönefeld. Indeed, as shown in Table 1, the number of passengers almost doubled between 2003 and 2004, going from 1,7 million to 3,3 million. It continued to rise sharply afterwards, reaching 5 million in 2005 and 6 million in 2006. Between 2003 and 2009, the number of passengers was multiplied by four.

3.4. Terminal B and the leasing of premises to easyJet at that terminal

- (53) At Schönefeld, Terminal B and Terminal A are physically linked and form together the airport's North Terminal. In terms of capacity, Terminal B is one of the smallest terminal areas at Schönefeld. The majority of passengers and airlines are handled at Terminal A, which is much larger. The only functions performed at Terminal B are passenger and luggage check-in as well as passenger security checks. The other parts of the passenger handling process (waiting for departure, preparation for boarding and boarding itself) are carried out at Terminal A. Also, all passengers and luggage arrive at Terminal A.
- (54) In anticipation of the significant additional traffic that was to be handled as a result of the 2003 easyJet agreement FBS concluded another agreement with this carrier in March 2004. Through this other agreement ('the 2004 easyJet tenancy agreement'), FBS granted the exclusive use of the check-in desks and crew rooms of Schönefeld's Terminal B to easyJet, for which the agreed rental payments were to be made separately from the airport charges. Moreover, the agreement provided easyJet with branding rights, allowing it to display its brand in certain areas of the terminal.
- (55) From 2004 to 2007, easyJet rented approximately [...] m² of office space and check-in desks, that is [...] % of the total floor area of Terminal B. Since February 2008, easyJet has moved to separate offices and now only uses [...] m² of office space at Terminal B.
- (56) The open areas of Terminal B including halls and corridors and the coffee shop located there may be used by passengers other than those travelling with easyJet since there is no physical separation between Terminal A and Terminal B.
- (57) Passenger handling at Terminal B differs from that at other terminals in respect of a technical feature of the baggage handling system's security equipment. The system used at Terminal B has an integrated X-ray machine for checking baggage. At Terminal A, the X-ray check is done by hand directly when passengers enter the check-in area. Germany considers that in terms of the technical effectiveness of the baggage handling system, the machine at Terminal B is equivalent to that of the baggage handling system at Terminal A.

3.5. Measures subject to the formal investigation procedure

- (58) The measures subject to the formal investigation procedure are the following:
- the control and profit transfer agreement ('measure 1'), whose potential beneficiary was identified in the opening decision as being FBS,
 - the fee arrangements laid down in the 2003 easyJet agreement ('measure 2'), whose potential beneficiary was identified as being easyJet,

- the conditions, including discounts to airport charges and various financial incentives, offered to various other LCCs through the agreements referred to in Table 6 above (hereafter referred to collectively as ‘measure 3’), whose potential beneficiaries were identified as being Ryanair, Volare, Germanwings, V-Bird, Norwegian Air Shuttle, Aer Lingus and Icelandair,
- the 2004 easyJet tenancy agreement (‘measure 4’) whose potential beneficiary was identified as being easyJet.

4. GROUNDS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

4.1. Measure 1: the control and profit transfer agreement

- (59) In the opening decision, the Commission noted that Schönefeld had been generating losses over a certain time and was still loss making. It also found that the offsetting of these losses by the profits generated by BFG had been instrumental in keeping FBS afloat. The Commission adopted the provisional conclusion that this cross-subsidisation, which stems from the control and profit transfer agreement, conferred an economic advantage on FBS, which that undertaking may not have obtained under normal market conditions. The Commission considered that that economic advantage was selective since it benefitted only one company, and that it was distorting competition and affecting trade between Member States.
- (60) Moreover, the Commission adopted the provisional conclusion that this economic advantage would be financed through State resources and would be imputable to the State. As regards State resources, the Commission stressed that FBS was a public undertaking whose shareholders were the German federal government and two German regions (*Länder*), and that eight out of 12 members of its Supervisory Board were representatives of German public authorities. The Commission thus took the view that FBS’s resources had to be seen as State resources. As regards the imputability of measure 1 to the State, the Commission emphasised in particular the nature of FBS’ activities, noting that airports played a fundamental role in several public policy areas, and that the public authorities were rarely absent from the decision-making process when the manager of an airport took decisions which determine the long-term development of such infrastructure.
- (61) The Commission thus found that the measure at issue might constitute State aid. It raised doubts as to the compatibility of this possible aid with the internal market, notably on the basis of the exemption provided for by Article 107(3)(c) of the TFEU. In that respect, the Commission noted that the measure at issue would be operating aid if it qualified as State aid, that it did not seem necessary and proportionate to the achievement of a public policy objective, and that it was not combined with a restructuring process. The Commission also raised doubts as to the compatibility of this measure under Article 106(2) of the TFEU, noting that the German authorities had not indicated that they had entrusted FBS with the operation of services of general economic interest. The Commission also referred to paragraphs 34 and 35 of the Community guidelines on financing of airports and start-up aid to airlines departing from regional airport⁽²⁰⁾ (‘the Aviation Guidelines’), according to which the operation of an airport may be regarded as a service of general economic interest only in exceptional circumstances.

4.2. Measure 2: the 2003 easyJet agreement

- (62) The Commission indicated in the opening decision that the airport charges paid by easyJet were substantially lower than the ones stemming from the applicable schedule of charges. The Commission further underlined that whereas the financial incentives awarded to other LCCs at Schönefeld are based on the applicable schedule of charges at each point in time, the 2003 easyJet agreement did not contain such a ‘dynamic’ reference to the schedule of charges. The Commission thus took the preliminary view that the 2003 easyJet agreement may confer a selective advantage on easyJet, which appeared to distort competition and affect trade between Member States.
- (63) The Commission also provisionally concluded that this measure was financed through State resources and was imputable to the State, including on the basis of the arguments summarised above with respect to measure 1, which also apply to measure 2. In addition to these arguments, the Commission indicated that the conclusion of agreements such as the one entered into with easyJet and other LCCs had probably required the approval of the Supervisory Board, most members of which are representatives of German public authorities. The Commission also noted that the fee discount scheme put in place by FBS had to be approved by the Brandenburg Ministry for Urban Development, Housing and Transportation. Those were seen as a further indication that measure 2 (as well as measure 3) was imputable to the State. The Commission also noted that the Minister President of the Brandenburg region (*Land Brandenburg*) is a member of the Supervisory Board of FBS while being a superior to the Ministry of Urban Development, Housing and Transportation.

⁽²⁰⁾ OJ C 312, 9.12.2005, p. 1.

- (64) Moreover, the Commission expressed doubts as to the compatibility of this measure with the internal market, should it qualify as State aid, notably in view of the rules laid down in the Aviation Guidelines.

4.3. Measure 3: agreements with various other LCCs

- (65) The Commission noted in the opening decision that only certain carriers had benefitted from the discount scheme established at Schönefeld to foster traffic growth and underlined the lack of transparency of that discount scheme. The Commission pointed out that some of the agreements under investigation were entered into at a time when the applicable schedule of charges did not provide for discounts, and that the 2004 Schedule was designed to provide a legal basis *ex post* for these arrangements. Moreover, according to the Commission, the discount scheme embedded in the 2004 Schedule could not validly enter into force since the 2004 Schedule was only approved by the competent authority subject to notification of the discount arrangements to the Commission and no such notification took place ⁽²¹⁾. In particular, in light of these elements, the Commission took the preliminary view that the agreements in question may confer a selective advantage on the airlines concerned. Moreover, the Commission considered that this economic advantage appeared to distort competition and affect trade between Member States.
- (66) The Commission brought forward the same arguments as for the 2003 easyJet agreement concerning the involvement of State resources in measure 3 and the imputability of this measure to the State.
- (67) Finally, the Commission raised doubts as to the compatibility of the agreements at issue with the internal market, should they qualify as State aid, notably in view of the rules laid down in the Aviation Guidelines.

4.4. Measure 4: the 2004 easyJet tenancy agreement

- (68) Regarding the agreement between FBS and easyJet on the use of Terminal B at Schönefeld, the Commission mentioned the judgment by the Potsdam Regional Court (*Landgericht Potsdam*) ⁽²²⁾ in the opening decision. According to this judgment, the Regional Court (*Landgericht*) had established that easyJet had been granted exclusive use of an entire terminal at Schönefeld airport (Terminal B) and that all other airlines which had previously used this terminal had had to leave. This terminal would have various features that would distinguish it from Schönefeld's other terminals. Those other terminals would not be equipped, for example, with a multi-layer luggage transportation system allowing baggage handling to be processed significantly faster than with their single-layer transportation systems.
- (69) The Commission also mentioned that the Regional Court (*Landgericht*) had established that the granting of an exclusive right to easyJet was not based on any particular reason in particular in view of the fact that other airlines also serving Schönefeld handled just as many passengers and served as many routes at Schönefeld as easyJet. Besides, the Commission took the view that the [...] EUR monthly rent charged by FBS to easyJet was likely to be below market price.
- (70) The Commission thus took the preliminary view that the 2004 easyJet tenancy agreement may confer a selective advantage on easyJet. Moreover, the Commission considered that this economic advantage appeared to distort competition and affect trade between Member States.
- (71) The Commission brought forward the same arguments as for the 2003 easyJet agreement concerning the involvement of State resources in measure 4 and the imputability of this measure to the State.
- (72) Finally, the Commission raised doubts as to the compatibility of this measure with the internal market, should it qualify as State aid, notably in view of the rules laid down in the Aviation Guidelines for start-up aid to airlines.

5. COMMENTS FROM INTERESTED PARTIES

5.1. Air France

- (73) According to Air France, the reduced fees charged by FBS at Schönefeld are not a general measure, as in this case the necessary publicity did not take place. Furthermore, the length of the 2003 easyJet agreement (20 years) would be at odds with the Commission's decision-making practice. Long-term financial support could not be objectively justified and no incentive effect could be demonstrated.

⁽²¹⁾ To support that preliminary conclusion, the Commission referred to a judgment of 20 October 2004 delivered by the Potsdam Regional Court (*Landgericht Potsdam*) (Az. 2 O 70/04, page 5).

⁽²²⁾ Judgment of 20 October 2004 delivered by the Potsdam Regional Court (*Landgericht Potsdam*) (Az. 2 O 70/04).

- (74) As regards the use of Terminal B by easyJet, Air France took the view that this was the only terminal which was reserved exclusively for use by one airline. The 2004 easyJet tenancy agreement would not have been subject to any tendering procedure. easyJet would be the only airline able to offer a convenient and reliable baggage delivery service at Schönefeld.

5.2. Lufthansa

- (75) Deutsche Lufthansa AG ('Lufthansa') pointed out in its comments that the business development of the three Berlin airports (Tegel, Schönefeld and Tempelhof) was extremely positive and the profit-sales ratio in the last three years had been around [...] %. Lufthansa took the view that Schönefeld was subsidised by the airlines operating from Tegel.

5.3. Germania

- (76) Germania Fluggesellschaft mbH ('Germania') took the view that the benefits provided at Schönefeld were financed by the passengers using Tegel as a result of the control and profit transfer agreement between FBS and BFG. According to Germania, the way in which the charges were calculated and the links between the companies operating Schönefeld and Tegel, which according to Germania amounts to collusion, results in cross-subsidisation. Germania considers that FBS did not act in relation to the offsetting of losses as a market economy operator would have done. Germania considers it unlikely that operations could cover FBS' costs at Schönefeld.
- (77) Germania stated that airlines at Schönefeld would receive operating aid, as a result of individual agreements on airport charges. Germania added that the 2004 Schedule was neither approved nor published.
- (78) Germania considered that the rent charged to easyJet for the use of Terminal B was not the normal market rate. This would amount to favourable treatment and State aid. The exclusive use of the entire terminal would allow easyJet to provide a more efficient service, whereas other airlines would not have that opportunity.

5.4. DBA

- (79) According to DBA Luftfahrtgesellschaft ('DBA'), a low cost airline which was controlled by Air Berlin until it ceased operations in 2008, price competition on the Berlin air transport market would be particularly strong. The competitive environment would have sharpened further with the implementation of the LCC Strategy at Schönefeld, particularly with the entry of Germanwings and easyJet. This would put pressure on the airlines operating out of Tegel, especially the other low-cost airlines such as Air Berlin/DBA.
- (80) DBA took the view that the rent paid by easyJet for Terminal B could not be regarded as the normal market rate. Moreover, the exclusive use of the baggage handling equipment in Terminal B would represent a favourable treatment and was relevant in terms of State aid legislation.

5.5. Association of European Airlines

- (81) The Association of European Airlines ('AEA'), which represents the interests of European network carriers, considers that cross-subsidisation between Tegel and Schönefeld, and between the AEA members operating predominantly out of Tegel and the subsidised airlines competing against them and based at Schönefeld, constituted discrimination. According to the AEA, without this anti-competitive cross-subsidisation, the airlines operating from Schönefeld would not be economically viable and the charges at Tegel could be significantly lower. As Tegel was close to Schönefeld there would be no public need for the subsidies.
- (82) The AEA argued in addition that the measures referred to in the opening decision were not objectively justifiable and the reductions and incentives were arbitrary and discriminatory and therefore incompatible with the Aviation Guidelines.

5.6. Germanwings

- (83) Germanwings argued that FBS had behaved vis-à-vis it at all times like a private investor would have done. Germanwings pointed out that in spite of the phasing out of its discounts over time, it had extended its route network from Schönefeld. Germanwings stated that it had been confident that the financial arrangements with FBS would comply with the law, especially as the three Berlin airports would form a unified airport system.

- (84) Germanwings indicated that that it did not regard the airports of Hamburg, Dresden, Leipzig or Lübeck ⁽²³⁾ as suitable competitive alternatives to Schönefeld because it mainly operates on German domestic routes. In view of the short flight times on domestic routes, the above-mentioned airports would be too far away from Berlin to be valid substitutes for Schönefeld.
- (85) Germanwings further stated that the letting of Terminal B to easyJet was contrary to antitrust and State aid law because easyJet was not in any way involved in the financing of Terminal B and the letting took place without a corresponding tendering procedure. Moreover, the rent would be too low given that Terminal B, unlike Terminals A and C, had a modern baggage-handling facility.

5.7. Lübeck Airport

- (86) Lübeck Airport indicated that it had not observed any negative impact of FBS's commercial strategy on the market.

5.8. Ryanair

- (87) Ryanair took the view that with regard to short and medium-haul flights, there was no competition between the airports of Dresden, Hamburg and Lübeck on the one hand and Schönefeld on the other hand. The distance between Schönefeld and, respectively, Dresden, Hamburg and Lübeck would be too great for such competition to take place. An agreement regarding Schönefeld would thus have no effect on the other airports mentioned.
- (88) Ryanair claims that the charges it pays at Schönefeld would be identical to those in the schedule of charges, which were in line with standard practice in the sector. The agreement with FBS would be similar to those with a number of private airports and would have been concluded in the same way by a market economy investor. Ryanair provided a study by a consultancy firm ([...]), which examined the contractual arrangements between Ryanair and FBS. Based on a comparative analysis of Schönefeld with Liverpool and Luton airports, the consultancy firm came to the conclusion that FBS acted vis-à-vis Ryanair in line with what would be expected from a private market economy operator.
- (89) Ryanair also argued that Berlin, like London and Milan, was a major European economic and administrative centre and therefore an important European destination. Airlines operating in Berlin could therefore rely on a sufficient number of passengers willing to travel there.

5.9. easyJet

- (90) With respect to the 2003 easyJet agreement, easyJet argued that a market economy operator acting in lieu of FBS would also have adopted this type of strategy. Indeed, the measure had brought FBS a substantial increase in passenger numbers and improved annual results.
- (91) easyJet further stated that the existence of an individual fee arrangement between FBS and easyJet did not necessarily mean that discriminatory rebates had been granted. easyJet took the view that other airlines operating with the same growth targets would have been granted exactly the same treatment as easyJet. In any event, the rebates would be justified in light of the economies of scale provided by easyJet. easyJet accounted for a large proportion of all passengers at Schönefeld and would have made a disproportionate contribution to the improvement of FBS's results.
- (92) Regarding its use of Terminal B, easyJet remarked that this was not a closed-off airport terminal. In fact the area rented by easyJet was a separate check-in area and associated office space at Schönefeld's North Terminal. Most of the area was publicly accessible and was also used by other carriers' passengers. At the time when the agreement with easyJet was signed there would have been sufficient spare capacity at Terminal B. Other airlines would therefore not have suffered from any disadvantage. easyJet stressed that since it began its operations at Schönefeld in 2004, it was the airline with by far the largest passenger throughput. Its exclusive use of certain parts of Terminal B would therefore be objectively justified.
- (93) In addition, easyJet stated that the baggage handling system at Terminal B merely reflected usual technical standards and did not provide it with any advantage over other airlines.
- (94) As regards the market value of Terminal B, easyJet stated that the rent it paid was higher than what would reflect the market value of Terminal B, given that it was insufficient to meet easyJet's capacity requirements. A rent comparison could only be made with similar areas at Schönefeld airport or, in relation to the offices, with office space in the immediate vicinity of the airport.

⁽²³⁾ Those airports were mentioned in the opening decision as examples of airports potentially harmed by some of the measures under investigation (see for instance paragraph 151 of the opening decision).

5.10. FBS

- (95) FBS referred to Berlin's particular situation, namely the airport system (originally made up of three airports) and the plans for the construction of the central Berlin Brandenburg airport (BER). In 2003, Schönefeld was operating at about half its traffic-handling capacity only and the airport was failing to cover its costs. According to FBS, the closure of Schönefeld would have led, *inter alia*, to the loss of Schönefeld's operating licence, which was essential for the running of BER.
- (96) FBS pointed out that the allegedly competing airports mentioned by the Commission in the opening decision were not actually competing against the Berlin airports because they were too remote from it.
- (97) With regard to the control and profit transfer agreement, FBS argued that in the business world, such agreements between companies within a group were commonplace. FBS took the view that a transfer of profits between the three Berlin airports was a purely internal matter for the undertaking. According to FBS, the airport system formed a single undertaking, pursuing common interests, and mutually bound by company law. The airport system would constitute a single geographic and product market. It would be normal market practice, and in the present case it would also make commercial sense.
- (98) FBS disputed some of the provisional findings arrived at in the opening decision as regards the involvement of State resources. According to FBS, the fact that the schedule of charges had to be approved by public authorities was not sufficient to conclude that FBS's resources were under State control. According to FBS, the system of charge schedules applied equally to public and private shareholders at airports and took account of the public interest in the operation of air transport, in line with legal standards. Besides, according to FBS, the Minister President of Brandenburg (*Ministerpräsident des Landes Brandenburg*), who sat in FBS' supervisory board, could not issue instructions to the ministry responsible for approving schedules of charges. Furthermore, when it comes to the determination of charges, the legal relationship between the airport and airlines was governed purely by private law and was binding under civil law, regardless of the approval by the relevant authority.
- (99) FBS also stated that the schedule of charges would have the effect of general terms and conditions and would form an integral part of the contract between an airport and an airline, independently of any official approval. The schedule of charges, including the discount schemes, would have been offered to all airlines without distinction since 1 May 2004. Individual contractual arrangements would have only been meant to establish bilateral settlement terms and to set forth the objectives in detail. No special advantages would have been granted through those agreements.
- (100) FBS argues that owing to the differing capacity utilisation patterns at Berlin's two main airports, with Tegel operating at close to full capacity without any significant expansion possibilities, as opposed to Schönefeld which had substantial free capacities and was in addition the future location of BER, FBS had to take measures in 2003 after the failed attempt to privatise the company, with a view to managing air transport in the Berlin conurbation on a sustainable, economically efficient basis.
- (101) FBS claims in addition that it was necessary to maintain Schönefeld in operation for the future operation of BER in the interest of the FBS group. According to FBS, even a temporary closure of Schönefeld would have made it *de facto* impossible to achieve the long-term strategic goal of operating a centralised Berlin airport on the Schönefeld site.
- (102) According to FBS, it was therefore necessary to bridge, in as economically efficient a manner as possible, Schönefeld's operation from 2003 until such time as BER would open. FBS added that in order to better harness Schönefeld's available capacities, it had launched the implementation of the LCC strategy proposed by a renowned consultancy firm. That LCC strategy would have been viewed as the economically most favourable option for FBS, since its proposed schedule of charges with embedded incentive schemes appeared likely to increase traffic at Schönefeld in the short term through targeted, degressive financial incentives.
- (103) According to FBS, the LCC strategy had been highly successful. The number of passengers at Schönefeld soared, with no decrease in passenger volumes at the other Berlin airports. FBS emphasised that the increased traffic led to increased revenues and the economic difficulties were quickly overcome. Already in 2006 the operating results (EBIT) of FBS were positive for the first time. According to FBS this positive trend was set to continue, and this was particularly significant for the financing capability of the new airport.

- (104) FBS argues that the strategic change initiated in 2003 had been essential for economic reasons and that FBS had behaved like a prudent market economy operator in taking that step. On the basis of the business plan underpinning the LCC Strategy, FBS would have been in a position to assume that the airport's operations would not continue to be unprofitable. FBS referred to the study that it commissioned to auditing firm [...] ('the first expert study'), which was finalised in 2007 and which would have confirmed that from the perspective of a market economy operator, it was rational to implement the LCC Strategy and put in place a corresponding schedule of charges.
- (105) FBS claims that the individual agreements concluded with certain LCCs before the date of application of the 2004 schedule of charges had been necessary for the implementation of the LCC strategy in order to offer airlines an incentive to base themselves at Schönefeld. FBS referred to a second study, commissioned to auditing firm [...], which was also finalised in 2007. In the framework of that study, the consultancy analysed the profitability of the various agreements forming measure 3 and found that FBS behaved like a rational market economy operator when it concluded each of them. All these individual agreements with the different airlines would have been concluded on the basis of purely economic considerations with a view to improving FBS's economic situation in the short term.
- (106) With regard to the 2003 easyJet agreement, FBS maintained that it had been an essential component of the implementation of the LCC strategy and that it did not involve State aid. The LCC strategy would have created an incentive for easyJet — one of the leading LCCs in Europe — to establish a base at Schönefeld.
- (107) On the basis of the successful conclusion of the 2003 easyJet agreement easyJet (viewed as an 'anchor tenant'), FBS would have been able to attract other airlines to Schönefeld. The contractual relationship with easyJet (including the latter's obligation to base a minimum number of aircraft at Schönefeld) would have ensured a high level of planning certainty on both sides and would have significantly contributed to increasing Schönefeld's profitability.
- (108) FBS argues that the 2003 easyJet agreement did not fundamentally deviate from the 2004 Schedule and entailed no undue granting of advantages. FBS also pointed out that the 2007 easyJet amending agreement explicitly referred to the 2006 Schedule, which was applicable at the time.
- (109) FBS further stressed that the individual contracts with LCCs had been signed before the 2005 Aviation Guidelines were adopted and, at least for some agreements, even before the adoption of the *Charleroi* decision of the Commission ⁽²⁴⁾.
- (110) Besides, according to FBS, renting facilities at Terminal B to easyJet conferred no specific advantage on it. The allocation of a separate terminal to easyJet would have been done on economic and practical grounds because of that airline's high passenger throughput at Schönefeld. easyJet would have paid a normal market price, which would have been agreed on the basis of existing rents at Schönefeld. The allocation of terminal areas was common practice at German and international airports. Furthermore, there would be no advertising rights giving easyJet an advantage over other airlines, since easyJet would have been given branding rights in its check-in area only, in the same way as any other airline.

6. COMMENTS FROM GERMANY

6.1. State influence

- (111) Germany argued that FBS's resources are not under State control, and that their use could not be attributed to the State. According to Germany, the incentives and rebates in question were not financed through public resources, but were the result of the business activities of an undertaking operating under private law.
- (112) Germany argued in this context that FBS and its subsidiaries, though partially state-owned, were not integrated into the public administration, but had been explicitly made subject to the principles of competition and free market. Germany added that the public shareholders expected FBS to yield profits.

⁽²⁴⁾ Commission 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 L 137, 30.4.2004, p. 1).

6.2. The control and profit transfer agreement (measure 1)

- (113) Germany took the view that the control and profit transfer agreement did not involve any cross-subsidisation giving rise to State aid.
- (114) Germany pointed out that in public law terms, as well as under EU legislation ⁽²⁵⁾, Berlin's airports were interlinked in such a way as to form a single 'airport system'. The purpose of such an airport system would be to treat different airports as a single airport with multiple runways. FBS and BFG would thus have to be viewed as a single undertaking. Germany stressed that the Commission itself had referred to a control and profit transfer agreement, a joint IT structure, centralised key functions and unified company plans as criteria for considering individual companies within a group as non-autonomous ⁽²⁶⁾.
- (115) According to Germany, the transfer of profits would not involve transferring the costs of Schönefeld to Tegel and Tempelhof. It would have no impact on airport charges at Tegel. The charges levied at all three airports would be based on the underlying costs at each site.
- (116) Moreover, Germany pointed out that FBS, like any other private undertaking, was following a strategic plan with a view to making long-term profits. The main feature of this plan would be the creation of a single airport for Berlin on the Schönefeld site.

6.3. Legal validity of the 2004 Schedule

- (117) According to Germany, the provisional conclusion reached by the Commission in the opening decision, according to which schedules of charges that have not been unconditionally approved by the competent regional authority are not valid ⁽²⁷⁾, would not correctly reflect the legal situation prevailing in Germany. Approval by the competent authority of the region (*Land*) in accordance with Section 43a of the Air Traffic Licensing Order ⁽²⁸⁾ would not be a pre-requisite for the legal validity of the schedule of charges. According to the established case-law of the Federal Court of Justice (*Bundesgerichtshof*) and the lower German courts, the airports' published schedules of charges would constitute 'standard terms of business' (*Allgemeine Geschäftsbedingungen*) as defined under German civil law ⁽²⁹⁾. This means that the schedules of charges would play the role of contractual conditions offered by default to those airlines using the airport, whether or not the competent authority has approved the relevant schedule of charges ⁽³⁰⁾.
- (118) According to Germany, in the judgment of 20 October 2004, referred to by the Commission at paragraph 22 of the opening decision ⁽³¹⁾, the Potsdam Regional Court (*Landgericht Potsdam*), misconstrued the circumstances. Moreover, Germany indicated that this judgment had been appealed. In that context, the Brandenburg Higher Regional Court (*Brandenburgisches Oberlandesgericht*) had issued judicial guidance (*richterlicher Hinweis*) according to which the judgment of the Potsdam Regional Court (*Landgericht Potsdam*) ought not to be upheld. Germany pointed out that subsequently, the complaint at the root of the proceedings had been withdrawn as part of a settlement between the parties to the dispute. The ruling by the Potsdam Regional Court (*Landgericht Potsdam*) would thus have never taken effect and would have been rendered inoperative by the withdrawal of the complaint, even though it was not explicitly annulled. Germany indicated that the Potsdam Regional Court (*Landgericht Potsdam*) would have subsequently revised its interpretation of the law and in a very similar subsequent case, dismissed a complaint about Schönefeld's schedule of charges.

6.4. Individual agreements between FBS and certain airlines (measures 2 and 3)

- (119) Germany stated that the system of charges and individual contractual arrangements with various airlines at Schönefeld should be viewed in the context of the implementation of the LCC strategy.

⁽²⁵⁾ See Article 2(h) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1).

⁽²⁶⁾ Commission Decision of 2002/346/EC of 17 October 2001 on the State aid granted by Germany to Deckel Maho Seebach GmbH, recital 16 (C 27/2000) (OJ L 126, 13.5.2002, p. 14); Commission Decision 202/468/EC of 15 January 2002 on the State aid implemented by Germany for Klausner Nordic Timber GmbH & Co. KG, Wismar, Mecklenburg-Western Pomerania, recital 67 (C 41/2001) (OJ L 165, 24.6.2002, p. 15).

⁽²⁷⁾ See recital 65.

⁽²⁸⁾ Section 43 in the old version of that order.

⁽²⁹⁾ See Federal Court of Justice (*Bundesgerichtshof*), judgment of 24 November 1977, file number: III ZR 27/76, *Zeitschrift für Luft- und Weltraumrecht* (Journal for Aviation and Space Law, ZLW) 1979, 140 (143); Berlin Regional Court (*Landgericht Berlin*), judgment of 25 August 2000, file number: 96 O 197/99, *Journal for Aviation and Space Law* 2001, 475 (479); Federal Court of Justice (*Bundesgerichtshof*) judgment of 23 January 1997, file number: III ZR 27/96, *Journal for Aviation and Space Law* 1997, 510.

⁽³⁰⁾ See Federal Court of Justice (*Bundesgerichtshof*), judgment of 24 November 1977, file number: ZR III 27/76, *Journal for Aviation and Space Law* 1979, 140 (148); Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of 8 July 1977, file number: VII C 72/74, *Journal for Aviation and Space Law* 1977, (49); Giemulla, in: Giemulla/Schmid (Publisher), *Frankfurt Comments on air traffic law*, Cologne 2007, Section 43 of the Air Traffic Licensing Regulations, paragraph 16.

⁽³¹⁾ See footnote 20 above.

- (120) Germany argued that in that context, as Berlin's airports form a single 'airport system', they are not in competition against one another. Schönefeld would have played a complementary role, taking the pressure off Tegel so as to compensate for the latter's lack of capacity. The LCC strategy would have been a legitimate way of indirectly controlling traffic. It would not have brought about any reduction in passenger numbers at Tegel. Rather, passenger numbers at both airports would have risen considerably in the years preceding the opening of the formal investigation procedure. Besides, given the geographical distance involved, Berlin's airports would not be competing against Leipzig, Dresden, Hamburg or Lübeck, particularly with respect to cost sensitive LCC passengers.
- (121) According to Germany, it would have been essential for the implementation of the LCC Strategy to get an airline as an anchor tenant to use Schönefeld as a hub. This would have been the first step towards establishing a large volume of traffic at that airport and would have made the latter more attractive to other airlines. It would have been impossible to attract such an anchor tenant if the same conditions had applied at Schönefeld as at Tegel, as shown by experiences with failed attempts to persuade airlines to move from Tegel to Schönefeld in the 1990s. To divert traffic and use Schönefeld's capacity efficiently, it was necessary to attract air traffic to that airport. Airlines were given an appropriate incentive through the implementation of the LCC strategy, which involved a schedule of charges with embedded volume discounts and other financial incentives.
- (122) It would have been necessary to implement the LCC strategy through individual agreements with several airlines prior to the entry into force of the 2004 Schedule, so as to limit the losses incurred by Schönefeld as quickly as possible and to obtain a favourable position on the then fast-growing LCC market. In that respect, Germany pointed out that a formal amendment to an airport's schedule of charges entailed extensive administrative work and that it could therefore not have been completed quickly enough to start implementing the LCC Strategy as soon as possible, namely by the end of 2003.
- (123) Germany argued that FBS had acted like a market economy operator in adopting the measures under assessment, since its business decisions were based on the LCC Strategy and the individual agreements had been concluded on the basis of a solid business plan developed by the consultant. Germany also referred to the assessments carried out by two auditing firms, [...] and [...] which were commissioned by FBS to assess whether the market economy operator principle had been complied with by the LCC Strategy and the individual agreements, and found that this was the case.
- (124) According to Germany, the auditors concluded that, as regards both the management decision on a strategic reorientation and the introduction of a financial incentive scheme, it could be shown that a market economy operator in a comparable situation would have taken the same decisions. As regards the 2003 easyJet agreement and the individual agreements mentioned in Table 6 (except the one with V-Bird), [...] calculated their net present values ('NPV'), which all turned out to be positive, and thus found that a market economy investor would have acted in exactly the same way as FBS. [...] had nevertheless raised a doubt specifically concerning the duration of the 2003 easyJet agreement, as originally agreed by the parties. [...] considered that given this duration (10 years with an option to extend it by a further 10 years), a rational market economy operator, when concluding this agreement, would have probably taken into account the impact of the contemplated agreement on the future operations of the BER airport, which was due to open before the expiry of the 2003 easyJet agreement⁽³²⁾. According to [...], the existence of the 2003 easyJet agreement may have put pressure on the charges that FBS would have been able to negotiate with other carriers for their operations at BER, affecting the profitability of the future airport. However, Germany pointed out that this comment on the originally foreseen duration of the 2003 easyJet agreement was no longer relevant since the agreement in question had been modified by the 2007 easyJet amending agreement, which introduced a provision whereby the agreement would expire upon the opening of BER, then scheduled for 2011.
- (125) Furthermore, in its observations on third parties' comments, Germany took the view that the statements by certain third parties on the 2004 schedule of charges and the individual agreements with LCCs were partially incorrect and taken out of context. Germany underlined that the schedule of charges at Schönefeld would have encouraged the

⁽³²⁾ This impact had not been taken into account in the calculation that led to a positive NPV for the 2003 easyJet agreement over periods during which it was originally set to apply (10 years or 20 years, depending on whether easyJet would opt for a 10-year extension after the first 10 years).

uptake of new destinations and would be non-discriminatory since any airline which managed to attract a sufficient number of passengers to Schönefeld or which opened new routes or new frequencies from Schönefeld would benefit from the discounts.

6.5. The 2004 easyJet tenancy agreement (measure 4)

- (126) Regarding the use of Terminal B by easyJet, Germany stressed that easyJet rents only part (24 %) of the total usable area of Terminal B. According to Germany, allocating the use of office space and check-in desks in a particular area of a terminal to a particular airline was common practice at international airports and did not constitute preferential treatment.
- (127) As regards the exclusivity granted to easyJet, Germany stressed that in view of the large number of passengers to be carried by easyJet, it would not be possible on purely practical grounds for other airlines to use Terminal B, as the terminal's capacity would already have been exceeded by easyJet.
- (128) Germany pointed out that other airlines were also granted exclusive use of specific areas of terminals at Schönefeld. In particular, the Lufthansa group (Condor, Sun-Express and Germanwings) had initially enjoyed sole use of Terminal D when it was built in 2004-2005.
- (129) Germany also disputed the comments made by some third parties in relation to measure 4 and claimed that the rent data mentioned by some of these third parties was false and unsubstantiated. The rents paid by easyJet would be set by reference to the general standard rents for Schönefeld. Germany took the view that contrary to the claims of some interested parties, rents at Schönefeld could not be compared with those at Tegel.
- (130) With regard to possible advantages for easyJet arising from the particular baggage handling equipment at Terminal B, Germany stated that this equipment was manufactured by the same company as that at Terminal A and was designed to comply with the same technical standards. However, as a result of the incorporation of X-ray technology, the equipment at Terminal B would be more complex and consequently would have a lower technical capacity, longer baggage delivery times and a greater tendency to break down. To that extent, the baggage handling facilities at Terminal B would actually place easyJet at a disadvantage compared with the airlines operating from Terminal A. Besides, because of the layout of the buildings, it would be possible to carry luggage to the waiting aircraft from Terminal A in considerably less time than from Terminal B. This would place easyJet at a further disadvantage compared to the airlines located at Terminal A.
- (131) Germany claimed that contrary to the comments of some interested parties, the baggage handling facilities had not been refurbished for easyJet. The X-ray equipment would have been merely incorporated in the existing baggage handling system in 2003 for security reasons.
- (132) Finally, Germany argued that the allocation of easyJet's passenger traffic to Terminal B had been based on non-discriminatory and appropriate criteria, though without a public procurement procedure, which for such cases is foreseen neither by German law nor by Union law. According to Germany, when easyJet decided to launch operations at Schönefeld in 2004, it was clear that this carrier would account for a very significant proportion of the airport's traffic from the outset. Indeed, already in 2004, easyJet generated 30 % of the airport's traffic. It was appropriate and rational to concentrate easyJet's operations at one single terminal, and Terminal B was found to be the most suitable location in view of its free capacity. According to Germany, access to Schönefeld was neither restricted nor prevented for other carriers, since the airport had sufficient capacity to host all potentially interested carriers.

7. ASSESSMENT OF THE MEASURES

- (133) In accordance with Article 107(1) of the TFEU, 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 is, insofar as it affects trade between Member States, incompatible with the internal market.
- (134) The criteria laid down in Article 107(1) of the TFEU are cumulative. Therefore, for a measure to constitute State aid within the meaning of Article 107(1) of the TFEU, each of the four following conditions need to be fulfilled. The financial support must:

— be granted by the State or through state resources,

- favour certain undertakings or the production of certain goods,
- distort or threaten to distort competition, and
- affect trade between Member States.

(135) In the present case, Germany has argued that FBS consistently acted as a prudent market economy operator guided by profitability goals would have done in a similar situation, such that the measures under assessment do not confer any economic advantage that the company would not have obtained under normal market conditions. If this is indeed the case, the measures implemented by FBS do not constitute State aid.

7.1. Market economy operator principle – General considerations

- (136) In judging whether a particular agreement entered into by a public company with a third party with respect to the provision of a good or service confers an economic advantage to the third party in question, the Commission examines whether a prudent market economy operator, guided by profitability prospects, would have adopted similar measures in similar circumstances. The comparison between the conduct of a public company such as FBS and a hypothetical prudent market economy operator must be made by reference to the attitude which the market economy operator in question would have had at the time of the conclusion of the transaction in question, having regard to the available information and foreseeable developments at that time, and regardless of subsequent events.
- (137) Thus the concept of foreseeable profitability for the public company concerned is of central importance. This does not necessarily mean that for a transaction to be free of State aid, the operator must enter into it only for the purposes of short-term profitability. However, the Court has also ruled that the conduct of a public investor may be compared with that of a private investor guided by prospects of profitability in the longer term ⁽³³⁾.
- (138) In the present case, the Commission has first of all assessed whether in the medium to long-term the LCC Strategy adopted as of 2003 by FBS appeared potentially capable of generating positive results, as well as whether it would have been rational, from a profitability perspective, to close down Schönefeld. The Commission has then analysed each measure covered by the formal investigation procedure in the light of the market economy operator principle, and has concluded that those measures did not constitute State aid.

7.2. Preliminary analysis: assessment of FBS's strategic options from a market economy operator perspective

- (139) The economic context in which FBS was running Schönefeld between the early 1990s and 2003 has been described in sections 2, 3.1 and 3.2 above.
- (140) As explained in those sections, FBS was also running the other Berlin airports, notably Tempelhof and Tegel. From the outset, Tempelhof was not considered as a suitable infrastructure for possible expansion, given its peculiarities and its inner-city location. Tegel was a modern airport which was overall more attractive to airlines and passengers than Schönefeld because it had more modern infrastructures and was closer to the city centre. In the 1990s, Tegel was already operating at close to full capacity and could not be significantly extended to avoid long-term capacity constraints. By contrast, Schönefeld was largely under-utilised and could be extended if necessary.
- (141) A second important element of the context was the prospect of a single Berlin airport substituting for all existing Berlin airports and located at Schönefeld. As indicated in recital 14, the decision to carry out such a project was formalised in an agreement concluded by the German federal government and the Berlin and Brandenburg regions (*Länder Berlin und Brandenburg*) in May 1996.
- (142) A third important element was the failed attempt to shift traffic from Tegel to Schönefeld in the 1990s, and the fact that after a period of stagnation in the second half of the 1990s, Schönefeld's traffic decreased steadily between 2000 and 2003, the year in which the public authorities acknowledge that they had failed to privatise the Berlin airports.

⁽³³⁾ Case C-305/89 *Italy v Commission* (ALFA Romeo) [1991] ECR I-1603, paragraph 20. Case T-228/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435, paragraphs 250-270.

- (143) In 2003, this led the public authorities and FBS to examine the different strategic options available to FBS. At that time, as indicated above, the objective of having a new and single airport in Berlin located at Schönefeld and incorporating part of Schönefeld's existing infrastructures was not questioned⁽³⁴⁾. The objective of FBS and the public authorities was thus to find an optimal strategy for Schönefeld for the period from 2003 up to the opening of BER, scheduled for 2011. In that context, as already indicated in recital 28, they commissioned a study from Roland Berger ('the consultant's study'), which recommended a strategy consisting in attracting LCCs to Schönefeld (LCC Strategy).
- (144) In addition to the LCC Strategy (option 1), FBS still had the options of retaining the strategy implemented up to that time at Schönefeld (option 2), or temporarily closing Schönefeld until the new airport BER would open (option 3).

7.2.1. Option 1 versus option 2

- (145) As will be shown below, it would have been rational, for a prudent market economy operator guided by medium to long-term profitability prospects and acting in lieu of FBS, to choose option 1 rather than option 2.

The consultant's study

- (146) As explained at recitals 29 and 30, the consultant found that there was a potential for a significant expansion of air traffic in Berlin, for a variety of structural reasons and that compared with other capital city airports, Berlin still had considerable potential in 2003 for the establishment and growth of an LCC traffic.
- (147) The consultant compared Berlin with other large cities from the viewpoint of LCC traffic. It found in particular that the number of frequencies per inhabitant in the metropolitan area was much lower in Berlin (0,011) than in other large European cities such as London (0,029), Brussels (0,040), Cologne (0,030) and Dublin (0,051). Also, the consultant found that the percentage of LCC frequencies out of all frequencies was much smaller in Berlin than in other major European cities and estimated on that basis that this percentage could be increased from [...] % to at least [...] % and possibly [...] %.
- (148) Further, on the basis of the experience of other major cities, the consultant estimated that if measures were taken to develop LCC traffic, two thirds of the additional LCC traffic would be made up of 'new passengers', namely passengers that would not travel by air from Berlin absent the additional LCC offer brought about by the measures in question⁽³⁵⁾. The consultant considered that part of the 'new passengers' would be 'diverted' from other modes of transport such as train or coach.
- (149) On the basis of these analyses, the consultant forecasted that the potential for additional LCC traffic at Schönefeld amounted to a growth of between 600 000 and 900 000 additional passengers per year in the short term, namely from 2003 to 2005, and 300 000 additional passengers per year in the medium term, namely between 2005 and 2010. As a result of such steep growth, Schönefeld could be expected to handle between 3 million and 4,2 million passengers more than in 2003. This meant that FBS could hope to reach a level of traffic between 4,7 million and 5,9 million passengers in total in 2010 at Schönefeld⁽³⁶⁾.
- (150) The consultant then assessed in detail the feasibility of a strategy focusing on LCC at Schönefeld, identifying the possible obstacles and factors able to mitigate the success of such a strategy.
- (151) The consultant first analysed in detail the operational requirements of LCC, which differ from those of traditional carriers in several respects. Basing its analysis on the situation of a series of European airports hosting LCCs, it found that the main requirements to be expected from LCCs were:

— a short turnaround (25-30 minutes⁽³⁷⁾) – the most important requirement,

⁽³⁴⁾ See footnote 8

⁽³⁵⁾ The consultant pointed out that existing analyses relating to European and American markets showed that between 50 % and 80 % of the passengers carried by a new entrant LCC are 'new passengers', with the precise ratio depending on the route concerned.

⁽³⁶⁾ In reality, FBS reached an even higher level (7,3 million passengers).

⁽³⁷⁾ In 2003, that is before the launch of the LCC Strategy, 26 out of the 32 airlines operating at Schönefeld had a turnaround comprised between 45 and 90 minutes.

- a set of airport services reduced to the minimum in terms of passenger and baggage handling but a high level of quality for the requested services,
 - ‘walk boarding’⁽³⁸⁾ instead of the more expensive use of jet bridges, with a short distance between the terminal and the ramp,
 - simple and functional infrastructures, with no expensive IT systems, intuitive and simple routings within the airport,
 - sufficient land transport connections to the airport,
 - exclusive allocation of gates, sales and check-in counters and provision of sufficient office spaces to LCCs.
- (152) The consultant found that Schönefeld could broadly meet these requirements. In particular, short turnover times at Schönefeld were operationally possible. Moreover, the consultant emphasised the optimal connections to the airport by bus, train and road. The consultant nevertheless identified various relatively minor loopholes and weaknesses, relating to walk boarding, exclusive allocation of terminal areas and office spaces, intuitive routings within the airport and distances between terminals and ramps. Including in light of solutions found at other airports hosting LCCs, the consultant recommended a series of relatively limited adaptations that could be made to fully meet the requirements of LCCs that would be interesting in launching operations at Schönefeld. No large-scale investment in infrastructures or significant modifications to existing infrastructures were found necessary. In particular, as regards walk-boarding, it appeared that additional walk boarding gates could be added to the existing infrastructures within a few months and at low costs.
- (153) In addition, the consultant assessed the competitive pressure that would be exerted on Schönefeld’s LCC operations should FBS decide to develop them. The consultancy concluded that such constraint would be limited in particular because the closest international airports able to host significant LCC traffic, such as Dresden, Leipzig or Hannover, were too remote to exert substantial competitive pressure. According to the consultant, this confirmed that the large potential for LCC traffic in the Berlin area could indeed be realised at Schönefeld.
- (154) Besides, the consultant identified and analysed the various options available to FBS to offer attractive airport charges to LCCs. This aspect was seen as a crucial element of a possible LCC Strategy. Indeed, it is undisputed that because of their own pricing policy vis-à-vis passengers, in the context of a strategy focusing on high volumes and attractive fares, LCCs demand low airport charges from airport managers. Moreover, since they are often ‘point-to-point’ rather than ‘hub-and-spoke’ carriers, they are able to open new routes, close existing ones, increase or decrease frequencies in a very flexible and dynamic fashion. This increases their ability to put pressure on airport managers to obtain the lowest airport charges possible. It was thus clear that no LCC Strategy would be successful without a more attractive system of airport charges at Schönefeld.
- (155) The options assessed by the consultant were in particular (i) a general decrease in airport charges, (ii) volume based discounts, (iii) a charge differentiation based on the nature of the services provided or (iv) combinations of these various basic options. On the basis of a legal and economic review of these options, it recommended an approach consisting in combining a general reduction in airport charges, a volume-base discount to the passenger fee and a charge differentiation based on the level of services provided which would notably involve an exemption from parking fees for a turnaround of less than 30 minutes. Apart from the general reduction in airport charges, these measures were designed in particular with a view to benefitting only LCCs that were yet to come to Schönefeld, and not carriers already operating at the airport. The rationale of that strategy was to attract new carriers without negatively impacting the revenues generated by carriers already present at the airport.

⁽³⁸⁾ Walk boarding requires passengers to go out of the terminal and walk along the ramp to board an aircraft.

- (156) Finally, the consultant identified and analysed various possible measures intended to increase non-aviation revenues, stemming in particular from the activities of restaurants and food chains, car parks, shuttles, advertising spaces etc. These recommendations took into account the volume and type ⁽³⁹⁾ of additional traffic expected from the proposed LCC Strategy.
- (157) In its study, the consultant has followed a sound methodology and carried out a detailed assessment taking into account all relevant factors. In particular, the quantification of the potential for additional LCC traffic, which is based on the specific features of the Berlin area as well as the experience of large 'benchmark cities', is a robust analysis. It was also meaningful to assess the extent to which a LCC Strategy could be thwarted by competition exerted by other airports, and the conclusions drawn from that analysis are reasonable. The review of the requirements of LCCs potentially interested in launching operations at Schönefeld, as well as the identification of measures intended to enable Schönefeld fully satisfy those requirements was equally robust. This analysis was indeed systematic and very detailed. So is the analysis of the various possible airport charge schemes envisaged to attract LCCs.
- (158) Moreover, it should be noted that in the context of its study, the consultant produced a number of documents for FBS, which together with documents produced by FBS itself (including an *ex ante* financial plan of 5 September 2003 with profitability forecasts) formed the basis of FBS' decision to implement the LCC Strategy. The following table provides an overview of the financial results expected in 2003 from the LCC Strategy and from a strategy whereby FBS would continue to focus on traditional traffic (referred to as 'option 1' in the second expert's study). As regards the LCC Strategy, two scenarios were envisaged, a 'pessimistic scenario' and a 'realistic scenario', which differ by the magnitude of the expected additional LCC traffic.

Table 8

Financial impact of option 1 and option 2 in terms of expected profit margins of Schönefeld over the period 2003-2012 (million euros)

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Profit margin without LCC (option 1)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Profit margin with LCC (option 2 — 'pessimistic scenario')	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Profit margin with LCC (option 3 — 'realistic scenario')	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: FBS's financial plan

- (159) For both the 'realistic' and 'pessimistic' scenarios, the above estimates were derived from the additional LCC traffic forecasts drawn up by the consultant. These estimates tend to confirm that the LCC Strategy would lead to a more favourable financial situation than a counterfactual situation whereby FBS would continue to focus on traditional carriers. Indeed, FBS could expect to continue to generate significant losses until 2012 if it were to choose option

⁽³⁹⁾ For instance, the consultant recommended the establishment of a fast food chain within the airport, which was expected to meet the requirements of a significant number of passengers travelling with LCCs.

1, with no significant decrease in these losses. By contrast, the LCC Strategy could be expected to lead to a significant and steady reduction in losses, with a return to profitability as of 2009 under the 'realistic scenario'.

- (160) As a result, the conclusions of the the consultant's study together with FBS' own forecasts would have been seen by a prudent market economy operator guided by medium to long-term profitability prospects as a sound basis to take a strategic decision. It would thus have been rational for such a prudent market economy operator to choose option 1 rather than option 2.

The first expert's study

- (161) As already indicated, FBS commissioned a study from an auditing firm [...] ('the first expert') to stress test the material available to FBS when it decided to implement the LCC Strategy ('the first expert's study'). That study was finalised in 2007 and concluded that from a market economy operator perspective, it was rational to implement the LCC Strategy and put in place a corresponding schedule of charges, namely the 2004 Schedule. The expert used as a basis of its analysis a series of documents dating from 2003, including in particular a financing plan prepared by FBS for the period from 2004 to 2012, and various documents drawn up by the consultant in the framework of the study carried out for FBS.
- (162) The first expert's conclusions are in line with those reached by the consultant study. Even though the first expert's study is not essential to the Commission's assessment, it is an additional element confirming that it would have been rational for a prudent market economy operator to choose option 1 rather than option 2.

Conclusion

- (163) In view of the above, it is concluded that it would have been rational, for a prudent market economy operator guided by medium to long-term profitability prospects and acting in lieu of FBS, to choose option 1 rather than option 2 in 2003.

7.2.2. Option 3 versus options 1 and 2

- (164) As already indicated, one possible option for FBS would have been to close Schönefeld down (option 3), at least until the opening of BER. FBS was in a position to take such decision not only in 2003 (the year in which FBS decided to launch the LCC Strategy) but also earlier and subsequently. From the available documents, it appears that FBS has never seriously considered such option, at least not since the conclusion of the control and profit transfer agreement in 1992. Moreover, the benefits of such option were not analysed in the consultant's study.
- (165) In assessing whether this option would have been found more beneficial than options 1 and 2 by a prudent market economy operator guided by profitability prospects, it is essential to take the BER project into account. As indicated at recital 14, the planning for the creation of the single Berlin airport started in January 1992 and on 20 June 1993 it was announced that the area south of Schönefeld, adjacent to the existing airport, was one of the possible locations for the new airport infrastructures of BER. Therefore, already in 1992-1993, the fact that Schönefeld could host the new single Berlin airport was more than a remote possibility. This possibility became a certainty with the agreement signed on 28 May 1996 by the Federal Government and the Berlin and Brandenburg regions (*Länder*), which has never been called into question since then.
- (166) Against this backdrop, the closure of Schönefeld would have entailed a series of major inconveniences for a prudent market economy operator acting in lieu of FBS. It should first be recalled that, while Tempelhof was gradually closing its operations, Tegel had increasingly been operating at the limits of its capacity since the 1990s and as shown by Table 1, its traffic has been growing significantly since then ⁽⁴⁰⁾. It could not, in any event, handle the whole traffic of the Berlin area. Schönefeld was necessary to ensure that Berlin would have sufficient airport capacities, and its closure would have led to a significant shortage. Indeed, between 1991 and 2003, Schönefeld was accounting for between 13 % and 20 % of Berlin's total air passenger traffic. Schönefeld was particularly needed at peak periods, in particular in periods when the activity of charter services from Berlin is intense. Schönefeld was also crucial for cargo flights because unlike Tegel, it has a 24-hour operating license and can thus be used for night flights. Besides, Tegel and Tempelhof could not be extended significantly to overcome capacity limitations in the long term ⁽⁴¹⁾.

⁽⁴⁰⁾ At that time, Tempelhof's traffic was very modest compared to the traffic at the two other Berlin airports.

⁽⁴¹⁾ See recitals 9 and 14.

- (167) In addition, Schönefeld itself had significant free capacities, as a result of which it could handle additional traffic. As illustrated by Table 1, the presence of Schönefeld enabled Berlin's traffic to grow significantly over time, in particular as of the launch of the LCC Strategy in 2003. Indeed, between 2003 and 2006, Berlin's traffic increased from 13,3 million to 18,4 million passengers and more than 80 % of that growth was absorbed by Schönefeld. Therefore, the closure of Schönefeld would have deprived Berlin not only from a significant part of its existing traffic but also from a significant potential to increase that traffic.
- (168) The prospect that the closure of an airport may give rise to a capacity shortage in the area where the airport is located and may limit the potential to increase air traffic in this area would not necessarily by itself deter a prudent market economy operator guided by profitability rather than public policy objectives from implementing that closure. However, in this case, the closure of Schönefeld and its impact on the overall capacity of airport infrastructures in the Berlin area, and consequently, on the overall air traffic in this area would have had a serious impact on the traffic of BER, as the future single airport in the Berlin area, at the outset of its operations. If Schönefeld had been closed down, BER would have started its operations in far worse business conditions than if Schönefeld had been kept in operation, that is, with a much lower traffic. This factor would have deterred a prudent market economy operator, acting in lieu of FBS, from closing Schönefeld down because of its impact on the profitability of the company.
- (169) Moreover, if Schönefeld had been closed down before the opening of BER, it would have been necessary for FBS to create the entirety of BER's initial traffic by convincing airlines operating from Tegel to move their operations to the new airport (instead of merely discontinuing them) and by convincing airlines not operating from Berlin to launch operations there. This would have been a far less favourable situation than one where Schönefeld would have still been operating when BER would open. Indeed, in this latter scenario, a significant part of the initial traffic of the new airport would be 'naturally' created by the airlines already operating at Schönefeld, including those attracted since 2003 through the LCC Strategy.
- (170) In addition, the closure of Schönefeld would have brought about a far-reaching administrative impact on the BER project. Indeed, the closure of the airport would have triggered the cancellation of its operating license. Therefore, an entirely new planning procedure and a fully new operating permit would have been necessary for the new airport. By contrast, should Schönefeld continue to operate, the opening of BER would only require an extension of Schönefeld's operating permit, which would entail a far lighter administrative process, involving much lower financial expenses, less time and a far lower degree of uncertainty as to the outcome of the process. In particular, should a fully new planning procedure and operating permits be required, significant uncertainties would affect the outcome of the assessment of the environmental impact of the project. Furthermore, it is common ground that a brand new airport project is much more delicate than a mere extension of infrastructures already in operation from a public acceptance point of view.
- (171) The cessation of operations at Schönefeld would have also resulted in costs for laying off workforce and the need to hire, recruit and train new staff at a later stage, when BER would open. This would have given rise to additional costs and operational difficulties compared to a scenario where staff working at Schönefeld would have been readily available to work at the new airport as of its opening.
- (172) The above aspects are very difficult to quantify in particular because they affect the economic situation of a future airport in the short, medium and long-term. However, it is clear that they would severely impact the economic conditions under which BER would open and operate, and even the viability of the project, which is of major strategic importance for FBS. Therefore, even on a qualitative basis, these inconveniences ought to be regarded as sufficiently serious to outweigh any benefits that could be expected from a closure of Schönefeld in the form of fixed cost savings, notably in a situation in which it could be expected that a strategy aimed at increasing LCC traffic in Schönefeld would have led to positive financial results.

7.2.3. Conclusion of the preliminary analysis

- (173) In view of the foregoing, it is concluded that from a prudent market economy operator perspective, it would not have been rational to close Schönefeld down at any point in time between 1992 and the opening of BER. Furthermore, among the three strategic options available in 2003, a prudent market economy operator guided by profitability prospects would have chosen option 1, namely the LCC Strategy, rather than options 2 or 3. As part of this strategy, it would have offered attractive airport charges (and/or financial incentives mitigating the costs of airport charges) to LCCs in order to attract them to Schönefeld.

7.3. Assessment of the control and profit transfer agreement (measure 1)

- (174) In the opening decision, the Commission doubted that FBS had acted like a prudent market economy operator when it offset the losses generated by Schönefeld at the level of the FBS group with profits from operations at Tegel and Tempelhof given the persisting losses generated by Schönefeld ⁽⁴²⁾.
- (175) The control and profit transfer agreement (*Beherrschungs- und Gewinnabführungsvertrag*) was signed on 6 August 1992, well before the ‘*Aéroports de Paris*’ judgment ⁽⁴³⁾ rendered on 12 December 2000. The German authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid, and accordingly such measures did not need to be notified to the Commission. It follows that the Commission cannot now bring into question on the basis of State aid rules such financing measures granted ⁽⁴⁴⁾ before the ‘*Aéroports de Paris*’ ⁽⁴⁵⁾ judgment, i.e. 12 December 2000. Therefore, the control and profit transfer agreement could potentially constitute State aid only as of this date. The temporal scope of the Commission’s investigation with respect to this measure is thus limited to the period running from 12 December 2000 until the date of the opening of the formal investigation procedure.
- (176) As stressed by Germany, concluding control and profit transfer agreements within groups is a standard business practice, in particular for considerations relating to corporate tax law. Moreover, the ‘compensation’ of losses and profits generated by various companies within a group is also usual, and can take the form of a transfer agreement as well as mere payments of dividends by subsidiaries to their parent companies. The mere fact that the FBS group put in place a control and profit transfer agreement in 1992 and has maintained it since then cannot as such give rise to State aid.
- (177) As already stated by the Commission concerning the market economy operator test, ‘a wide margin of judgement must come into entrepreneurial investment decisions. The principles [of the market economy operator test] have however to be applied when it is beyond reasonable doubt that there is no other plausible explanation for the provision of public funds other than considering them as State aid. This approach will also have to be applied to any cross-subsidisation by a profitable part of a public group of undertakings of an unprofitable part. This happens in private undertakings when either the undertaking in question has a strategic plan with good hopes of long-term gain, or that the cross-subsidy has a net benefit to the group as a whole. In cases where there is cross-subsidisation in public holding companies the Commission will take account of similar strategic goals.’ ⁽⁴⁶⁾
- (178) Therefore, in this case, the cross-subsidisation cannot be deemed to confer an economic advantage on Schönefeld if it is part of a strategic plan with long-term gains or if it is overall beneficial for the FBS group.
- (179) For all the reasons mentioned in section 7.2.2, it was clear at least since 1992, and therefore well before the ‘*Aéroports de Paris*’ judgment ⁽⁴⁷⁾, that it was rational to maintain Schönefeld in operation instead of closing it down even if it generated losses for many years. Indeed, Schönefeld’s closure would have caused serious economic harm to BER airport (which as the future single Berlin airport was expected to generate profits at least in the long term, and even put the viability of this major strategic project into question. Indeed, the decision to build a sole airport in Berlin was not only driven by land planning or environmental considerations, but also with the view to absorbing potential increase in traffic and increasing revenues. As recognised by the 2009 Commission decision approving the aid to the financing of the BER airport, the success of the project relied on the expected traffic growth in Berlin ⁽⁴⁸⁾ in a single airport ⁽⁴⁹⁾. In order to maintain Schönefeld in operation, possibly with a view to transforming Schönefeld into a profitable airport (first by inviting airlines to relocate at Schönefeld and later by

⁽⁴²⁾ Opening decision, paragraphs 69 to 71.

⁽⁴³⁾ Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by Case C-82/01 [2002] ECR I-9297, paragraphs 75-79.

⁽⁴⁴⁾ The relevant criterion for the date at which a possible aid measure is deemed to have been granted is the date of the legally binding act by which public authorities undertake to award the measure at stake to its beneficiary. See Case T-358/94 *Compagnie Nationale Air France v Commission* [1996] ECR II-2109, paragraph 79, Case T-109/01 *Fleuren Compost BV v Commission* [2004] ECR II-127, paragraph 74, and Joined Cases T-362/05 and T-363/05 *Nuova Agricast v Commission* [2008] ECR II-297, paragraph 80, and Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission* [2009] ECR II-4315, paragraph 321.

⁽⁴⁵⁾ Decision C 38/2008 of 3 October 2012 on Munich airport Terminal 2, not yet published in the Official Journal, recitals 74 to 81.

⁽⁴⁶⁾ Commission communication to the Member States - Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ C 307, 13.11.93, p. 3) to public undertakings in the manufacturing sector, recital 29.

⁽⁴⁷⁾ See footnote 42.

⁽⁴⁸⁾ See in particular recital 82 of the decision in case NN 25/09 (ex N 167/09).

⁽⁴⁹⁾ See in particular recital 78 of the the decision in case NN 25/09 (ex N 167/09).

implementing the LCC strategy), it was necessary to ensure its economic viability by using part of the profits generated by Tegel and Tempelhof to finance it. Therefore, the cross-subsidisation occurring in this case is part of 'a strategic plan with good hopes of long-term gain', and in any event, it is beneficial to the FBS group as a whole in the long run compared to a counterfactual situation where Schönefeld would be closed down. These long-term benefits – the successful opening and profitable operation of a new single airport for the Berlin agglomeration (plus the expected profits from the operations of Schönefeld after some years of implementing the LCC strategy) – could be expected by FBS to exceed the losses accumulated by Schönefeld before the opening of BER.

- (180) Therefore, by concluding and maintaining in place the control and profit transfer agreement and maintaining Schönefeld in operation, the FBS group has not conferred any economic advantage on Schönefeld⁽⁵⁰⁾. The conclusion and implementation of the control and profit transfer agreement since 12 December 2000 thus does not involve State aid.

7.4. Agreements between FBS and various airlines: preliminary remarks

- (181) Before the agreements between FBS and various airlines are assessed, it is useful to make various preliminary remarks, notably in light of the judgment of the General Court in the *Charleroi* case (the '*Charleroi* judgment')⁽⁵¹⁾, which was issued after the formal investigation procedure was opened in the present case.

7.4.1. Application of the market economy operator principle to the agreements between FBS and various airlines

- (182) Certain third parties argued in substance that the agreements at issue confer an economic advantage on the airlines concerned because the conditions offered through these agreements would deviate from the general rules applicable to airport charges at Schönefeld or because the same conditions are not offered equally to all airlines.
- (183) The crucial question raised by these arguments is the following. If there is a system of published charges at a given airport run by a public company and if the airport manager offers discounts to these charges or financial incentives having the same effect as such discounts⁽⁵²⁾, do such discounts and incentives⁽⁵³⁾ confer by themselves and in all circumstances an economic advantage on the airlines concerned?
- (184) The answer to this question is no. Indeed, in the *Charleroi* judgment which concerned in particular a discount offered by the Walloon region to an airline at an airport for which the region was responsible for setting airport charges, the General Court stated: '*The mere fact that, in the present case, the Walloon Region has regulatory powers in relation to fixing airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the private investor principle, since such a scheme could have been put in place by a private operator.*'⁽⁵⁴⁾ It follows from this statement that discounts to airport charges (or financial incentives which reduce the net financial flows from the airlines to the airport manager) do not automatically confer an economic advantage. In order to determine whether they do so, it is necessary to assess whether a prudent market economy operator guided by profitability prospects would have accepted to grant similar discounts and incentives to the particular carrier concerned⁽⁵⁵⁾.
- (185) For a prudent market economy operator running an airport, there can be many reasons for not offering the same conditions to all airlines. In particular, it can be rational to offer specific financial incentives (including in the form

⁽⁵⁰⁾ Assuming that Schönefeld airport can be viewed as an undertaking within the FBS group, even if it is not a distinct legal entity, and could receive State aid 'from' FBS.

⁽⁵¹⁾ Case T-196/04 *Ryanair Ltd v Commission* [2008] ECR II-3643.

⁽⁵²⁾ Such as payments or charge reductions available upon the opening of a new route or frequency, or marketing grants intended to cover part of the marketing costs incurred by the airline, for example when opening a new route.

⁽⁵³⁾ These incentives are proposed through bilateral agreements or through financial incentive schemes based on parameters such as the number of passengers, and laid down in a published act such as a schedule of charges.

⁽⁵⁴⁾ *Charleroi* judgment, paragraph 101.

⁽⁵⁵⁾ The Commission took a similar approach in its Decision C (2011) 3497 final of 24 May 2011 to open the formal investigation procedure in case SA.31662 — C/2011 (ex NN/2011) — Romania — Timisoara International Airport — Wizz Air (OJ C 270, 13.11.2011, p. 11). See also recital 129, where the Commission held that 'In accordance with settled case-law, it is necessary to assess whether, in similar circumstances, a private airport operator would have entered into same or similar commercial arrangements as Timisoara airport, having regard in particular to the information available and foreseeable developments at the date of those contributions'.

of marketing grants) and specific discounts to the published airport charges to airlines that bring a high number of passengers to the airport. These favourable conditions can be objectively justified by the expected additional traffic, in view of the non-aeronautical revenues brought about by that additional traffic ⁽⁵⁶⁾ and also because, even if the margin per passenger generated by the airport charges paid by the airline is reduced by the discounts and financial incentives, this margin may be significant in absolute terms in light of the numbers of passengers at stake.

- (186) Numerous factors can be taken into account by a prudent market economy operator running an airport to determine the conditions offered to airlines, not only the expected additional traffic but also the moment in which the agreement with the airline is negotiated (and the situation of the airport in that period, in particular in terms of capacity utilisation), the routes on which the airline considers operating ⁽⁵⁷⁾, the airline's operational requirements at the airport, the types of services required from the airport and their characteristics, the pressure exerted by airlines during negotiations ⁽⁵⁸⁾ etc.
- (187) For a prudent market economy operator running an airport, it can thus be justified to offer different conditions to different airlines in terms of airport charges and financial incentives, whether through bilateral agreements or through discount and financial incentive schemes embedded in the acts setting the charges ⁽⁵⁹⁾. For the purposes of assessing whether such discounts and financial incentives confer an economic advantage, it must be determined whether, when the airport manager took the decision to offer them, it could reasonably expect this decision to be profitable, or in other words, to lead to a higher profit (or lower losses) than would be achieved in the counterfactual situation.
- (188) Furthermore, contrary to what certain third parties have suggested, when it comes to conditions offered by airport managers to airlines through bilateral agreements (for instance specific grants for the opening of new routes) and not resulting from general discount or financial incentive schemes embedded in a published schedule of charges, a prudent market economy operator has no reason to ensure that such conditions are based on a set of general and transparent criteria applicable to all carriers. When negotiating a bilateral arrangement with an airline, a prudent market economy operator is expected to take into account all the relevant features of the airline's proposed services rather than a set of pre-determined transparent criteria which may constrain its margin of negotiation. Therefore, the comments made by certain third parties as regards the alleged lack of transparency of the discount and financial incentives offered by FBS in this case are irrelevant in the context of the application of the market economy operator principle.

7.4.2. *Lawfulness of the 2004 Schedule and of the bilateral agreements between FBS and various airlines under national law*

- (189) The question of whether the 2004 Schedule lawfully entered into force under national law, while important under German law, is irrelevant in the context of the application of the market economy operator principle. Indeed, the fact that a discount to generally applicable airport charges, or a financial incentive with an equivalent effect, is granted via a bilateral agreement rather than through a general scheme embedded in a published schedule of charges is irrelevant. As a matter of fact, a prudent market economy operator could decide to grant discounts or incentives through either type of mechanism and the profitability of such decisions would not depend on the chosen mechanism. Therefore, the question of whether the conditions offered by FBS to certain airlines resulted from the mere implementation of a valid applicable schedule of charges or from bilateral arrangements is irrelevant.

⁽⁵⁶⁾ This refers to revenues flowing to the airport manager as a result of the additional activity of car parks, shops, restaurants etc. generated by the additional passengers.

⁽⁵⁷⁾ Different routes can bring different profiles of passengers in particular in terms of purchasing behaviour at airports and related potential to generate non-aeronautical revenues. Therefore, two different sets of routes can have different impacts in terms of revenues accruing to the airport manager.

⁽⁵⁸⁾ Since they aim to be able to offer as low fares as possible, LCCs tend to exert more pressure than traditional carriers on airport managers to obtain low airport charges.

⁽⁵⁹⁾ Such as the passenger volume discount, frequency incentive and destination incentive schemes embedded in the 2004 Schedule.

- (190) Besides, the question of whether FBS had the right, under national law, to enter into bilateral agreements that would set conditions deviating from the applicable schedule of charges⁽⁶⁰⁾ is equally irrelevant. As stated by the General Court in the *Charleroi* judgment: '[...] whether the conduct of an authority granting aid complies with national law is not a factor which should be taken into account in order to decide whether that authority acted in accordance with the private investor principle or granted an economic advantage in contravention of Article 87(1) EC.'⁽⁶¹⁾

7.4.3. *Effects of conditions offered to airlines operating at Tegel*

- (191) In their comments, certain interested parties have argued that airlines operating at Schönefeld would be subsidised by airlines operating at Tegel through low airport charges and other favourable conditions. This alleged cross-subsidisation would come from the fact that FBS would compensate the effect of low charges at Schönefeld through high charges at Tegel.
- (192) These comments suggest that for the conditions offered at Schönefeld to be free of State aid, they should equate to those offered at Tegel.
- (193) However, this is not the case. First, Tegel and Schönefeld differ in many respects other than airport charges, in particular concerning the nature of the airport infrastructures and the distance to the city centre. Therefore, they are not perfect substitutes for one another. This is evidenced by the failure to persuade airlines to move from Tegel to Schönefeld before the implementation of the LCC Strategy.
- (194) Moreover, airlines are not 'forced' to operate from Tegel or from Schönefeld. In addition to these options, airlines have two other options: operate neither from Tegel nor from Schönefeld or just operate with lower capacity at those airports (and use their aircraft and crew on routes other than from Berlin as LCCs have proven to be able to quickly adjust their capacity to changing market circumstances). Therefore, any attempt by FBS at imposing on an airline considering operating from Schönefeld the same conditions as at Tegel may simply lead that airline to abandon its plans and to decide to operate neither from Schönefeld nor from Tegel or downsize operations from Berlin.
- (195) Therefore, there would be no reason for a prudent market economy operator to take into consideration the conditions prevailing at Tegel when determining the level of charges at Schönefeld. Following the same line of reasoning and taking into account the limited economic scope, the downsizing and the eventual cessation of operations of Tempelhof, there would be no reason for a prudent market economy operator to take into consideration the conditions prevailing at Tempelhof when determining the level of charges at Schönefeld.

7.4.4. *Application of the market economy operator principle to the airport/airlines agreements*

- (196) The Commission notes that in the present case, the agreements at issue have to be seen as part of the implementation of the LCC Strategy, which was expected to lead to positive results for Schönefeld in the medium/long term.
- (197) In order to assess whether any of the agreements at issue confers an economic advantage, it is necessary to analyse whether, at the date when the agreement was concluded, a prudent market economy operator would have expected this agreement to lead to a higher profit than would have been achieved otherwise. This higher profit is to be measured by the difference between the incremental revenues expected to be generated by the contract (that is, the difference between the revenues that would be achieved if the contract were concluded and the revenues that would be achieved absent the contract) and the incremental costs expected to be incurred as a result of the contract (that is, the difference between the costs that would be incurred if the contract were concluded and the costs that would be incurred absent the contract), the resulting cash flows being discounted with an appropriate discount rate.
- (198) Furthermore, in this analysis, all the relevant incremental revenues and costs associated with the transaction must be taken into account. The various elements (discounts to airport charges, marketing grants, other financial incentives) must not be assessed separately. Indeed, as stated in the *Charleroi* judgment: 'It is (...) necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to

⁽⁶⁰⁾ This issue arises in particular in relation to the 2003 easyJet agreement, which was concluded when the 2003 Schedule was applicable and clearly deviated from its terms (see recital 42). Moreover, the first agreement with Ryanair, the first agreement with Germanwings and the agreements with Volare and V-Bird were concluded when the 2003 Schedule was applicable and foresaw the payment of grants, which were not provided for in the schedule (see recital 48). Similarly, the agreements with Aer Lingus, Icelandair and Norwegian Air Shuttle were concluded when the 2004 Schedule was applicable and foresaw the payment by FBS of grants to cover part of the marketing costs of the carriers concerned without this being provided for in the schedule (see recital 49).

⁽⁶¹⁾ *Charleroi* judgment, paragraph 98.

determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context [...].'⁽⁶²⁾

- (199) The expected incremental revenues must include in particular the revenues from airport charges, taking into account the discounts as well as the traffic expected to be generated by the agreement and the non-aeronautical revenues expected to be generated by the additional traffic. The expected incremental costs must include in particular all the incremental operating and investment costs that would not be incurred absent the agreement as well as the costs of the marketing grants and other financial incentives.

7.5. Assessment of the 2003 easyJet agreement (measure 2)

- (200) The 2003 easyJet agreement was concluded before the entry into force of the 2004 Schedule and initially foreseen for a period of 10 years with an option to extend it by a further 10 years.
- (201) Germany has submitted evidence exhibiting the *ex ante* financial prospects of the project, based in particular on the FBS forecasts of 17 December 2003, i.e. before the date of the agreement signed between FBS and easyJet on 19 December 2003, see recital 42). FBS foresaw that the agreement would bring about a positive incremental operational profit for each year of the period 2004-2012 and that the operational break-even would be reached in 2010:

Table 9

FBS forecasts as regards the incremental profits generated by the 2003 easyJet agreement (million euros)

	2004	2005	2006	2007	2008	2009	2010	2011	2012
Operating profit without easyJet	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Additional operating profit with easyJet	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Consolidated operating profit	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

- (202) The Commission considers that these forecasts and their underpinning assumptions were a sound basis to sign the 2003 easyJet agreement.
- (203) The traffic forecasts expected from the 2003 easyJet agreement were calculated on the basis of the number of aircraft to be based by easyJet at Schönefeld over time, as set out in the agreement, and a load factor of [...] %, which appears plausible in view of the usual load factors achieved by LCCs.
- (204) The business plan took into account all relevant categories of incremental cost and incremental revenue forecasts, including aeronautical and non-aeronautical categories of revenues and the costs of the financial incentives offered to easyJet. These forecasts took into account, in particular, the additional traffic and flight movements expected from the agreement and the terms of the agreement.
- (205) To stress test this strategic decision, FBS eventually commissioned auditing firm [...] ('the second expert') to assess whether a prudent market economy operator, guided by profitability prospects, would have signed that contract in 2003. That assessment ('the second expert study') also covered agreements signed with other airlines and was finalised in 2007.
- (206) The second expert based its analysis of the 2003 easyJet agreement on FBS' forecasts already mentioned in recital 158.
- (207) The second expert verified in detail the soundness of FBS' cost and revenue forecasts and made a few adjustments to these assumptions when it considered that FBS' assumptions had not been adequate, on the basis of the information available when the agreement was concluded.

⁽⁶²⁾ *Charleroi* judgment, paragraph 59.

- (208) For example, the second expert made an adjustment in the business plan to incorporate an investment cost of EUR [...] million in order to create additional gates for easyJet at Terminal B. Moreover, it made adjustments to reflect the fact that FBS's forecasts were based on a version of the draft agreement with easyJet, which exhibited some differences with the signed agreement. The second expert thus made adjustments in the business plan in order to align it in full with the terms of the signed agreement.
- (209) Besides, the second expert calculated the net present value (NPV) of the easyJet 2003 agreement for the period 2004-2007 at 30 December 2003 value, on the basis of FBS's forecasts, adjusted as explained above. The NPV of a time series of expected cash flows, both incoming and outgoing, is defined as the discounted sum of the individual expected cash flows over the relevant period. The NPV is a standard tool used by undertakings to assess the profitability of a project. The second expert calculated the aggregated NPV of the 2003 easyJet agreement at the end of each year until the expiry of the agreement. To that end, the second expert calculated the discount rate to be applied for the discounting of cash flows, on the basis of a classical capital asset pricing method ⁽⁶³⁾, so that the discount rate truly reflects FBS' costs of capital in 2003.
- (210) The resulting NPVs are displayed in the following table:

Table 10

NPV of the cash flows expected from the 2003 easyJet agreement

Aggregated NPV at year's end (at 30 December 2003 value):	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
NPV (EUR million)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Second expert's study.

- (211) These NPVs are all positive and confirm that it was rational to conclude the 2003 easyJet agreement.
- (212) The second expert noted in its report that the impact of the agreement as originally signed, that is for a period of 10 years with an option to extend it for a further 10 years, on the BER airport had not been taken into consideration by FBS in 2003, when the opportunity to sign the agreement was assessed. As noted by the second expert, the 2003 easyJet agreement in its initial terms was set to be still applicable for several years after the opening of BER, scheduled for 2011. Moreover, that agreement foresaw conditions which were apparently more favourable than those envisaged in the general charges planned for BER as of its opening. According to the second expert, there could therefore be a risk that the existence of the 2003 easyJet agreement would result in other carriers exerting significant pressure on FBS in order to reduce the difference between the general charges prevailing at BER and those agreed with easyJet. However, in 2003 this was a very remote risk which could not be foreseen with any degree of likelihood let alone be quantified, notably in the light of the fast changing market developments of the LCC business. As a matter of fact this risk never became concrete. Indeed, the 2007 easyJet amending agreement, which was set to expire upon the opening of BER, replaced the 2003 easyJet agreement.
- (213) Therefore, the second expert Study confirms that a prudent market economy operator would have concluded the 2003 easyJet agreement.
- (214) To conclude, the 2003 easyJet agreement does not involve State aid.

⁽⁶³⁾ Under the Capital Asset Pricing Model, the formula to determine the discount rate 'ra' is the following:

$$ra = rrf + Ba (rm - rrf)$$

where:

rrf = the rate of return for a risk-free security

rm = the broad market's expected rate of return

Ba = beta of the asset.

7.6. Assessment of the agreements with other airlines (measure 3)

- (215) FBS' decisions to conclude the agreements with Ryanair, Germanwings, Volare, Icelandair, Norwegian Air Shuttle and Aer Lingus were also based on *ex ante* forecasts of incremental traffic, costs and revenues, which revealed that it would be profitable to conclude these agreements.
- (216) For each of these agreements, the traffic forecasts expected were calculated on the basis of the number of flight movements expected from the carrier's planned operations and reasonable assumptions about their load factors. These forecasts took into account all relevant categories of incremental cost and incremental revenue forecasts, including aeronautical and non-aeronautical categories of revenues and the costs of the financial incentives offered to the carriers by FBS.
- (217) As in the case of the 2003 easyJet agreement, FBS's *ex ante* forecasts were stress tested by the second expert which concluded that signing contracts with those airlines would still lead to incremental revenues exceeding incremental costs for each year of each contract over the period of application of the agreements (despite some more conservative conclusions). To reach that conclusion, the second expert carried out an analysis for each contract on the basis of those adjusted forecasts, which fully comply with the methodology described in sections 7.4.4 and 7.5. The second expert exclusively based its review and adjustments on data and forecasts available to FBS when the opportunity to conclude the agreement was assessed.
- (218) The *ex ante* NPVs calculated by the second expert for eight of the nine agreements concerned at the time when those agreements were concluded, over the period during which they were set to apply, is presented in Table 11 below:

Table 11

NPVs of the agreements between FBS and various LCCs

Airline/Agreement	Period during which the agreement was set to apply	NPV over the duration of the agreement (EUR)
Ryanair (first agreement)	1 May 2003-30 April 2004	[...]
Ryanair (second agreement)	1 May 2003-30 April 2008	[...]
Germanwings (first agreement)	26 October 2003-31 October 2006	[...]
Germanwings (second agreement)	1 May 2004-30 April 2008	[...]
Volare	26 October 2003-31 March 2007	[...]
Icelandair	6 June 2004-31 March 2009	[...]
Norwegian Air Shuttle	29 March 2004-31 March 2009	[...]
Aer Lingus	30 March 2004-31 March 2009	[...]

Source: Second expert's study.

- (219) As shown by this table, all these NPVs are positive. Therefore, it would have been rational for a prudent market economy operator guided by profitability prospects to accept the terms of these agreements at the date at which they were signed.
- (220) For the agreement with V-Bird ⁽⁶⁴⁾, no NPV was calculated. The second expert pointed out that no *ex ante* business plan was available for this agreement. However, the terms of this agreement are very similar to those of the agreement with Volare. Both agreements were signed almost concomitantly, for similar periods (of three and a half and four years respectively). They foresaw the applicability of the 2003 Schedule to determine airport charges, as well as the payment of the same incentive grant (EUR [...] million) for Volare and V-Bird. The operations involved in both agreements were to generate a very close number of flight movements and the same type of aircraft. Moreover, at the time of the conclusion of these agreements, it was reasonable to assume that both companies would have a similar load factor. The incremental traffic to be expected from both agreements was thus similar.

⁽⁶⁴⁾ This is the only agreement with a LCC that is covered by the formal investigation procedure but not mentioned in table 11.

Finally, both agreements could be expected to lead to similar incremental operating costs for FBS. On the basis of the similarities between these two agreements, it was reasonable to conclude, that the V-Bird agreement complies with the market economy operator test.

- (221) In any event, V-Bird suspended operations on 8 October 2004 and filed for and was subsequently declared bankrupt on 18 October 2004. V-Bird was liquidated in early January 2005. There is therefore no undertaking existing any more which would have benefited, either directly or indirectly, from any potential State aid involved in the V-Bird agreement.
- (222) In view of the foregoing, none of the agreements listed in Table 6 involve State aid.

7.7. Assessment of the 2004 easyJet tenancy agreement (measure 4)

- (223) Certain interested parties have taken the view that the 2004 easyJet tenancy agreement provided easyJet with the exclusive use of Schönefeld's Terminal B and prevented other airlines from having access to it.
- (224) As indicated in recital 55, from 2004 to 2007, easyJet rented approximately [...] m² of office space and check-in desks, that is 24 % of the total floor area of Terminal B. The public areas of Terminal B (corridors, halls, coffee shop) are accessible to passengers of airlines other than easyJet, given the physical connection between Terminal B and Terminal A.
- (225) Allocating check-in areas to specific airlines and granting branding and advertising rights to these airlines in the immediate surrounding areas are normal business practice at European and international airports and such arrangements are widespread.
- (226) Especially where an airline or an alliance of airlines carries a substantial number of passengers from or to a given airport, it is rational from an operational (and thus from a business) point of view that its activities are concentrated in a single terminal. This optimises the operational processes of both the airport and the airline.
- (227) Therefore, an airport manager does not necessarily confer an economic advantage on an airline by providing it with the exclusive use of all the check-in desks and office spaces at a Terminal. This might possibly be the case only when the airport manager grants exclusive use of areas in excess of what the carrier needs (thereby preventing other airlines from using physically available capacity) or when an abnormally low rent is charged. As shown below, the 2004 easyJet tenancy agreement fulfils none of those conditions.
- (228) Ever since it began flight operations at Schönefeld, easyJet has been by far the dominant airline. Between 2004 to 2007 easyJet carried between [...] % and [...] % of all Schönefeld's passengers. It was anticipated already in 2003 that easyJet would be by far the largest carrier in terms of traffic. Indeed, because of easyJet's contractual obligation to base a defined number of aircraft at Schönefeld, FBS was able to assume correspondingly large passenger numbers from the moment when easyJet began operations.
- (229) According to the International Civil Aviation Organisation, the capacity of Terminal B was 600 000 passengers per year, which is significantly lower than the number of passengers that easyJet was expected to carry from and to Schönefeld as of 2004 ([...] million ⁽⁶⁵⁾). It is therefore clear that through the 2004 easyJet tenancy agreement, FBS was not engaging into any kind of 'capacity hoarding' strategy designed to prevent other airlines from competing against easyJet at Schönefeld. In 2006, [...] million passengers were handled at Terminal B, that is, more than twice as much as the theoretical capacity, without any major technical modifications. The possibility to handle so many passengers arose in particular from the use of the terminal facility by one single carrier, which allowed for the optimisation of the passenger flows.
- (230) Regarding the rental charge, it is meaningless to compare rental prices at different airports because of the differences in their capacity, market conditions, and the quality of the facilities. The rental prices paid by easyJet were in fact in line with FBS's rental charge grid, with no discount granted.
- (231) At terminal B easyJet pays EUR [...] per m² for counter space and EUR [...] per m² for offices. Similar charges were agreed for similar facilities with other airlines at other terminals. Germanwings, for instance, also paid EUR [...] per m² for counter space at Terminal A. Aeroflot was charged EUR [...] per m² for an office at Terminal A. At Terminal B, Condor rented offices before easyJet and paid a lower rent for the same kind of premises in Terminal B. Whereas easyJet paid EUR [...] per m² for office space, Condor was charged EUR [...] per m² only.

⁽⁶⁵⁾ Second expert Study, Table 2, page 22.

- (232) This type of comparison is appropriate to assess the existence of an economic advantage within the 2004 easyJet tenancy agreement. Indeed, unlike an agreement governing the whole operations of an airline at an airport and its main financial relationships with the airport⁽⁶⁶⁾, a tenancy agreement for check-in desks and office spaces relates to the provision of access to relatively standard facilities, at least within one given airport. Moreover, rents involved in such contracts account for minor amounts compared to airport charges, marketing grants and other financial incentives. Therefore, there is no significant incentive for the airport manager to determine tailor-made rents or to try to extract the highest possible rents through negotiations with airlines. The commercial interest of the airport manager rather lies in the concentration of the operations of a given airline in one location to ensure operational efficiency to the benefit of its customer, especially when, as in the case of FBS, it tries to attract airlines and entice them to increase their traffic.
- (233) Therefore, contrary to what third parties have argued, it would not necessarily make sense to allocate areas to airlines on the basis of calls for tender. Such practice actually appears to be very unusual across European airports. The conduct expected from a rational airport operator guided by profitability prospects consists in finding appropriate areas for each main airline operating at the airport, in terms of capacity and other characteristics, and charge a reasonable rent in line with usual practices within the airport.
- (234) For these reasons, the level of a rent does not confer an economic advantage if it is broadly in line with the rents charged to other airlines within the airport. This is the case for the 2004 easyJet tenancy agreement.
- (235) Furthermore, it is rational for an airport operator to conclude such contracts for a duration that is in line with the duration of the 'main' agreement governing the operations of the airline at the airport. This is the case for the 2004 easyJet tenancy agreement.
- (236) As regards the baggage handling facility, the systems in place at Terminal A and Terminal B are identical from a technical viewpoint, except in one aspect: the facility at Terminal B includes a fixed X-ray machine. It was installed at the request of the German Federal police, which would otherwise have withdrawn the operating permit of Terminal B. The technical equipment of the baggage handling facility at Terminal B does not give easyJet any operational advantage, such as quicker or smoother loading/unloading of baggage. Rather, it offers an integrated method of carrying out X-ray checks, but this has no impact on the airline's check-in procedures.
- (237) In fact, the integrated security system rather causes operational difficulties for easyJet. If a problem with a piece of passenger luggage is detected that requires a manual check, the passenger has to be called back to the control room at Terminal B. But by then the passenger will already be in the departure lounge and has to be informed and fetched back. This is a cumbersome procedure which implies that the check-in acceptance time limit applied by Schönefeld for passengers at Terminal B is at least 30 minutes. easyJet currently applies a 40 minute time-limit, since there is otherwise no guarantee that the process can be completed on time. At Terminal A, by contrast, there is no need for this type of procedures. A 20 minute time-limit before take-off is common practice and poses no technical problems.
- (238) Another difficulty relates to the fact that the baggage-handling facilities at Terminal B and Terminal A differ in their susceptibility to technical malfunction. Owing to the integrated security technology, with the greater complexity it entails, the baggage-handling facility at Terminal B was working for [...] % of the operating hours during the period from May to December 2004, whereas the facility at Terminal A was ready for service for [...] % of the time.
- (239) From all of the foregoing, it is concluded that none of the provisions of the 2004 easyJet tenancy agreement resulted in an economic advantage being conferred on easyJet. Therefore, that agreement does not constitute State aid,

HAS ADOPTED THIS DECISION:

Article 1

The following measures which Germany has implemented for the companies mentioned in points (a)-(l) do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union:

- (a) the control and profit transfer agreement concluded on 6 August 1992 by Berlin Brandenburg Flughafen Holding GmbH and Berliner Flughafen-Gesellschaft mbH;
- (b) the agreement concluded on 19 December 2003 between Flughafen Berlin-Schönefeld GmbH and easyJet Airline Company Ltd;

⁽⁶⁶⁾ Such as the 2003 easyJet agreement.

- (c) the agreement concluded on 31 March 2003 between Flughafen Berlin-Schönefeld GmbH and Ryanair Limited;
- (d) the agreement concluded on 28 April 2004 between Flughafen Berlin-Schönefeld GmbH and Ryanair Limited;
- (e) the agreement concluded on 14 October 2003 between Flughafen Berlin-Schönefeld GmbH and Germanwings GmbH;
- (f) the agreement concluded on 23 December 2004 between Flughafen Berlin-Schönefeld GmbH and Germanwings GmbH;
- (g) the agreement concluded on 22 October 2003 between Flughafen Berlin-Schönefeld GmbH and Volare Airlines S.p.A.;
- (h) the agreement concluded on 3 November 2003 between Flughafen Berlin-Schönefeld GmbH and V-Bird Airlines B.V.;
- (i) the agreement concluded on 6 June 2004 between Flughafen Berlin-Schönefeld GmbH and Icelandair Reykjavik Airport;
- (j) the agreement concluded on 17 May 2004 between Flughafen Berlin-Schönefeld GmbH and Norwegian Air Shuttle AS;
- (k) the agreement concluded on 13 May 2004 between Flughafen Berlin-Schönefeld GmbH and Aer Lingus Limited;
- (l) the agreement concluded in March 2004 between Flughafen Berlin-Schönefeld GmbH and easyJet Airline Company Ltd for the use of certain areas and facilities at Terminal B of Schönefeld airport.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 February 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION (EU) 2015/507**of 16 September 2014****on the measure SA.23129 — (12/C) (ex 12/NN) (ex CP 141/2007) implemented by Germany***(notified under document C(2014) 6411)***(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 called on interested parties to submit their comments pursuant to the Article cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 30 March 2007, Neubrandenburger Wohnungsgesellschaft mbH (hereinafter: 'NEUWOGES') lodged a complaint with the Commission, on the basis of Article 20(2) of Council Regulation (EC) No 659/1999 ⁽²⁾, alleging that illegal state aid had been granted to Bavaria Immobilien Trading GmbH & Co, Immobilien Leasing Objekt Neubrandenburg KG and Bavaria Immobilien Beteiligungsgesellschaft mbH & Co. Objekte Neubrandenburg KG (hereinafter: 'BAVARIA 1' and 'BAVARIA 2'; together: 'BAVARIA') by means of a land-lease and sale contract (*Erbbaurechtsvertrag*) and a general management contract (*Generalverwaltervertrag*). NEUWOGES requested the initiation of a formal investigation procedure pursuant to Article 108(2) TFEU.
- (2) On 6 August 2007, 14 May 2008, 6 April 2009 and 3 February 2012, the Commission called for further information from the German authorities. The German authorities responded on 4 September 2007, 12 October 2007, 17 October 2007, 11 July 2008, 14 July 2008, 12 December 2008, 30 June 2009 and 28 February 2012. NEUWOGES submitted comments on 30 May 2007, 5 November 2007, 26 February 2008, 15 July 2008, 30 September 2008, 18 December 2008, 6 March 2009, 4 June 2009, 15 July 2009, 26 August 2009, 22 September 2009 and 19 January 2012. BAVARIA commented on 13 May 2008.
- (3) On 28 November 2008, Rostock Regional Court (*Landgericht Rostock*) handed down its judgment with regard to the court proceedings between BAVARIA and NEUWOGES. BAVARIA had sued NEUWOGES for failure to comply with the contract concluded between the two parties, in response to which NEUWOGES had claimed that the contract involved unlawful and incompatible state aid and was therefore void. Rostock Regional Court concluded that no advantage was conferred on BAVARIA and there was therefore no state aid within the meaning of Article 107(1) TFEU. NEUWOGES appealed against the judgment, and the proceedings before Rostock Higher Regional Court (*Oberlandesgericht Rostock*) are pending. Additionally, BAVARIA initiated proceedings before Greifswald Administrative Court (*Verwaltungsgericht Greifswald*), seeking to obtain a ruling granting it access to all the files held by NEUWOGES or the City of Neubrandenburg in relation to the contracts in question. The case is still pending.
- (4) By letter of 4 June 2009, NEUWOGES asked the Commission, in accordance with Article 265(2) TFEU, to initiate the formal investigation procedure within two months.
- (5) By letter of 29 July 2009, the Commission communicated its preliminary assessment to NEUWOGES to the effect that neither the land-lease and sale contract nor the general management contract constituted state aid within the meaning of Article 107(1) TFEU.
- (6) By letter of 26 August 2009, NEUWOGES contested the Commission's assessment of the facts and called on the Commission to initiate the formal investigation procedure within two weeks.
- (7) The Commission informed NEUWOGES by letter of 15 September 2009 that it would send a further letter containing an assessment of NEUWOGES' latest comments. By letter of 22 September 2009, NEUWOGES informed the Commission that it did not agree with the Commission's proposal.

⁽¹⁾ OJ C 141, 17.5.2012, p. 28.

⁽²⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

- (8) On 9 October 2009, NEUWOGES brought an action before the General Court of the European Union and requested that it annul the decision allegedly contained in the Commission's letter of 29 July 2009 or, in the alternative, declare that the Commission had failed to act by refusing to initiate the formal investigation procedure under Article 108(2) TFEU. On 9 January 2012, the General Court dismissed the annulment action as inadmissible and the action for failure to act as unfounded ⁽³⁾.
- (9) By letter of 19 January 2012, NEUWOGES again called on the Commission to initiate the formal investigation procedure provided for in Article 108(2) TFEU.
- (10) By letter of 21 March 2012, the Commission informed the German authorities of its decision to open the formal investigation. The Commission's decision to initiate the procedure (hereinafter: the 'Opening Decision') was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the measure. On 22 March 2012, NEUWOGES brought an appeal against the General Court's decision of 9 January 2012. On 15 November 2012, the Court dismissed the appeal as being devoid of purpose ⁽⁵⁾.
- (11) The Commission received comments from NEUWOGES on 17 July 2012, 2 October 2012, 4 April 2013 and 15 April 2014, and from BAVARIA on 18 June 2012 and 22 April 2013. The submissions were forwarded to the German authorities on 7 August 2012 and 16 September 2013. On behalf of the German Government, the City of Neubrandenburg commented on 23 July 2012 and 28 September 2012, and Berlin *Land* on 16 May 2012, 28 September 2012 and 30 September 2013.

2. DESCRIPTION OF THE MEASURES

- (12) NEUWOGES is a limited liability company incorporated under German law. The City of Neubrandenburg holds 100 % of its shares. NEUWOGES pursues the objective of providing affordable housing to large parts of the population in Neubrandenburg and the surrounding areas. NEUWOGES today owns 33 % of all housing in the City of Neubrandenburg. BAVARIA 1 and BAVARIA 2 are property companies that were specifically founded for transactions with NEUWOGES and are majority-owned by closed real-estate funds. BAVARIA 1 is owned by BAVARIA Immobilien Beteiligungsgesellschaft mbH & Co. Erste Leasing Fonds KG (94 %) and BAVARIA Immobilien Management GmbH i.L (6 %), while BAVARIA 2 is wholly owned by Perseus Immobilien Verwaltungs GmbH & Co. KG — LBB Fonds Dreizehn. The shares of both BAVARIA Immobilien Beteiligungsgesellschaft mbH & Co. Erste Leasing Fonds KG and Perseus Immobilien Verwaltungs GmbH & Co. KG — LBB Fonds Dreizehn are held by private investors. Both funds were initiated and marketed by Berliner Immobilien Holding GmbH, which belonged to the Bankgesellschaft Berlin until 1 January 2006 and has since been owned directly and wholly by Berlin *Land*.
- (13) NEUWOGES is the owner of, *inter alia*, a number of plots of land in Neubrandenburg, on which twelve housing blocks with an aggregate total of 557 individual flats and some commercial units are situated. On 21 January 1998, NEUWOGES and BAVARIA concluded the land-lease and sale contract and the general management contract (hereinafter: 'contracts at issue' or, together, 'sale-and-lease-back transaction').

2.1. LAND-LEASE AND SALE CONTRACT

- (14) On 21 January 1998, NEUWOGES and BAVARIA concluded a land-lease and buildings sale contract for 12 buildings with a total of 557 individual flats. Under that contract, BAVARIA obtained a lease on the land for 75 years and bought the buildings.
- (15) The land-lease and sale contract is divided into two main components:
 - (a) First, BAVARIA committed itself to paying a total of EUR [...] (*) ⁽⁶⁾ to NEUWOGES, of which EUR [...] constituted capitalised rent on the land for the period up to 31 December 2028 and EUR [...] constituted the purchase price for the buildings.
 - (b) From 1 January 2029, BAVARIA will also have to pay an annual rent for the land of [...] % of the current land value, which has been calculated at EUR [...] per m² or EUR [...] per year, for a period of 10 years. For the subsequent remaining duration of the land-lease and sale contract, an adjustment of the rent in line with the development of the total cost-of-living index is foreseen, provided the latter fluctuates by more than [...] %.

⁽³⁾ Case T-407/09 *Neubrandenburger Wohnungsgesellschaft v Commission*, not yet reported.

⁽⁴⁾ See footnote 1.

⁽⁵⁾ Case C-145/12 P *Neubrandenburger Wohnungsgesellschaft v Commission* EU, not yet reported.

^(*) Parts of the text have been amended to ensure that confidential information is not published. These parts are hereinafter replaced by square brackets.

⁽⁶⁾ Throughout this Decision, the Commission has converted all original DM amounts into EUR amounts, using the official conversion rate of EUR 1 = DM 1,95583. Small rounding errors may have occurred. All digits after the decimal point have been omitted from this Decision.

- (16) In 1997, before concluding the land-lease and sale contract with BAVARIA, NEUWOGES had in-house experts value the property (buildings and land). According to this valuation, the value of the property was EUR [...]. In 2007, NEUWOGES additionally instructed an external expert to retrospectively calculate the 1997 market value of the property. The 2007 valuation estimated the property's 1997 value at EUR [...].

Inherited Debt Support Law (*Altschuldenhilfegesetz*)

- (17) The land-lease and sale contract was concluded in the context of the Inherited Debt Support Law ⁽⁷⁾. After the reunification of Germany in 1990, the former 'people's housing companies' in East Germany were incorporated as legally separate communal housing companies. The old entities' assets and liabilities were transferred to these new companies, which were thus placed under a heavy burden. To enable the housing companies to be viable in the long term, the federal legislator passed the Inherited Debt Support Law, which entered into force on 27 June 1993.
- (18) Under the Inherited Debt Support Law, communal housing companies in East Germany could obtain debt relief upon application. Under Section 4(1)-(2) of the Law, the debt exceeding EUR 76,69 per m² could be written off up to a maximum of EUR 434,60 per m². In return, the housing company had to accept certain obligations, in particular to make all reasonable efforts to privatise 15 % of its apartments (Section 4(5)(1) in conjunction with Section 5), to have a business plan envisaging speedy privatisation, modernisation and renovation of its apartments (Section 4(5)(2)) and to report on its investment programme and the privatisation (Section 4(5)-(7)). In the version of the law that was in force at the relevant time (1997/98), the housing companies had until 31 December 2003 to fulfil their privatisation obligation. Where a housing company had failed to fulfil its privatisation obligation (i.e., by not making all reasonable efforts to do so), the debt relief already granted had to be repaid.
- (19) A certain percentage of the revenue exceeding EUR 76,69 per m² obtained by the housing company through privatisation had to be transferred to the 'inherited debt relief fund' (*Erblastentilgungsfonds*). At the relevant time (1997/98), Section 5(2) of the Inherited Debt Support Law provided that, for all privatisations up to 31 December 1998, 45 % of the qualifying revenue had to be transferred. For privatisations up to 31 December 2000 or 31 December 2003, the transfer quotas were set at 50 % and 55 % respectively. Where privatisation took the form of selling only the buildings and granting a lease for the land (rather than selling the buildings and land outright), the revenue on the basis of which the transfer obligations were calculated was the sale price of the buildings and the cash value of the agreed land rent (Section 5(2) of the Inherited Debt Support Law).
- (20) In the course of 1995, it emerged that the originally envisaged form of privatisation — i.e. sale to the tenants — was unlikely to lead to a privatisation quota of 15 %. Accordingly, the Bank for Reconstruction (*Kreditanstalt für Wiederaufbau*), charged with administering the debt relief programme, started accepting what was known as 'mediated privatisation' ⁽⁸⁾. Under this model, which was supposed to be applied only where the 15 % quota could foreseeably not be reached via direct privatisation, a housing company could sell apartment buildings *en bloc* to a commercial buyer. In order for the sale to be counted towards the housing company's 15 % privatisation obligation, the commercial buyer had to accept an obligation both to modernise the buildings and to attempt to sell as many apartments as possible (and a minimum of one third of them) to the tenants ⁽⁹⁾. Where, after firm offers of sale had been made, significantly less than one third of the tenants were interested in buying, the commercial buyer could exempt 60 % of the apartments from the privatisation obligation, thereby limiting its obligations to the privatisation of one third of the remaining 40 % of the apartments ⁽¹⁰⁾.

NEUWOGES and the Inherited Debt Support Law

- (21) The land-lease and sale contract was eventually recognised by the Bank for Reconstruction as constituting a relevant 'mediated privatisation' under the Inherited Debt Support Law. Entering into the sale-and-lease-back

⁽⁷⁾ Inherited Debt Support Law (*Altschuldenhilfegesetz*) of 23 June 1993 (Federal Law Gazette I p. 944, 986), as last amended on 31 October 2006 (Federal Law Gazette I p. 2407).

⁽⁸⁾ See the Federal Ministry of Regional Planning's letter 'Anerkennung mieternaher Privatisierungsformen' dated 18 May 1995, and the Bank for Reconstruction's Merkblatt zu Mieterprivatisierung, mieternahen Privatisierungsformen und subsidiärem Drittverkauf dated 22 December 1995.

⁽⁹⁾ Letter from the Federal Ministry of Regional Planning, 'Anerkennung mieternaher Privatisierungsformen' dated 18 May 1995, p. 183.

⁽¹⁰⁾ The Bank for Reconstruction's 'Merkblatt zu Mieterprivatisierung, mieternahen Privatisierungsformen und subsidiärem Drittverkauf' dated 22 December 1995, pp. 5-6.

transaction therefore helped NEUWOGES fulfil its privatisation obligation under the Inherited Debt Support Law. However, it is unclear and a matter of dispute to what extent this law influenced the commercial considerations underlying NEUWOGES' decision to conclude the contracts, and whether the debt relief obtained by NEUWOGES pursuant to the law must be taken into account in analysing whether the sale-and-lease-back transaction constituted aid to BAVARIA.

- (22) By its own account, NEUWOGES received total debt relief of EUR [...] ⁽¹¹⁾. NEUWOGES submitted that it was difficult to apportion a part of the total debt relief it received to the sale-and-lease-back transaction, since the Inherited Debt Support Law granted debt relief only if the housing company had entirely fulfilled its privatisation obligation. However, if a portion of the total debt relief received were to be apportioned to an individual privatisation on the basis of the share of these privatisations in NEUWOGES' total privatisation obligation, then total gross debt relief of EUR [...] could be mathematically apportioned to the sale-and-lease-back transaction. Of the revenue generated by the BAVARIA sale, EUR [...] had to be transferred to the inherited debt relief fund, leaving NEUWOGES with mathematical net relief of EUR [...] ⁽¹²⁾.

2.2. GENERAL MANAGEMENT CONTRACT

- (23) On 21 January 1998, BAVARIA and NEUWOGES also signed the general management contract, which effectively leased the buildings back to NEUWOGES. Under this contract, NEUWOGES remains responsible for administering and commercially exploiting the buildings in question for 30 years. All the income from renting the buildings remains with NEUWOGES. In exchange for these rights of use, NEUWOGES committed itself to paying a fixed monthly leasing payment of EUR [...] (EUR [...] per year) until the modernisation was complete, and EUR [...] (EUR [...] per year) thereafter. From 1 January 2000, this leasing payment increased by [...] % annually.

2.3. GLOBAL LUMP-SUM CONTRACT

- (24) BAVARIA committed itself to modernising the buildings in question, for which purpose it concluded a global lump-sum contract with BRG Bau-Regie GmbH (hereinafter: 'BRG'), a 100 % subsidiary of NEUWOGES. Under this contract, BAVARIA paid BRG a lump sum of EUR [...] for the agreed modernisation works.

3. OBSERVATIONS BY GERMANY

- (25) In replying to the Opening Decision, Germany confines itself to explaining that it is not making any submissions in response to the Opening Decision in this case. Instead, it is leaving it to the territorial units concerned — the city of Neubrandenburg and Berlin *Land* — to do so.

4. COMMENTS BY INTERESTED PARTIES

4.1. NEUWOGES

- (26) NEUWOGES submits that, in concluding the contracts at issue, it did not behave like a market economy operator (hereinafter: 'MEO') and thus granted BAVARIA an economic advantage that constitutes state aid within the meaning of Article 107(1) TFEU. NEUWOGES estimates that the contracts at issue resulted in losses amounting to EUR [...] in nominal terms and EUR [...] after discounting. These losses are viewed by NEUWOGES as constituting incompatible state aid to BAVARIA.
- (27) For the purpose of assessing the market conformity of the contracts at issue, NEUWOGES argues that the land-lease and sale contract and the general management contract must be examined separately from each other (section 4.1.1). With respect to the individual contracts, NEUWOGES asserts that neither the land-lease and sale contract (section 4.1.2) nor the general management contract (section 4.1.3) would have been concluded by a MEO. NEUWOGES submits further that a MEO would have chosen an alternative approach (section 4.1.4). Finally, NEUWOGES asserts that the advantage conferred on BAVARIA constitutes a transfer of state resources that was imputable to the city of Neubrandenburg (section 4.1.5).

⁽¹¹⁾ NEUWOGES first submitted that the total debt relief amounted to EUR [...] and the attributable share to EUR [...]. However, it later corrected the attributable share to EUR [...]. Assuming that this correction stemmed from a correction of the total debt relief, the latter amount was corrected accordingly.

⁽¹²⁾ See Rostock Regional Court, judgment of 28 November 2008 (hereinafter: 'Rostock Regional Court judgment', p. 24).

4.1.1. Joint versus separate assessment of the contracts at issue

- (28) NEUWOGES submits that, with respect to whether or not the contracts at issue were concluded under market conditions, the land-lease and sale contract and the general management contract must be assessed strictly independently of one another. According to NEUWOGES, the two contracts are each legally independent and were each intended to exist separately. NEUWOGES maintains that if the two contracts had in actual fact been intended to form a single unit, they would have both had to be notarised; however, only the land-lease and sale contract was notarised.
- (29) On the basis of these arguments, NEUWOGES proceeds to assess the market conformity of each contract separately.

4.1.2. Land-lease and sale contract

- (30) NEUWOGES is of the opinion that, in the light of the 1997 and 2007 valuations of the property (buildings and land) in question, no MEO would have concluded the land-lease and sale contract with BAVARIA at the agreed price. Neither the payment of rent for the land, nor the debt write-off pursuant to the Inherited Debt Support Law and resulting from the land-lease and sale contract, nor the obligation to modernise, nor the limited bidding process could cause this conclusion to be changed in any respect.

4.1.2.1. Purchase price

- (31) NEUWOGES points out that BAVARIA paid a cash amount of EUR [...] for the buildings plus EUR [...] as capitalised rent for the land. It further recalls that the two valuations, carried out in 1997 and 2007, estimated the value of the property as a whole (value of land and buildings combined) at EUR [...] and EUR [...] respectively. Finally, NEUWOGES recalls that each valuation estimated not only the total value of the property, but also the separate values of the land (1997 valuation: EUR [...]; 2007 valuation: EUR [...]) and of the buildings (1997 valuation: EUR [...]; 2007 valuation: EUR [...]).
- (32) Asserting that the 1997 valuation represents a realistic estimate of the property's value at the relevant time (1997/98), NEUWOGES argues that only the price actually paid by BAVARIA for the buildings (rather than the price for the buildings plus the capitalised land rent) should be taken into account for comparison purposes. Accordingly, NEUWOGES asserts that it received EUR [...] less than the market price at the relevant time (1997/98). It further argues that, even if, for the sake of argument, the debt write-off pursuant to the Inherited Debt-Support Law is added to the sales price, the price paid by BAVARIA would still remain 16 % lower than even the lower 2007 valuation. According to NEUWOGES, the price paid by BAVARIA was far below the market price, so that no MEO would have agreed to sell at this price.
- (33) In this context, NEUWOGES points out that, according to the 'Commission Communication on state aid elements in sales of land and buildings by public authorities' ⁽¹³⁾, a sale price that is up to 5 % lower than that calculated in an independent valuation can, under certain circumstances, be accepted as the market price. NEUWOGES argues that, *a contrario*, a price that, viewed in even the most positive light, is at least 16 % lower than the lowest valuation cannot be accepted as the market price.

4.1.2.2. Capitalised rent for the land

- (34) NEUWOGES submits that, for the purpose of comparing the price paid by BAVARIA with the prices calculated in the two valuations of 1997 and 2007 (which estimated the value of full ownership of the buildings and land), the capitalised rent for the first 30 years should not be taken into account. As this rent is paid for the right to use the land for 75 years, rather than for the ownership of the land, it cannot be relied on for the purpose of comparing the price paid for the buildings by BAVARIA and one or other of those estimated in the two valuations.

4.1.2.3. Debt write-off pursuant to the Inherited Debt Support Law

- (35) NEUWOGES argues further that, for the purpose of comparing the price paid by BAVARIA with the prices determined in the two valuations, the debt write-off, pursuant to the Inherited Debt Support Law, that resulted from the contracts at issue — amounting to EUR [...] — cannot be taken into consideration. The reasons are as follows:

— The debt write-off pursuant to the Inherited Debt Support Law is a benefit conferred on NEUWOGES by a third party (the Bank for Reconstruction), which has no connection with the buyer. There is no reason why a vendor should accept a price below the market price simply because the transaction will result in some additional benefits granted by a third party.

⁽¹³⁾ OJ C 209, 10.7.1997, p. 3.

- BAVARIA did not assume any responsibilities under the Inherited Debt Support Law that were previously incumbent on NEUWOGES and that would merit remuneration in the form of a lower sale price. While BAVARIA did formally assume the obligation to attempt to sell a number of apartments to the tenants, it charged NEUWOGES with actually carrying out the privatisation at NEUWOGES' own expense, and hence did not assume any real responsibility. Nor was BAVARIA at risk of being held liable if the privatisation efforts were to fail.
- Because the debt write-off was linked to NEUWOGES' fulfilling its obligation to privatise 15 % of its apartments and the BAVARIA deal satisfied only 20 % of the total privatisation obligation, a proportional allocation of the debt write-off facilitated by the deal is not realistically (as opposed to mathematically) possible. In other words: if NEUWOGES had not fulfilled its total privatisation obligation, it would not have received any benefit under the Inherited Debt Support Law from the BAVARIA deal.
- At most, the sale-and-lease-back transaction meant that NEUWOGES had to transfer only a comparatively low percentage (45 %, rather than 50 % or 55 %) of the revenue to the inherited debt relief fund, whereas not concluding the contract and searching for an alternative buyer would have involved the risk of having to divert a larger share of the sales revenue into the fund.
- In any event, NEUWOGES claims to have eventually fulfilled its privatisation obligation at a rate of 165 %, meaning that even without the BAVARIA deal the debt write-off would have been confirmed.

4.1.2.4. Modernisation

- (36) NEUWOGES further submits that it did not benefit from the modernisation carried out by BAVARIA, as BAVARIA was the owner of the buildings and thus the only beneficiary of the modernisation.

4.1.2.5. Bidding Process

- (37) NEUWOGES asserts that the limited bidding process carried out in 1997 cannot be invoked as an indication that the price paid by BAVARIA was in actual fact the market price. It submits that the bidding process was not open, transparent, unconditional and non-discriminatory, and is therefore insufficient for establishing the market value.

4.1.3. General Management Contract

- (38) NEUWOGES asserts that no MEO of similar size and in a similar situation would have concluded the general management contract, as it was clear from the outset that the contract would result in substantial losses. Specifically, NEUWOGES argues that losses were foreseeable from the start, as the calculations underlying the contract were based on assumptions about the future development of the rental market in Neubrandenburg that were clearly too optimistic. NEUWOGES also maintains that various allegedly similar contracts provided by BAVARIA for the purpose of comparison cannot prove the market conformity of the general management contract; NEUWOGES accepted this clearly disadvantageous contract only for political reasons, which are irrelevant in applying the MEO test.

4.1.3.1. The General Management Contract in the light of market expectations

- (39) NEUWOGES submits that the central provisions of the General Management Contract — a fixed monthly leasing payment that is increased annually by [...]%, a non-indexed cost deduction of initially approximately [...]% for costs (including [...]% risk of loss of rent), and a duration of 30 years — do not correspond to conditions that a MEO would have agreed to. More specifically, NEUWOGES asserts that:
- the low calculated risk of loss of rent of only [...]% of the net rent income imposes on NEUWOGES the financial risk of not being able to achieve an occupancy rate of at least [...]%;
 - the indexation of the fixed leasing payment by [...]% per year means that NEUWOGES bears the financial risk of not being able to impose annual rent increases corresponding to at least this rate;
 - since the costs are not independently indexed, NEUWOGES bears the financial risk of any increase in administration and maintenance costs, and only a rent increase of over [...]% per year could conceivably offset an increase in costs;
 - these financial risks are significant in the light of the long, 30-year, duration.
- (40) NEUWOGES argues that it was clear from the outset that these risks would materialise, leading to heavy losses, and that accordingly no MEO would have concluded the contract. According to NEUWOGES, a MEO would conclude only a contract that was profitable or that at least did not result in losses. NEUWOGES asserts that the general management contract could have been expected to result in a profit only if it had been reasonable to

expect that the high occupancy rate, annual rent increases of [...] % and stable costs could actually be achieved. According to NEUWOGES it was, however, already clear when the contract was concluded that an average occupancy rate of [...] % would not be achievable, that a rent increase of at least [...] % per year would be impossible, and that the administration and maintenance costs would inevitably increase over the duration of the contract. To support these assertions, NEUWOGES points to both the projected population decline and the real-estate market in Neubrandenburg, maintaining that, in the light of these factors, the contract was bound to result in a loss. Since Neubrandenburg's population was in decline even before the contracts at issue were concluded, there was a significant oversupply of apartments from at least 1995 onwards, with the unattractive prefabricated apartment blocks, which are the subject of the contract, being most affected by vacancies and low rents.

- (41) NEUWOGES alleges that a MEO would have based its calculations on more pessimistic expectations, such as projected annual rent increases of between [...] % and [...] %, a risk of loss of rent of [...] % and an indexation of the costs of [...] %. NEUWOGES presents an *ex post* cash-flow analysis prepared in 2012 demonstrating that, on the basis of these assumptions, the cash flow that would have been expected to result from the general management contract was EUR [...] in nominal terms and EUR [...] after discounting⁽¹⁴⁾. It is NEUWOGES' submission that this amount constitutes the state aid received by BAVARIA. A number of variations of this cash-flow analysis are also provided, showing that, even if more optimistic assumptions had been justified (such as an average vacancy rate of [...] %, annual rent increases of [...] % and an increase in costs of [...] %), the overall predicted cash flow would also have been negative. The general management contract would have been expected to result in a profit only if allegedly quite unrealistic assumptions had been accepted ([...] % vacancy rate, [...] % annual rent increase and [...] % increase in costs).

4.1.3.2. Comparison contracts

- (42) NEUWOGES disputes that certain contracts from similar transactions (the [...] ⁽¹⁵⁾, [...] ⁽¹⁶⁾ and [...] ⁽¹⁷⁾ contracts) can prove the market conformity of the general management contract. Rejecting suggestions that these contracts are comparable, NEUWOGES argues that they differ from the general administration contract in the following material respects:
- Since no evidence was presented that the economic situation and outlook of these cities (in which the properties to which the comparison contracts relate are located) were sufficiently similar to those of Neubrandenburg, it cannot be assumed that the contracts as a whole are comparable.
 - The indexation of the leasing payment in the comparison contracts differs significantly from that in the general management contract (i.e. 1,0-1,5 %).
 - None of the individual comparison contracts is suitable for comparison because the circumstances are different in each case ([...]: less onerous maintenance obligations; [...]: commercial properties rather than apartments, which had a vacancy rate of 0 % at the conclusion of the contract; [...]: the properties were located in a growth region).
- (43) Rather than proving the market-conformity of the general management contract, NEUWOGES submits that the comparison contracts demonstrate precisely its non-conformity, since they include less onerous provisions despite relating to property with a better economic outlook.

4.1.3.3. Political motivation

- (44) NEUWOGES submits that the general management contract, despite clearly being economically disadvantageous, was concluded for political reasons. After pointing out that the reasons for which a public authority grants state aid are not relevant to the legal assessment, NEUWOGES argues that the political motivation proves precisely that economic considerations were not the deciding factor. More specifically, NEUWOGES asserts that the general management contract was concluded for the following reasons:
- There was intense political pressure to promote both the modernisation and privatisation of apartments owned by local housing companies in the former East Germany.
 - By modernising and privatising apartments, the city of Neubrandenburg hoped to counteract the ongoing decrease in population numbers.

⁽¹⁴⁾ NEUWOGES based its calculations on a discount rate of 5 %.

⁽¹⁵⁾ General management contract with [...] dated 19 December 1997.

⁽¹⁶⁾ General management and rent guarantee contract with [...] dated 13 August 1998.

⁽¹⁷⁾ General management and rent guarantee contract with [...] property development company, dated 1 December 1999.

- Concluding the general management contract, in combination with the global lump-sum contract, maintained a high level of investment in Neubrandenburg, a fall in which would have had significant consequences for the local unemployment rate.

4.1.4. *Alternatives*

- (45) NEUWOGES finally submits that a MEO would have preferred alternatives to the contracts at issue.
- (46) First, NEUWOGES submits that an outright sale would have been preferable, since it would have generated a profit, whereas the general management contract could from the start have been expected to result in losses. It claims that the property (buildings and land) could have been sold at or above the price determined in the valuations. It is further claimed that even if a buyer had simply bought the land and demolished the buildings, such a sale would have been more profitable. This assessment would remain the same even if the debt write-off pursuant to the Inherited Debt Support Law were taken into account, since NEUWOGES could have attempted to fulfil its obligations by privatising other buildings and, even without the debt-write off, a sale would have been more profitable than the sale-and-lease-back transaction. NEUWOGES claims that the reasons for not choosing any of these alternatives are to be found in NEUWOGES' political commitments.
- (47) Second, NEUWOGES further argues that a MEO would also have preferred financing a more limited modernisation itself, continuing to rent without any modernisation, or demolishing the buildings. Again, the reasons for not choosing these alternatives lie in NEUWOGES' political commitments.
- (48) Finally, NEUWOGES maintains that, if a decision to modernise had been taken, it would have been more profitable for NEUWOGES to finance these works by other means. For instance, a loan could have been taken up for which a guarantee from the City of Neubrandenburg could have been secured, rendering the loan conditions more favourable than those of the BAVARIA deal.

4.1.5. *State resources and imputability*

- (49) NEUWOGES is of the opinion that the alleged advantage was granted through state resources and is imputable to the State.
- (50) First, NEUWOGES submits that the City of Neubrandenburg, which was its sole shareholder and dominated its supervisory board, had a dominating influence on NEUWOGES. Based on this control, the losses allegedly resulting from the sale-and-lease-back transaction constitute foregone state resources.
- (51) Second, NEUWOGES argues that, in this case, virtually all the indicators of imputability are present. It points out that the City of Neubrandenburg has far-reaching control over NEUWOGES, that serving the city's interests is of the utmost importance for NEUWOGES, that the transaction in question was concluded for political reasons, and that the evidence indicates that the City of Neubrandenburg had the final say on the sale-and-lease-back transaction.

4.2. BAVARIA

- (52) BAVARIA rejects NEUWOGES' submissions, arguing instead that the contracts at issue were normal market transactions not conferring an advantage and accordingly not constituting state aid. BAVARIA first asserts that the contracts at issue have to be seen as an economic unit (section 4.2.1); second, that the contracts as a whole were not such that no MEO would have agreed to them (section 4.2.2); third, BAVARIA asserts that the alternatives put forward by NEUWOGES would not have been more advantageous to NEUWOGES (section 4.2.3); finally, BAVARIA submits that no imputable transfer of state resources was involved (section 4.2.4).

4.2.1. *Joint versus separate assessment of the contracts at issue*

- (53) BAVARIA argues that the contracts at issue have to be seen as a unit and cannot be assessed in isolation from each other. The sale and subsequent lease-back of the buildings constitute two interdependent parts of one transaction. BAVARIA stresses that the transaction was advertised as a package and perceived as such by NEUWOGES, as evidenced by the internal minutes documenting its decision-making process.
- (54) In consequence — according to BAVARIA — the MEO test has to be applied to the transaction as a whole, not to each individual contract.

4.2.2. *The transaction did not confer an advantage upon NEUWOGES*

- (55) According to BAVARIA, the possible existence of an advantage is already excluded by the fact that NEUWOGES undertook a bidding process (albeit a limited one) in order to survey the market. It is asserted that there is no reason to doubt that NEUWOGES chose the economically most advantageous offer available.

- (56) BAVARIA considers that, in order to determine whether, regardless of the bidding process, a MEO would have engaged in the transaction, the particular situation of NEUWOGES has to be taken into account. This included the need to take up capital as well as to modernise the apartments in order to privatise them (while maintaining moderate rents) and obtain the debt write-off pursuant to the Inherited Debt Support Law. In the light of these factors, BAVARIA asserts that a MEO finding itself in the same circumstance would also have engaged in the transaction.
- (57) Regarding the provisions in the general management contract and the risks associated with a worse-than-expected development of the real-estate market in Neubrandenburg (such as a higher-than-expected vacancy rate, etc.), BAVARIA argues that the risk of not being able to achieve the desired rent and occupancy rate was not *imposed* on NEUWOGES, but rather *remained* with NEUWOGES. If NEUWOGES had not undertaken the transaction with BAVARIA, it would also have had to bear the consequences of a worse-than-expected development of the market.
- (58) With respect to the individual provisions of the general management contract, BAVARIA submits that the average rent per m² underlying the calculation of the leasing payment was actually slightly lower than what could have been expected in the light of the relevant rent table for Neubrandenburg. BAVARIA further stresses that the same rent table assumed increasing rents for the period after 1 January 2000, with the result that expecting a rent increase of [...] % per year was not unrealistic.
- (59) Moving on to the land-lease and sale contract, BAVARIA stresses that no direct comparison can be made with the 1997 and 2007 valuations, since these valuations concerned an outright sale, whereas the land-lease and sale contract, while constituting a sale of the buildings, involved only the creation of a ground lease on the land. As the ownership of the land remained with NEUWOGES, the value of the land as stated in the valuations could not be considered. BAVARIA further maintains that, in any event, the valuations have no continuing significance since they determined only the theoretical value of the property, not the actual market value.
- (60) BAVARIA further submits that the debt write-off obtained through the transaction has to be considered. It submits that securing this write-off pursuant to the Inherited Debt Support Law was one of NEUWOGES' goals in entering into the transaction at issue.
- (61) BAVARIA also submits that, apart from the precise conditions of the land-lease and sale contract and the general management contract, the advantages obtained by NEUWOGES through the global lump-sum contract must be considered. BAVARIA maintains that NEUWOGES insisted on charging its subsidiary BRG with the modernisation of the properties, bearing in mind that NEUWOGES would receive all profits made by BRG (but was also liable to cover any losses). In this light, the profits generated from the contract with BRG, EUR [...], have to be considered a relevant benefit for NEUWOGES.
- (62) As regards the overall logic of the sale-and-lease-back model, BAVARIA submits, finally, that it is only natural that NEUWOGES has to repay BAVARIA's initial investment plus interest. Indeed, BAVARIA refers to the minutes of NEUWOGES' internal decision-making process to show that the latter was perfectly aware that the purpose of the leasing payment was to pay back BAVARIA's initial investment.

4.2.3. Alternatives

- (63) With respect to the alternatives that NEUWOGES puts forward and believes would have been economically more advantageous, BAVARIA submits that these alternatives were either not actually available or not more advantageous. First, with respect to the alleged option of selling directly to the tenants, BAVARIA argues that it is very unlikely that NEUWOGES would have succeeded in selling unmodernised flats, but that it was at the same time lacking the funds to finance the necessary modernisation. Second, as regards financing the modernisation with a loan, BAVARIA claims that NEUWOGES would have had all the same risks and costs it had under the BAVARIA deal. Additionally, selling modernised apartments, either directly to the tenants or to a commercial buyer, would not have been attractive, since NEUWOGES would have had to pass on a significant percentage of the higher price to the inherited debt relief fund.

4.2.4. State resources and imputability

- (64) BAVARIA finally submits that the transaction does not involve state resources and is not imputable to the State. In particular, it argues that NEUWOGES is a normal company governed by private law that does not receive any state funds, directly or indirectly. The general control exercised by the supervisory board, which is dominated by representatives of the City of Neubrandenburg, is insufficient to impute the transaction to the State. NEUWOGES' argument, according to which the City of Neubrandenburg urged NEUWOGES to conclude this transaction for political reasons, is not plausible.

4.3. CITY OF NEUBRANDENBURG

- (65) The City of Neubrandenburg, the owner of NEUWOGES, submits that the contracts at issue involve state aid. While the city endorses the arguments put forward by NEUWOGES, it presents its own reasoning with regard to a number of points.

4.3.1. *Advantage*

- (66) First, Neubrandenburg maintains that the land-lease and sale contract and the general management contract must be assessed separately, since the contracting parties carefully kept them apart, both in a legal and an economic sense. Second, Neubrandenburg refers to NEUWOGES' arguments regarding the forecast decrease in its population which, it maintains, a MEO would have taken into account. Neubrandenburg also stresses that high vacancy rates would have been clearly foreseeable by a MEO. Third, Neubrandenburg asserts that the modernisation commissioned by BAVARIA was of such a basic nature that it did not justify the expectation of high occupancy rates and large rent increases.
- (67) Moreover, Neubrandenburg rebuts the additional arguments put forward by BAVARIA. Most relevantly, it argues that the bidding process cannot be taken as an indicator that BAVARIA's offer was the best available on the market. In any event, it submits that a MEO would not have accepted BAVARIA's offer even if it had indeed been the best offer available on the market. As regards alleged alternatives, Neubrandenburg essentially seizes on the arguments put forward by NEUWOGES. With regard to the valuations and BAVARIA's argument that the estimated prices could not have been achieved, Neubrandenburg asserts that, since it is no longer possible to ascertain what price NEUWOGES could actually have obtained on the market in 1998, the valuation has to be used as an indication of the market price at the relevant time.

4.3.2. *State resources and imputability*

- (68) The City of Neubrandenburg argues that the transaction is imputable to it, since it exercised a sufficient degree of control over NEUWOGES in general and over the sale-and-lease-back transaction in particular.
- (69) As its sole shareholder, the City of Neubrandenburg claims to have had full control over NEUWOGES. In particular, NEUWOGES' management was duty-bound to follow the City's directives. Furthermore, eight of the ten members of NEUWOGES' supervisory board are representatives of the City, giving the latter another mechanism through which it can exert its control. In fact, the City of Neubrandenburg was under a legal duty under regional law to ensure that it could exercise appropriate influence over NEUWOGES.
- (70) As regards the transaction in question, the City of Neubrandenburg claims that not only did it have the ability to exert control, but that it actually did so in this transaction. Neubrandenburg is of the view that, inter alia, the minutes of the supervisory board demonstrate the close involvement of city representatives, and that a decision of that board was necessary before the transaction could be concluded. With regard to the terms of the transaction, Neubrandenburg submits that the City demanded that local political interests had to be satisfied.
- (71) In conclusion, the City of Neubrandenburg submits that the City's control over the sale-and-lease-back transaction, and its responsibility for this, is borne out by the facts, so that the transaction must be imputed to it.

4.4. BERLIN LAND

- (72) Berlin Land, which is closely connected to BAVARIA ⁽¹⁸⁾, submits that the contracts at issue do not contain any state aid component as no advantage was conferred upon BAVARIA.

4.4.1. *Advantage*

- (73) Berlin first argues that the contracts at issue have to be viewed as one transaction, as they formed mutually complementary parts of a sale-and-lease-back transaction. Berlin asserts that they were also treated as such by NEUWOGES itself.
- (74) Regarding the MEO test, Berlin submits that, considering NEUWOGES' economic position at the relevant time (1997/98) and the type of transaction it sought (privatisation in compliance with the conditions under the Inherited Debt Support Law in order to secure the debt write-off, modernisation and continued administration of the apartments, and the maintenance of moderate rents), BAVARIA offered a balanced solution.

⁽¹⁸⁾ See recital 12.

- (75) More particularly with regard to the land-lease and sale contract, Berlin first argues that the bidding process undertaken by NEUWOGES demonstrates that NEUWOGES considered BAVARIA's offer to be the best financing offer available on the market at the relevant time (1997/98). Second, it submits that the debt write-off pursuant to the Inherited Debt Support Law must be considered, since compliance with the privatisation obligation under that law was a central motivation of NEUWOGES. Third, Berlin underlines that it was in NEUWOGES' economic interest to sell at a relatively low price (by selling unmodernised buildings with the obligation to modernise, rather than undertake the modernisation itself and then sell), since a lower price meant that less money had to be passed on to the inherited debt relief fund.
- (76) With respect to the general management contract, Berlin first argues that the comparison contracts demonstrate that neither the duration nor the indexation of the leasing payment by [...] % per year were uncommon. Second, the indexation is justified in the light of the average inflation rate at the relevant time (1997/98). Third, the rent per m² was within the applicable rent table rates for Neubrandenburg.

4.4.2. State resources and imputability

- (77) Like BAVARIA, Berlin *Land* argues that the City of Neubrandenburg did not fund NEUWOGES. Rather, it argues, only revenue generated from its own activities was available to NEUWOGES, over which the local authorities had no direct control.
- (78) As regards imputability, Berlin asserts that it is not plausible to maintain that the City of Neubrandenburg decided to grant aid to a real-estate fund from Berlin, to the detriment of its own local housing company. Further, it alleges that there are no sufficient indications that the City of Neubrandenburg intended the conclusion of the contracts to be imputed to it.

5. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (79) In its decision opening the formal investigation procedure, the Commission took a preliminary position on a range of issues and called on interested parties to submit information with respect to three issues in particular.
- (80) First, the Commission provisionally accepted that the land-lease and sale contract and the general management contract have to be assessed as a unit, not in isolation from each other, as both were integral parts of a real estate sale-and-lease-back transaction⁽¹⁹⁾. It concluded that the assessment of a potential economic advantage was therefore based on an analysis of the returns that NEUWOGES could have expected in 1998 from the joint conclusion of the land-lease and sale contract and the general management contract⁽²⁰⁾.
- (81) As regards the land-lease and sale contract in particular, the Commission expressed two doubts:
- First, clarification was required as to whether the debt write-off pursuant to the Inherited Debt Support Law could be taken into account in the assessment⁽²¹⁾.
 - Second, the Commission sought further information on the differences between the 1997 and 2007 valuations, asserting that without further clarification it was impossible to determine which, if any, represented the actual market value of the property in 1997/98⁽²²⁾.
- (82) With respect to the general management contract, the Commission reasoned first that the comparison contracts indicated that the conditions agreed between NEUWOGES and BAVARIA were not unusual on the market at the relevant time (1997/98)⁽²³⁾. The Commission asserted, second, that the — albeit limited — bidding process carried out by NEUWOGES demonstrates that NEUWOGES had the ability to inform itself in the market and take an economically rational decision⁽²⁴⁾. Third, the Commission referred to the fact that the contractually agreed rent level for 2008 actually corresponded to the average rent in the relevant neighbourhood in 2008 or was only slightly below this⁽²⁵⁾.
- (83) Despite the fact that all these factors pointed towards the conclusion that the general management contract did conform to normal market conditions, the Commission solicited further information about the actual expectations of participants in the real estate market in 1998 in order to analyse the respective arguments in more depth⁽²⁶⁾.

⁽¹⁹⁾ Opening Decision, recital 46.

⁽²⁰⁾ Opening Decision, recital 47.

⁽²¹⁾ Opening Decision, recital 55.

⁽²²⁾ Opening Decision, recital 56.

⁽²³⁾ Opening Decision, recital 60 et seq.

⁽²⁴⁾ Opening Decision, recital 62.

⁽²⁵⁾ Opening Decision, recital 64.

⁽²⁶⁾ Opening Decision, recital 66.

- (84) The Commission finally examined the cash-flow analysis submitted by NEUWOGES, ultimately coming to the conclusion that, due to methodological deficiencies, the analysis could not prove an economic advantage in favour of BAVARIA ⁽²⁷⁾.
- (85) In conclusion, the Commission decided that, on the basis of the submitted information, it could not prove that BAVARIA had been granted an economic advantage ⁽²⁸⁾. However, it indicated its intention to analyse the participants' arguments in more depth and called upon all interested parties to provide additional useful information ⁽²⁹⁾.

6. NATIONAL COURT PROCEEDINGS

- (86) On 28 November 2008, Rostock Regional Court issued its judgment in first-instance proceedings between BAVARIA and NEUWOGES. BAVARIA had initiated the proceedings as, from October 2006 onwards, NEUWOGES had refused to pay the monthly leasing payment agreed in the general management contract, arguing that the contract was void because it contained illegal state aid.
- (87) In its judgment, Rostock Regional Court reasoned that the land-lease and sale contract and the general management contract had to be viewed as a unit and not in isolation, as they both formed part of one and the same sale-and-lease-back transaction ⁽³⁰⁾.
- (88) With respect to the land-lease and sale contract, Rostock Regional Court first calculated the annual rent for the land over the first 30 years of the contract, arriving at a figure of [...] % per year. The court expressed the view that this did not constitute inappropriately low remuneration since NEUWOGES received the ground rent for the first 30 years upfront and could invest it, which would not have been the case if the rent had been paid on a yearly basis ⁽³¹⁾.
- (89) Rostock Regional Court further affirmed that the debt write-off obtained by NEUWOGES under the sale-and-lease-back transaction had to be taken fully into account, as the transaction created the conditions allowing for the debt write-off to be secured ⁽³²⁾. When the debt write-off is added to the purchase price for the buildings, the resulting figure is only 16 % lower than that determined for the buildings in the 2007 valuation and is thus not disproportionate to the buildings' value ⁽³³⁾. The court finally reasoned that NEUWOGES had an interest in a low purchase price, as a lower purchase price reduced BAVARIA's overall investment volume and the corresponding leasing payment ⁽³⁴⁾. Additionally, it held that a lower purchase price was also beneficial since NEUWOGES' payment obligations towards the inherited debt relief fund depended on the price obtained in the sale ⁽³⁵⁾.
- (90) As regards the general management contract in particular, Rostock Regional Court began by expressing the view that a duration of 30 years was not uncommon in real-estate leasing transactions ⁽³⁶⁾. Second, it considered that the contractually agreed leasing payment of initially EUR [...] per m² was not disproportionate to the average rents for comparable buildings at the relevant time (1997/98) ⁽³⁷⁾. Rostock Regional Court further considered that the yearly increase in the leasing payment by [...] % was justified, having regard to average inflation between 1970 and 1998 (i.e. 3,52 % per year) ⁽³⁸⁾. In addition, the court remarked that the actual development of rents in the relevant neighbourhoods over the first 10 years of the contract roughly corresponded to the contractually agreed increase. Third, the court maintained that the costs of administration and maintenance had been calculated according to the applicable legislation and did not indicate an advantage for BAVARIA ⁽³⁹⁾.
- (91) With respect to the risk of loss of rent of [...] %, Rostock Regional Court was of the opinion that, under any lease, the lessee has to bear the risk of whether the leased object can be used as intended ⁽⁴⁰⁾. The court supported this conclusion by arguing that no credit institution would accept responsibility for whether or not the property for which a loan was taken out could be used as intended.

⁽²⁷⁾ Opening Decision, recital 68.

⁽²⁸⁾ Opening Decision, recital 69.

⁽²⁹⁾ Opening Decision, recital 70.

⁽³⁰⁾ Rostock Regional Court, p. 18.

⁽³¹⁾ Rostock Regional Court, pp. 23-24.

⁽³²⁾ Rostock Regional Court, pp. 24-25.

⁽³³⁾ Rostock Regional Court, p. 26.

⁽³⁴⁾ Rostock Regional Court, p. 26.

⁽³⁵⁾ Rostock Regional Court, p. 26.

⁽³⁶⁾ Rostock Regional Court, p. 19.

⁽³⁷⁾ Rostock Regional Court, pp. 19-20.

⁽³⁸⁾ Rostock Regional Court, p. 20.

⁽³⁹⁾ Rostock Regional Court, pp. 20-21.

⁽⁴⁰⁾ Rostock Regional Court, p. 21.

- (92) Rostock Regional Court finally compared the average leasing rate resulting from the sale-and-lease-back transaction with the interest rates on traditional loans. Arguing that the average yearly leasing interest rate was at [...] % per year, Rostock Regional Court held that this could not be said to have been disproportionate to the likely development of interest rates for building loans, which could be as high as 10 % per year ⁽⁴¹⁾.
- (93) In conclusion, Rostock Regional Court found that BAVARIA had not been granted an advantage, as a MEO would also have concluded the contracts in question ⁽⁴²⁾.
- (94) NEUWOGES appealed against this judgment, and proceedings before the Rostock Higher Regional Court are pending.
- (95) Additionally, BAVARIA initiated proceedings before Greifswald Administrative Court, seeking to obtain a ruling granting it access to all files held by NEUWOGES or the City of Neubrandenburg in relation to the contracts in question. BAVARIA claimed to have previously attempted to obtain such access by means of a freedom of information application, which was, however, rejected by Neubrandenburg on the basis of the argument that BAVARIA already had access to all relevant documents in the context of the proceedings before the Rostock Regional Court and Higher Regional Court and the European Commission ⁽⁴³⁾. The case before the Greifswald Administrative Court is also still pending.

7. ASSESSMENT OF THE MEASURE

7.1. EXISTENCE OF AID UNDER ARTICLE 107(1) TFEU

- (96) Article 107(1) TFEU provides that ‘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’. Accordingly, a measure constitutes state aid if the following four cumulative conditions are met:
 - (a) The measure confers a selective economic advantage upon an undertaking.
 - (b) The measure is imputable to the State and financed through state resources.
 - (c) The measure distorts or threatens to distort competition.
 - (d) The measure has the potential to affect trade between Member States.
- 7.1.1. *Selective advantage conferred upon an undertaking: general principles*
- (97) According to the settled case-law of the Court of Justice, the conditions that a measure must meet in order to be regarded as ‘aid’ within the meaning of Article 107 TFEU are not met if the recipient undertaking, in circumstances corresponding to normal market conditions, could have obtained the same advantage as that made available to it through state resources. In order to assess whether the same measure would have been adopted in normal market conditions by a MEO in a situation as close as possible to that of the State, only the benefits and obligations linked to the capacity of the State as shareholder — to the exclusion of those linked to its capacity as a public authority — are to be taken into account ⁽⁴⁴⁾.
- (98) The applicability of the MEO test ultimately depends on the Member State concerned having conferred, in its capacity as an economic operator and not in its capacity as public authority, an economic advantage on an undertaking. It follows that, if a Member State relies on that principle during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that it took the measure in its capacity as an economic operator. That evidence must show clearly that, before or at the same time as conferring the economic advantage, the Member State concerned took the decision to carry out a commercial operation in respect of the undertaking by means of the measure actually implemented. In that regard, it may be necessary to produce evidence showing that the decision was based on economic evaluations comparable to those that a rational private operator in a situation as close as possible to that of the Member State would have had carried out before making the investment, in order to determine the future profitability of that investment.
- (99) By contrast, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a MEO, it is not enough to rely on economic evaluations made after the advantage was conferred, or on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen ⁽⁴⁵⁾.

⁽⁴¹⁾ Rostock Regional Court, pp. 22-23.

⁽⁴²⁾ Rostock Regional Court, p. 26.

⁽⁴³⁾ BAVARIA submission of 18 June 2012, pp. 4-5.

⁽⁴⁴⁾ Case C-124/10 P *Commission v EDF*, not yet reported, paragraphs 78 and 79.

⁽⁴⁵⁾ Case C-124/10 P, paragraphs 81 to 85.

- (100) It follows from the foregoing, first, that the documents presented by the parties that post-date the adoption of the measure cannot be taken into account as such for the application of the MEO test in this case.
- (101) It follows from the above, second, that the effect of the Inherited Debt Support Law on the financial situation of NEUWOGES cannot be taken into account either for the application of the MEO test in this case. Indeed, the Inherited Debt Support Law pursued a public policy purpose, and only a limited category of companies (Section 2 of the Inherited Debt Support Law) was eligible for the benefits awarded by it. This law would not have been applicable to a MEO in a situation as close as possible to NEUWOGES.

7.1.2. Structure of the assessment in the present case

- (102) In order to determine whether the contracts at issue have granted an advantage to BAVARIA, it must be determined whether those contracts fell within the range of transactions a MEO in a situation as close as possible to NEUWOGES' would have engaged in.
- (103) The Commission's assessment comprises three steps. First, as a preliminary step, the financial implications of the transaction for NEUWOGES are analysed to determine what profits it could expect to obtain from the transaction (section 7.2). Second, in order to determine whether any available alternative would have been economically more attractive, the sale-and-lease-back transaction is compared to other options, such as a direct sale (section 7.3). Third, a benchmarking exercise is carried out by comparing the transaction in question with similar sale-and-lease-back transactions concluded around the same time, by analysing the results of a limited bidding process carried out by NEUWOGES, and by comparing the terms of the transaction with the standard interest rates of other financing transactions available at the relevant time (late 1997/early 1998) (section 7.4). Taken together, these three levels of analysis enable a conclusion to be drawn concerning whether NEUWOGES behaved like a MEO.

7.2. THE FINANCIAL IMPLICATIONS OF THE TRANSACTION FOR NEUWOGES

- (104) The first step in the analysis of the financial implications of the transaction under scrutiny is to determine the nature of the transaction. In this case, the question revolves mainly around whether the two contracts concluded between NEUWOGES and BAVARIA constitute two parts of an integrated, single transaction or whether they must be assessed as separate transactions (section 7.2.1). Second, in order to facilitate a proper assessment of the financial impact of the transaction on NEUWOGES, the particular nature of a sale-and-lease-back operation is examined (section 7.2.2). After the financial impact of the land-lease and sale contract (section 7.2.3) and the general management contract (section 7.2.4) has been separately analysed in depth, a global assessment of the profitability to be expected from the transaction for NEUWOGES is undertaken (section 7.2.5).

7.2.1. Joint versus separate assessment of the contracts in question

- (105) It should first be pointed out that both the Commission's Opening Decision and Rostock Regional Court's judgment concluded that the two contracts in question had to be analysed in conjunction with one another ⁽⁴⁶⁾. The formal investigation confirmed that finding, for the following reasons:
- (a) The two contracts constitute mutually complementary parts of a single sale-and-lease-back transaction. The leaflet produced by BAVARIA, advertising its particular sale-and-lease-back model, indicated that the transaction would be implemented via two contracts, one regulating the sale and one the lease-back ⁽⁴⁷⁾. The two contracts were then always referred to as one package transaction.
- (b) The contracts were concluded on the same day (21 January 1998) and refer to one another ⁽⁴⁸⁾, indicating their close connection and the fact that neither of the contracts would have been concluded without the other.
- (c) The terms of the contracts are inseparably linked to one another, as is evidenced by BAVARIA's original price calculation, submitted by NEUWOGES ⁽⁴⁹⁾. The amount of the upfront cash payment depended on the leasing payment to be paid on a monthly basis by NEUWOGES and BAVARIA's investment in the modernisation of the buildings. Indeed, in a sale-and-lease-back transaction, the leasing payment serves to repay the lessor's

⁽⁴⁶⁾ See recitals 80 and 87 above.

⁽⁴⁷⁾ BAVARIA leaflet, 'Leasingmodell Immobilien', p. 4.

⁽⁴⁸⁾ See, for example, Part I (3) of land-lease and sale contract; Preamble to the general management contract.

⁽⁴⁹⁾ NEUWOGES' submission of 17 July 2012, Annex 1.

original investment. This means that, if the provisions of the general management contract had been different, the figures in the land-lease and sale contract would have changed as well, and *vice versa* ⁽⁵⁰⁾.

- (d) The minutes of NEUWOGES' supervisory board meetings show that the two contracts were always considered by NEUWOGES as forming part of one single transaction ⁽⁵¹⁾. For instance, the submissions to the supervisory board meetings of 30 October 1997 and 16 December 1997 state that the financing of the purchase price by the buyer is based on a leasing model, showing that NEUWOGES was well aware of the connection between the land-lease and sale contract and the general management contract. Similarly, during the meeting on 16 December 1997, the management of NEUWOGES explained to the supervisory board that the payment negotiated with BAVARIA was the price that could be achieved for this 'package' and that the 'package' entailed some risks for the company, which were, however, bearable. The reference to the 'package' and the risk involved again demonstrates that both contracts were perceived as a single transaction.
- (106) NEUWOGES' arguments relating to the failure to have one of the contracts in question notarised are unpersuasive. NEUWOGES' main argument is that this failure to notarise demonstrates the intention of the parties to conclude two separate, mutually independent contracts. The Commission points out that, as state interventions take various forms and must be assessed in relation to their effects, it cannot be excluded that several consecutive measures of state intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another ⁽⁵²⁾. The notion of a single transaction for the purpose of EU state aid law is therefore broader than the notion of a single transaction under German contract law. The considerations listed in recital 105 show that, based on the chronology, the purpose, and the circumstances of the undertaking at the time the contracts in question were concluded, those contracts have to be regarded as a single transaction for the purpose of EU state aid law.

7.2.2. Background: how the sale-and-lease-back transaction works

- (107) The transaction between BAVARIA and NEUWOGES is based on BAVARIA's real-estate leasing model (*Leasingmodell Immobilien*). The basic formula underlying this model is that the buyer (BAVARIA) finances its original investment by leasing the purchased buildings back to the seller (NEUWOGES). To determine the investment volume and the corresponding leasing payments, the leasing model uses a simple formula, by which the investment volume is calculated by dividing the nominal yearly leasing payment by the leasing rate (expressed as a %):

$$\text{Investment Volume} = \text{Monthly Leasing Payment} \times 1\,200 / \text{Leasing Rate}$$

$$\text{Monthly Leasing Payment} = \text{Investment Volume} \times \text{Leasing Rate} / 1\,200$$

The leasing rate, in turn, results from a combination of the duration of the contract, the indexation of the leasing payment, and the residual value of the buildings:

Leasing Rate (%):

Duration: 25 years

Indexation	Residual Value (%)						
	0	1	1,5	2	2,5	3	3,5
10	8,385	7,687	7,35	7,02	6,701	6,39	6,068
50	7,80	7,149	6,836	6,53	6,232	5,943	5,661
100	7,066	6,478	6,194	5,917	5,647	5,384	5,129

⁽⁵⁰⁾ See also BAVARIA Leaflet 'Leasingmodell Immobilien', pp. 8, 10.

⁽⁵¹⁾ Submission 110/97 to the meeting of NEUWOGES' supervisory board on 30 October 1997; minutes of the meeting of NEUWOGES' supervisory board on 30 October 1997; submission 114/97 to the meeting of NEUWOGES' supervisory board on 12 December 1997; minutes of the meeting of NEUWOGES' supervisory board on 16 December 1997.

⁽⁵²⁾ Case 399/10 P — *Bouygues and Bouygues Télécom v Commission and Others*, not yet reported, paragraphs 103 and 104.

Duration: 30 years

Indexation	Residual Value (%)						
	0	1	1,5	2	2,5	3	3,5
10	7,94	7,196	6,83	6,488	6,148	5,81	5,498
50	7,552	6,844	6,503	6,177	5,847	5,53	5,229
100	7,069	6,464	6,08	5,774	5,47	5,17	4,893

- (108) It is, then, clear that the investment volume depends on the leasing rate as well as on the monthly leasing payments and *vice versa*. Once the participants in the transaction have chosen the basic parameters (duration, yearly indexation, residual value) and either the target overall investment volume or the intended monthly leasing payments, the missing parameters can be calculated. The formula is such that a shorter duration, a lower residual value, a lower indexation or lower nominal monthly leasing payments will all lead to a lower total investment volume.
- (109) Once the overall investment volume has been determined, the costs for modernisation, taxes and other potential costs are deducted. The remaining amount represents the purchase price. In the NEUWOGES/BAVARIA sale-and-lease-back transaction, this purchase price (upfront cash payment) does not differentiate between the price paid for the ownership of the buildings and the rent for the land.

Calculation underlying the BAVARIA — NEUWOGES transaction

Total Investment Volume	EUR [...]
Modernisation	EUR [...]
Taxes and Fees	EUR [...]
Privatisation Remuneration	EUR [...]
Purchase Price	EUR [...]

- (110) The sale-and-lease-back transaction in question consists of two elements, the land-lease and sale contract and the general management contract, which are in turn related to the global lump-sum contract. The financial implications of the land-lease and sale contract, the general management contract, and the global lump-sum contract for NEUWOGES have to be evaluated in this light.

7.2.3. Determining the likely financial impact of the land-lease and sale contract on NEUWOGES

- (111) The central components of the land-lease and sale contract are the sale of the buildings and the creation of a 75-year ground lease on the land on which they stand. BAVARIA committed itself to paying a total of EUR [...] to NEUWOGES, of which EUR [...] constituted capitalised rent on the land for the period up to 31 December 2028 and EUR [...] constituted the purchase price for the buildings⁽⁵³⁾. From 1 January 2029, for a period of 10 years, BAVARIA will also have to pay an annual rent of [...] % of the current land value, which has been calculated at EUR [...] per m² or EUR [...] per year⁽⁵⁴⁾. From 2039 onward, and until the land-lease and sale contract expires at the end of 2073, an adaptation of the rent to the total cost-of-living index is provided for, insofar as the latter fluctuates by more than [...] %⁽⁵⁵⁾.
- (112) In addition to purchasing the buildings and acquiring a ground lease on the underlying land, BAVARIA accepted the obligation to modernise the buildings, agreeing to enter into a contract with NEUWOGES' subsidiary, BRG, for the construction works.
- (113) To determine the purchase price to be paid by BAVARIA to NEUWOGES under the land-lease and sale contract, the parties assumed a monthly leasing payment of EUR [...] per m², an indexation of [...] % per year, a residual

⁽⁵³⁾ Part IV, Section 1 of the land-lease and sale contract.

⁽⁵⁴⁾ Part III, Section 10(2) of the land-lease and sale contract.

⁽⁵⁵⁾ Part III, Section 10(3) of the land-lease and sale contract.

value of the buildings of [...] % (to be paid by NEUWOGES after the expiration of the 75-years ground lease contract and based on an expert evaluation at that time), and a duration of 30 years for the lease-back ⁽⁵⁶⁾ The total investment volume resulting from these assumptions was EUR [...] ⁽⁵⁷⁾. After the deduction of modernisation costs of EUR [...], privatisation costs of EUR [...] and taxes/fees of EUR [...], the resulting sale price was set at EUR [...] ⁽⁵⁸⁾.

Monthly Leasing Payment $\times$ 1 200/Leasing Rate = Investment Volume

EUR [...] $\times$ 1 200/[...] = EUR [...]

- (114) This final price was then separated into the price of the buildings ([...] % = EUR [...]) and the capitalised rent for the land ([...] % = EUR [...]) ⁽⁵⁹⁾. The amounts allocated to the land and the buildings were not calculated separately, but rather set as portions of the overall sale price.
- (115) The first benefits that NEUWOGES derived from the transaction were therefore the cash payment of EUR [...] and, starting after 30 years, the income from the rent on the land to be paid by BAVARIA.

7.2.3.1. Other factors

Privatisation remuneration

- (116) Before proceeding, it must be observed that the cash payments of EUR [...] made by BAVARIA to NEUWOGES as privatisation remuneration must in any case be taken into account.
- (117) As the buyer of the buildings and lessee of the land, BAVARIA had to undertake clearly prescribed efforts to sell a portion of the apartments to the tenants pursuant to the contracts at issue. That condition had been included in the contract so that a sale could be accepted as 'mediated privatisation' for the purposes of the Inherited Debt Support Law. Under that law, a commercial buyer had to attempt to sell as large as possible a portion — at least one third — of the apartments acquired in the transaction to the tenants ⁽⁶⁰⁾. This obligation involved making efforts to inform the tenants of their options and gauge their interest in buying apartments. The task of making such efforts was effectively transferred back to NEUWOGES through the land-lease and sale contract (Part V Sections 1-3), and a remuneration for NEUWOGES of EUR [...] per m² was agreed, resulting in a total remuneration for the privatisation effort of EUR [...].
- (118) Initially, it was not intended that NEUWOGES would receive any remuneration for the privatisation efforts, and the amounts later paid as a separate remuneration for the privatisation efforts were simply part of the originally envisaged sale price ⁽⁶¹⁾. Indeed, it did not make sense for BAVARIA to remunerate NEUWOGES for performing activities in which BAVARIA had no commercial interest. Obtaining the debt relief pursuant to the Inherited Debt Support Law, for which engaging in the privatisation efforts was necessary, was solely in NEUWOGES' economic interest.
- (119) However, the remuneration for the privatisation efforts was later deducted from the sale price and paid separately, presumably because maintaining it as part of the sale price would have meant its having to be transferred to the inherited debt relief fund. The sale price paid by BAVARIA to NEUWOGES was reduced by the corresponding amount. From BAVARIA's perspective, this change made no economic difference. NEUWOGES received exactly the same amount of funds from BAVARIA as it would have received if no separate privatisation remuneration had been agreed. Indeed, NEUWOGES itself included the privatisation payments in the revenue to be derived from the sale-and-lease-back transaction ⁽⁶²⁾.
- (120) The handling of these payments as a separate fee rather than as part of sale price was relevant for NEUWOGES only against the background of the Inherited Debt Support Law. However, as explained above (in recital 101), a MEO would not have taken the Inherited Debt Support Law into account. The fact that NEUWOGES engaged in the privatisation efforts and expended resources on them is not relevant in this context. A MEO not acting against the backdrop of the Inherited Debt Support Law would not have engaged in privatisation efforts, which is why they cannot be taken into account in applying the MEO test.

⁽⁵⁶⁾ Sections 2-4 of the general management contract.

⁽⁵⁷⁾ NEUWOGES' submission of 17 July 2012, Annex 1.

⁽⁵⁸⁾ NEUWOGES' submission of 17 July 2012, Annex 1.

⁽⁵⁹⁾ See letter from NEUWOGES to BAVARIA of 24 November 1997, p. 2.

⁽⁶⁰⁾ See Part IV Section 3 of the land-lease and sale contract in connection with Part V Sections 3, 4 EBv.

⁽⁶¹⁾ See BAVARIA's submission of 22 April 2013, Annex 12.

⁽⁶²⁾ See submission 114/97 to the meeting of NEUWOGES' supervisory board on 12 December 1997.

- (121) Accordingly, the remuneration for privatisation efforts paid by BAVARIA to NEUWOGES has to be considered a relevant benefit for NEUWOGES and one that has to be added to the sale price in order to determine the total financial impact of the sale-and-lease-back transaction on NEUWOGES.

Modernisation

- (122) The modernisation carried out in the context of the sale-and-lease-back transaction had further financial implications for NEUWOGES. It must be pointed out that the modernisation costs were directly related to the payment by BAVARIA to NEUWOGES under the land-lease and sale contract. This payment resulted from a calculation of the total investment volume minus the costs, including modernisation costs (see recital 109 above). In other words: the higher the modernisation costs, the lower the purchase price. It is for this reason that in an alternative calculation of the transaction, in which lower rent levels, a lower indexation and thus significantly lower leasing payments were assumed, the purchase price was still above that of the actual land-lease and sale contract, mostly because the modernisation costs in this alternative calculation were assumed to be much lower than eventually agreed between BAVARIA and BRG ⁽⁶³⁾.
- (123) Against this background, it should be noted that the lump-sum modernisation payment made by BAVARIA to NEUWOGES' wholly owned subsidiary BRG under the global lump-sum contract was much higher than the modernisation costs originally estimated by NEUWOGES ⁽⁶⁴⁾. While NEUWOGES' original estimate assumed total costs of EUR [...] or EUR [...] per m², the lump-sum modernisation costs finally agreed between BAVARIA and NEUWOGES' subsidiary BRG amounted to EUR [...] or EUR [...] per m². In other words, the agreed costs exceeded the originally estimated costs by EUR [...] or [...]%. The significantly higher agreed lump-sum costs significantly reduced the payment by BAVARIA to NEUWOGES under the land-lease and sale contract.
- (124) No explanation was provided for this divergence between the originally estimated costs and the agreed lump-sum payment. This is particularly surprising in view of NEUWOGES' original assertion that the estimated modernisation costs averaging EUR [...] per m² were 'common' or 'usual' costs[...] ⁽⁶⁵⁾. The study 'Between Modernisation and Demolition: Prefabricated Apartment Blocks in East Germany' (hereinafter: the 'Pestel study'), submitted by NEUWOGES, also estimated the costs of a modernisation similar to that carried out by BRG at between EUR [...] per m² and EUR [...] per m² ⁽⁶⁶⁾. As the owner and administrator of the buildings, NEUWOGES had intimate knowledge of the modernisation needs, and it is hard to see why it would have originally underestimated these so drastically.
- (125) The modernisation costs must be taken into account in determining the financial impact of the land-lease and sale contract. First of all, it is clear that it was irrelevant to BAVARIA itself what modernisation costs NEUWOGES' subsidiary, BRG, would charge it, simply because all additional modernisation costs would simply be set off against the purchase price. NEUWOGES, on the other hand, had a manifest economic interest both in having BAVARIA contract with BRG to undertake the modernisation works and in shifting part of the sale price onto the modernisation costs. The reason for the latter consideration is that profits made from the modernisation by NEUWOGES' subsidiary were not subject to the transfer obligations under the Inherited Debt Support Law. According to its own estimates, the profits earned by BRG (and hence NEUWOGES) from the BAVARIA modernisations amounted to EUR [...] ⁽⁶⁷⁾. These profits constitute a direct benefit for NEUWOGES that must be taken into account. In justifying the sale price, NEUWOGES' management too stressed that BRG was contracted to carry out the modernisation works ⁽⁶⁸⁾.

Ground rent

- (126) Moving on to the ground rent, it is important to address NEUWOGES' argument that BAVARIA did not effectively have to pay any rent for the first 30 years, since the capitalised rent for the land was included in the sale price. However, whether the ground rent is paid on a yearly basis or upfront as capitalised rent is hardly decisive for this assessment. There is no indication that such an arrangement was irrational; it merely expressed a preference for upfront liquidity on the part of NEUWOGES.
- (127) Finally, it must not be forgotten that BAVARIA is under the obligation to pay the ground rent even after the general management contract expires. From 1 January 2029, for a period of 10 years, BAVARIA will have to pay an annual rent of [...] % of the current land value, which has been set at EUR [...] per m². For the subsequent remaining term, an adaptation of the ground rent to the total cost-of-living index is provided for, as

⁽⁶³⁾ BAVARIA's submission of 18 June 2012, Annex 11.

⁽⁶⁴⁾ See letter from NEUWOGES to BAVARIA of 7 March 1997 and BAVARIA's first offer in response thereto (BAVARIA's submission of 18 June 2012, Annexes 9 and 10).

⁽⁶⁵⁾ See letter from NEUWOGES to BAVARIA of 7 March 1997 (BAVARIA's submission of 18 June 2012, Annex 9).

⁽⁶⁶⁾ Pestel-Study (NEUWOGES' submission of 17 July 2012, Annex 2), p. 68 ('Sanierungsstufe 2').

⁽⁶⁷⁾ NEUWOGES' submission of 27 September 2012, Annex.

⁽⁶⁸⁾ Submission 114/97 to the meeting of NEUWOGES' supervisory board on 12 December 1997, p. 3.

long as the latter fluctuates by more than [...]%. Assuming for the sake of simplicity that the cost-of-living index will not fluctuate, these future payments will have a nominal value of EUR [...]. For an overall evaluation, the discounted value in 1998 of these future payments must also be considered as part of the benefit received by NEUWOGES.

7.2.3.2. Conclusions

- (128) It must be pointed out that it was the purpose of the foregoing analysis to determine the financial impact of the land-lease and sale contract on NEUWOGES as accurately as possible. This analysis leads to the conclusion that the relevant benefits received by NEUWOGES include:

- (a) the cash price paid by BAVARIA (EUR [...]);
- (b) the fee paid for the privatisation efforts (EUR [...]);
- (c) the profits earned from the modernisation (EUR [...]);
- (d) the cash value of the ground rent after 2029 (EUR [...], after discounting).

7.2.4. Determining the likely financial impact of the general management contract on NEUWOGES

- (129) Under the general management contract, NEUWOGES is responsible for managing the buildings in question. In return for the right to keep all income generated from renting the apartments and commercial space, NEUWOGES has to pay the owner (BAVARIA) a fixed monthly leasing payment, set at EUR [...] until the completion of the modernisation works, and EUR [...] thereafter (Section 3 of the general management contract). The contract has a duration of 30 years from the completion of the modernisation works (Section 2.1). The monthly leasing payment is indexed at [...] % per year (Section 4.2). The purpose of the following analysis is to determine the financial impact of the general management contract on NEUWOGES.

7.2.4.1. Background (Calculations)

- (130) The monthly leasing payment is the result of multiplying the likely net rent per m² and per month — reduced by the costs of administration and maintenance and taking account of the risk of loss of rent — by the number of m² available ⁽⁶⁹⁾. The central assumptions are, then, the likely net rent per m² and per month, and the likely costs. In the general management contract, the parties assumed net rent levels of EUR [...] per m² after modernisation and costs of EUR [...] per m², leading to the monthly leasing payment being set at EUR [...] per m² ⁽⁷⁰⁾.

$(\text{Average rent/m}^2 - \text{Administration Costs} - \text{Maintenance Costs} - \text{Risk of loss of Rent}) \times \text{Total m}^2 = \text{Monthly Leasing Payment}$

$(\text{EUR [...] - EUR [...] - EUR [...] - EUR [...]}) \times \text{EUR [...] = EUR [...]}$

- (131) In setting the particular parameters that were eventually included in the general management contract, NEUWOGES had a choice ⁽⁷¹⁾. By setting a different rent level or a higher indexation, it could precisely determine its monthly payments over the duration of the contract and the price it would obtain from the sale ⁽⁷²⁾. There was, then, a direct correlation between assuming a higher or lower risk in setting a particular leasing payment (e.g. by setting different rent levels, indexation, and costs) and the liquidity received in the form of the sale price. For example, in an alternative calculation provided by BAVARIA, which assumes an indexation of 2,0 %, rent levels of EUR [...] and hence a leasing payment of EUR [...], the monthly leasing payment would have amounted to EUR [...] instead of EUR [...] ⁽⁷³⁾. Of course, the sale price would have been lower as well.

⁽⁶⁹⁾ Cf. NEUWOGES' submission of 17 July 2012, Annex 1.

⁽⁷⁰⁾ Ibid.

⁽⁷¹⁾ BAVARIA submits that NEUWOGES freely chose the relevant parameters. See BAVARIA's submission of 22 April 2013, para. 23. See, in addition, the letter from NEUWOGES to BAVARIA of 6 May 1997 (BAVARIA's submission of 18 June 2012, Annex 1a), where NEUWOGES asks BAVARIA to prepare the contracts with a 30-year duration, [...] % indexation of the leasing payment and [...] % residual value.

⁽⁷²⁾ It is important to note in this context that the monthly leasing payment, together with the yearly indexation (here, [...] % per year), the duration of the contract (here, 30 years), and the residual value of the buildings (here, [...] %), result in the overall investment volume. This means that, where lower rent levels, higher costs, or a lower indexation are chosen, the overall investment level is reduced. Considering, further, that the sale price is a direct consequence of the total investment volume minus the modernisation costs, privatisation costs and taxes/fees, the sale price is directly dependent on the rent level, costs, indexation, etc.

⁽⁷³⁾ BAVARIA's submission of 18 June 2012, Annex 11.

7.2.4.2. Financial impact analysis

General considerations

- (132) In determining the financial impact of the general management contract on NEUWOGES, it is important to note two considerations. First, the leasing payment is calculated on a per m² basis. Since a number of apartments were sold by BAVARIA after the conclusion of the contract, the relevant amount changed from, initially, [...] m² to [...] m² in 1999, [...] m² in 2000, and [...] m² in 2001. After 2001, the relevant amount remained stable at [...] m². In its submissions, NEUWOGES used these progressively decreasing amounts of m² to calculate projected financial flows. As only the *ex-ante* perspective is important, NEUWOGES should not have reduced the overall amount of m² underlying its calculations by the amount actually sold thereafter, but by the amount it expected, in early 1998, to be sold thereafter. Accordingly, the following analysis will not be based on the numbers used in NEUWOGES' submissions; rather, it will use the numbers that NEUWOGES included in its original profit projection, which assumed a progressive reduction from [...] m² to [...] m² until 2003. Second, to determine the financial impact of the contract for NEUWOGES, expected when the transaction was concluded, future income and costs must be discounted, requiring a discount rate to be set. In line with its original letter and the cash-flow analyses provided by NEUWOGES, the Commission assumes the discount rate to be 5 % per year ⁽⁷⁴⁾.

Reliability of NEUWOGES' cash-flow analyses

- (133) Before proceeding to provide an independent economic analysis of the general management contract, it is first necessary to comment on the *ex post* cash-flow analyses provided by NEUWOGES, which are supposed to demonstrate the cash-flow that a prudent MEO would have expected the general management contract to generate *ex ante*. NEUWOGES argues that under realistic *ex ante* assumptions — claimed by NEUWOGES to be an increase of rent of [...] % per year, an indexation of costs of [...] % per year and a vacancy rate of [...] % — the general management contract would, *ex ante*, have been expected to lead to a total negative cash-flow of EUR [...] in nominal terms and of EUR [...], discounted ⁽⁷⁵⁾. NEUWOGES also submits that only where allegedly unrealistic *ex ante* assumptions are made — rent increase of [...] % per year, vacancy rate of [...] %, and stable costs — could the general management contract have been expected to result in a positive value of EUR [...] in nominal terms and EUR [...], after discounting ⁽⁷⁶⁾. On this basis, NEUWOGES submits that it was clear, *ex ante*, that rent increases of [...] % would have to be enforced every year simply to cover the leasing payment, leaving no room for increases in costs.
- (134) It must be observed in this respect that NEUWOGES makes assumptions about the cost levels that are unpersuasive (and the initial cost levels are the same in all the analyses provided by NEUWOGES). The calculations underlying the general management contract, as concluded, assume total costs (administration, maintenance, risk of loss of rent) amounting to some [...] % of the rent. In contrast, NEUWOGES' cash-flow analyses assume an initial cost level (after modernisation) of not less than [...] % ([...] % risk of loss of rent, [...] % administration and maintenance). Even if the dramatic increase in loss of rent (from [...] % to [...] %) is ignored, there is an increase in other costs from [...] % to [...] % of the rent. NEUWOGES' submissions do not adequately explain why this increase would be necessary. On the contrary, NEUWOGES states that the level of [...] % (EUR [...] per m²) was plausible for the period directly after the modernisation, but would then increase every year by [...] % ⁽⁷⁷⁾. Similarly, the valuation commissioned by NEUWOGES before the sale assumed total cost levels (including risk of loss of rent ⁽⁷⁸⁾) of between [...] % and [...] % (1997 valuation). As the valuation does not specify what percentage is allocated to loss of rent, it is not possible to determine how its basic assumptions regarding other costs depart from those of NEUWOGES. In any event, even if one were to assume that the 1997 valuation was based on an estimate of risk of loss of rent of [...] %, the other costs assumed by NEUWOGES are higher. In the light of this, NEUWOGES' cash-flow analyses cannot be accepted and must be corrected on the basis of an initial cost level of [...] % excluding risk of loss of rent ⁽⁷⁹⁾.

⁽⁷⁴⁾ The Commission's own reference discount rate for the relevant period is 5,94 % (http://ec.europa.eu/competition/state_aid/legislation/reference_rates_eu15_en.pdf). However, since the Opening Decision assumed a discount rate of 5 %, and given that NEUWOGES adopted this rate in its own calculations, the Commission has decided to continue assuming a discount rate of 5 %.

⁽⁷⁵⁾ NEUWOGES' submission of 17 July 2012, Annex 7.

⁽⁷⁶⁾ NEUWOGES' submission of 17 July 2012, Annex 8(e).

⁽⁷⁷⁾ NEUWOGES' submission of 17 July 2012, p. 60.

⁽⁷⁸⁾ See Section 18 of the Land Valuation Order (*Wertermittlungsverordnung*) of 6 December 1988, BGBl. I, p. 2209.

⁽⁷⁹⁾ The Commission notes that NEUWOGES, in its cash-flow analyses, already indexed the costs for 1999. The Commission, however, only started indexing the costs from 2000 onwards. The reason is that cost calculations were done with the post-modernisation period in view, and this period started in 1999. Likewise, NEUWOGES argued in its submission that the cost level was reasonable immediately after the modernisation, i.e. in 1999. In the light of this, it is more appropriate to start increasing the costs only from 2000 onwards.

- (135) In the light of this, it must further be remarked that NEUWOGES' submission that rent increases of [...] % would need to be enforced to cover the increase in the leasing payment alone is erroneous. Since the leasing payment is calculated as a percentage of the original overall rent (here [...] %), a rent increase of [...] % would allow *both* the increase in the leasing payment *and* an increase in the costs by [...] % to be covered. Where the costs are stable, a smaller rent increase would already suffice to offset the increase in the leasing payment. In fact, assuming a risk of loss of rent of [...] % and otherwise stable costs, a yearly rent increase of [...] % would suffice to cover the increase in the leasing payment. Any increase over and above that would be available for NEUWOGES to offset rising costs or make a profit.

Financial impact analysis

- (136) When entering into the contract, NEUWOGES itself undertook a nominal cash-flow analysis ⁽⁸⁰⁾. In this analysis, it assumed that its own costs (administration, maintenance) would rise by [...] % p.a., that it could increase the rent by [...] % every three years, that it could maintain a vacancy rate of [...] % and that [...] % of the apartments would be sold on to the tenants. On this basis, NEUWOGES expected a nominal cash-flow of EUR [...] to be generated by the general management contract over its duration of 30 years.
- (137) The formal investigation procedure has revealed no reason to believe that these calculations were made on the basis of expectations *known* to be too optimistic. No evidence has been submitted that the NEUWOGES representatives who presented these figures to NEUWOGES' board did so believing they were inaccurate. In fact, it appears that NEUWOGES does not allege that its managers were consciously entering into a disadvantageous transaction for political reasons, but rather that an erroneous assessment was made of the economic implications (which, in NEUWOGES' submission, a MEO would have avoided) ⁽⁸¹⁾.
- (138) Nevertheless, it is necessary to enquire whether these expectations were such that a MEO would not have based its decision on them. In this context, it is noted that NEUWOGES submits that a MEO would have expected a rent increase of merely [...] % p.a., a risk of loss of rent of [...] % and an increase in administration and maintenance costs of [...] % ⁽⁸²⁾. On the basis of these assumptions, NEUWOGES claims that the total cash flow would be EUR – [...] in nominal terms and EUR – [...] after discounting, with the more than sevenfold increase in the loss of rent having the most significant impact.

7.2.4.3. Market expectations

- (139) As a first step, reference is made to the documents providing information as to the actual expectations of the two parties to the transaction. First, the minutes of the supervisory board meeting of 16 December 1997 demonstrate that NEUWOGES' managers considered the risks involved in the transaction as 'bearable' ⁽⁸³⁾. On the basis of these minutes, it is, furthermore, clear that NEUWOGES acted on the basis of calculations that assumed a rent increase of [...] % every three years, an increase in costs (without reference to the risk of loss of rent) of [...] %, and a risk of loss of rent of [...] % ⁽⁸⁴⁾.
- (140) NEUWOGES consulted the auditor Nordrevision before signing the contracts, which estimated that a rent increase of [...] % corresponded to the general inflation rate, but would probably not be achievable ⁽⁸⁵⁾. It also took the view that, while the initial costs were reasonable under the assumption of no vacancies (the calculations were based on an estimate of costs of [...] % of the rent), an indexation of those costs in line with that of the indexation of the leasing payment was necessary ⁽⁸⁶⁾.
- (141) BAVARIA, for its part, assumed that, on the basis of an expectation that the population of Neubrandenburg would remain stable (due to the establishment of various big service providers) ⁽⁸⁷⁾ and the good location of the buildings, a very low vacancy rate could be expected ⁽⁸⁸⁾. It further assumed that rent increases in line with the indexation of the leasing payments would be achievable ⁽⁸⁹⁾.

⁽⁸⁰⁾ See Submission 114/97 to the meeting of NEUWOGES' supervisory board on 12 December 1997, Annex 6.

⁽⁸¹⁾ See, for example, NEUWOGES' submission of 5 November 2007, p. 4.

⁽⁸²⁾ NEUWOGES' submission of 17 July 2012, p. 61.

⁽⁸³⁾ Minutes of NEUWOGES' supervisory board meeting of 16 December 1997, p. 5.

⁽⁸⁴⁾ See submission 114/97 to the meeting of NEUWOGES supervisory board on 12 December 1997, Annex 6.

⁽⁸⁵⁾ Letter from Nordrevision to NEUWOGES of 20 November 1997 (NEUWOGES' submission of 25 April 2007, Annex 13), p. 3.

⁽⁸⁶⁾ Ibid.

⁽⁸⁷⁾ It should be noted that in 1997/1998, the City of Neubrandenburg and Mecklenburg-Vorpommern *Land* assumed that the population numbers would remain stable. See Germany's submission of 4 September 2007, p. 6.

⁽⁸⁸⁾ Proposed Decision for BAVARIA's Product Committee meeting of 13 September 1997 (BAVARIA's submission of 22 April 2013, Annex 15), p. 2.

⁽⁸⁹⁾ Ibid, p. 3.

- (142) Finally, it should be pointed out that the valuation of the property commissioned by NEUWOGES before the sale contains information about relevant expected developments. The 1997 valuation assumed cost levels of between [...] % and [...] %, but did not specify what percentage is allocated to the risk of loss of rent ⁽⁹⁰⁾.

7.2.4.4. Assessment

Administration costs

- (143) First, the expectations regarding the costs of administration and maintenance, both as regards their initial level (EUR [...] per m², or [...] % of the rent) and the expected increase ([...] % p.a.) appear reasonable. As regards the initial cost level, this finding results from NEUWOGES' own statement that, at least for the period directly following the modernisation, these costs had been set at a sufficiently high level. Secondly, the Pestel study states that, in 1997, the costs of administration and maintenance would on average amount to EUR [...] per m², which is EUR [...] lower than the provision for the same costs in the sale-and-lease-back transaction ⁽⁹¹⁾. Finally, the costs assumed in the expert valuation were also in this range. While an increase in these costs could certainly be expected, it would appear that assuming an increase of [...] % p.a. was reasonable, even somewhat cautious. Nordrevision had suggested keeping such an indexation of the administration costs in line only with the indexation of the leasing payment, namely an annual increase of [...] %, lower than that actually assumed by NEUWOGES. Incidentally, an indexation of [...] % is what NEUWOGES itself now submits could reasonably have been expected, demonstrating that [...] % p.a. was certainly not unreasonably low.

Risk of loss of rent

- (144) With respect to the risk of loss of rent, it was not unreasonable to expect a general loss of rent level of [...] %. First, it must be noted that Nordrevision did not question this level in its assessment of the contracts, despite expressing other concerns about the general economic situation and the real-estate market in Neubrandenburg ⁽⁹²⁾. Second, the 1997 valuation, despite not specifying the assumed risk of loss of rent, does not appear to assume significantly higher risks of loss of rent ⁽⁹³⁾.
- (145) BAVARIA's internal decision-making documents indicate that BAVARIA assumed that, in view of the variety of large services providers established in Neubrandenburg, the population of the city would probably remain stable and that almost all the apartments in question could be rented out after they had been modernised. Indeed, according to NEUWOGES, in 1997/98 the City of Neubrandenburg and Mecklenburg-Vorpommern *Land* assumed stable population numbers and stable income development.
- (146) Finally, the fact cannot be ignored either that NEUWOGES' management, which ran an undertaking that owned more than 30 % of the apartments in Neubrandenburg and thus had intimate knowledge of the local real-estate market, judged the risks involved in the sale-and-lease-back transaction to be bearable and based its own projections on a risk of loss of rent of [...] %. It is not clear why these experts in the local real-estate market would have based their calculations on this assumption if it had been as unreasonably low as NEUWOGES now claims.
- (147) At the same time, account has to be taken of the documents provided by NEUWOGES in connection with the issue of whether a prudent participant in the relevant real-estate market (prefabricated apartment blocks in East Germany) would have expected higher vacancy rates, in so far as the documents date from before the conclusion of the sale-and-lease-back transaction. Of the studies provided, only the Pestel study dates from before the conclusion of the contracts at issue. In this context it must be observed, however, that the Pestel study concerns East Germany as a whole and does not take into account the specific local conditions in Neubrandenburg — a state of affairs that limits its probative value in the present context. While the study points to some general problems in the East German real-estate market, the study in itself is not sufficient to establish that a MEO would not have based its investment decision on an assumed risk of loss of rent of [...] %.

⁽⁹⁰⁾ See NEUWOGES' submission of 5 November 2007, Annexes 1 and 5.

⁽⁹¹⁾ Pestel study, p. 62.

⁽⁹²⁾ Letter from Nordrevision to NEUWOGES of 20 November 1997 (NEUWOGES' submission of 25 April 2007, Annex 13), p. 3.

⁽⁹³⁾ It should be noted that, if the 1997 valuation assumed a higher risk of loss of rent, this would in turn mean that it assumed correspondingly lower administration and maintenance costs.

Rent

- (148) Moving on to the rent, it must first be observed that NEUWOGES has not submitted that the expected rent levels after modernisation were set too high. It claims, rather, that these could not be increased by as much as expected. In the light of Rostock Regional Court's finding that the average rent level of EUR [...] per m², on which the general management contract is based, was within the range set by the applicable rent table ⁽⁹⁴⁾, it can be concluded that the initial average rent level was set at a realistic level.
- (149) As regards indexation of the agreed leasing payment, there is no direct evidence of what average increase of rent was generally expected in 1998. Nordrevision remarked only that the [...] % per year originally set corresponded to the general inflation rate, but was not likely to be achievable in Neubrandenburg ⁽⁹⁵⁾. The fact that NEUWOGES did eventually agree to an indexation of 'only' [...] % and expected to be able to enforce rent increases of [...] % every three years (or [...] % p.a.) appears to demonstrate that it took this warning into account. The valuations did not explicitly express any expectation about future rent increases. It must, nevertheless, be noted that since the valuations did not make explicit assumptions about inflation and rent development, the underlying assumption is that the rent increase and general inflation (which had been around 3,5 % in the preceding decades) would converge ⁽⁹⁶⁾. Rostock Regional Court was of the opinion that the indexation was justified in light of the average annual inflation rate of 3,52 % in the 28 years before the conclusion of the contracts ⁽⁹⁷⁾. It further remarked that the development of rents was obviously difficult to predict over a period of 30 years, but that it could not recognise a clear disproportion between the indexation of the leasing payment and the development of rent levels to be expected.
- (150) The Pestel study submitted by NEUWOGES does not provide any data on what participants in the East German real-estate market actually expected, and contains no specific data on Neubrandenburg. Nevertheless, it points towards a potentially difficult market in East Germany. However, in the light of the remaining evidence, it again fails to demonstrate that agreeing an indexation of the leasing payments of [...] % p.a. and expecting to be able to enforce rent increases of [...] % p.a. was unreasonable.

Duration

- (151) As regards, finally, the duration of the contract, Rostock Regional Court reasoned that certain leasing contracts are marked by long durations (of up to 30 years) and that the contract in question is not necessarily uncommon ⁽⁹⁸⁾. While the 30-year duration did, of course, involve some risks, it also offered the possibility of making stable profits and having high certainty regarding the costs. In addition, a longer duration also meant that the monthly lease payments necessary to pay back the buyer's investment were lower, or that the sale price was higher with equal leasing payments than if a shorter duration had been chosen ⁽⁹⁹⁾. In this light, agreeing on a duration of 30 years does not seem unreasonable.

7.2.4.5. Conclusion

- (152) Based on these considerations, it appears that the expectations expressed by NEUWOGES in its original calculation cannot be said to have been unreasonable. Accordingly, in light of the evidence presented, it was reasonable for NEUWOGES to expect to make a profit within the framework of the general management contract. If the nominal expected profits are discounted to the relevant time (early 1998), it turns out that NEUWOGES acted on the basis of assuming that the general management contract had a cash value of EUR [...].

7.2.5. Overall assessment

- (153) As the Commission had already reached the conclusion that the land-lease and sale contract and the general management contract formed part of one integrated business transaction, the cash values of both contracts have to be added together to determine the total value of the transaction for NEUWOGES. To recap: under the land-lease and sale contract NEUWOGES could expect the following benefits:

- (a) the cash price paid by BAVARIA (EUR [...]);
- (b) the fee paid for the privatisation efforts (EUR [...]);

⁽⁹⁴⁾ Rostock Regional Court, pp. 19-20.

⁽⁹⁵⁾ Letter from Nordrevision to NEUWOGES of 20 November 1997 (NEUWOGES' submission of 25 April 2007, Annex 13), p. 3.

⁽⁹⁶⁾ In contrast, where the rent is expected to increase more slowly than general inflation, either due to non-indexed rent contracts or market developments, it is common practice to increase the property interest (*Liegenschaftszins*) by a margin reflecting the expected divergence between rent increase and inflation.

⁽⁹⁷⁾ Rostock Regional Court, p. 20.

⁽⁹⁸⁾ Rostock Regional Court, p. 19.

⁽⁹⁹⁾ For instance, the initial leasing rate would have been [...] % rather than [...] % if a duration of 20 instead of 30 years had been chosen.

(c) the profits earned from the modernisation (EUR [...]);

(d) the cash value of the ground rent after 2029 (EUR [...], after discounting).

- (154) In addition, it was assumed (as established in section 7.2.4 above) that, based on NEUWOGES' reasonable expectations, the general management contract had a discounted cash value of EUR [...]. Thus, the sale-and-lease-back transaction had a total value of EUR [...] for NEUWOGES.

7.3. COMPARISON WITH ALTERNATIVE BUSINESS OPTIONS

- (155) To determine whether NEUWOGES' decision to engage in the sale-and-lease-back transaction fell within the range of economic behaviour that a rational market economy operator would have reasonably engaged in, the value of that transaction must now be compared to that of alternative business options. If NEUWOGES had had an alternative that was economically more advantageous, the decision to engage in the sale-and-lease-back transaction could not be said to be one that a MEO would have taken.
- (156) In this context, it should be noted that neither renting the buildings without first modernising them, nor demolishing them, would have been viable business alternatives. First, renting without modernisation would have resulted in limited revenues, and it was clear that unmodernised buildings would more often be left vacant than modernised buildings⁽¹⁰⁰⁾. There is thus no solid basis for concluding that the profits derived from continuing to rent unmodernised buildings could have been expected to exceed those obtained under the sale-and-lease-back transaction. Likewise, demolition would have created no revenue, but would have involved demolition costs. Thus, nor can demolition qualify as a viable alternative at the relevant time (1997/98).

7.3.1. *Loan alternative*

- (157) A first possible alternative to consider would have been loan financing. If NEUWOGES had financed the modernisation of the buildings in question via a loan, it could have obtained some of the same profits it received from the sale-and-lease-back transaction. In the first place, it would have been able to rent out the modernised buildings, thereby generating a good revenue stream. In addition — and in contrast to the position under the sale-and-lease-back transaction — it would have remained the owner of the buildings.
- (158) However, it is also clear that loan financing would have involved certain disadvantages. First, NEUWOGES would have had to provide 30 % of the investment volume from its own capital, as NEUWOGES considered that it had to maintain a capital ratio of 30 %⁽¹⁰¹⁾. In late 1997, the NEUWOGES supervisory board discussed lowering the capital ratio in order to facilitate more investment. This proposal was, however, rejected by the management as impossible from an economic point of view, since it would have led to an unacceptable degree of indebtedness⁽¹⁰²⁾. The management explained that reducing the capital ratio from 30 % to 25 % would not be feasible (degree of indebtedness)⁽¹⁰³⁾. Mr Räuber, a member of NEUWOGES' supervisory board, further stated that reducing the capital ratio was unthinkable in terms of business economics. The company's commitments had to be serviced⁽¹⁰⁴⁾. In order to finance the modernisation investment of EUR [...], NEUWOGES would therefore have had to contribute EUR [...] in own capital. It is highly doubtful that this amount of own capital was immediately available. It is clear from the supervisory board minutes that the possible total investment volume for 1998 (including loans) was approximately EUR [...], which was already earmarked for other projects⁽¹⁰⁵⁾. It is clear, then, that NEUWOGES could have resorted to a loan to finance the modernisation only if it had abandoned other projects.
- (159) In contrast to loan financing, the sale-and-lease-back transaction had the advantage not only of not requiring NEUWOGES to invest own capital, but also of supplying fresh liquidity in addition to wholly financing the modernisation of the buildings.
- (160) Taking all these considerations into account, it cannot be regarded as established that a loan-financed modernisation would have either been available or, if so, more beneficial to NEUWOGES than the BAVARIA deal. The fact that NEUWOGES was unlikely to have the own capital necessary for obtaining the loan and that it could use the additional liquidity to finance other investments are apt to lead to the conclusion that choosing the sale-and-lease-back transaction over loan financing was a sensible decision.

⁽¹⁰⁰⁾ See, for example, valuation GA 22b/07 (NEUWOGES' submission of 5 November 2007, Annex 5), p. 19: 'If the building is to be leased in the long term, modernisation and repairs are urgently needed. ... Unmodernised buildings, in particular, are apt to remain vacant.'

⁽¹⁰¹⁾ Minutes of NEUWOGES' supervisory board meeting of 16 December 1997, p. 3.

⁽¹⁰²⁾ Minutes of NEUWOGES' supervisory board meeting of 16 December 1997, p. 3.

⁽¹⁰³⁾ Minutes of NEUWOGES' supervisory board meeting of 16 December 1997, p. 3.

⁽¹⁰⁴⁾ Minutes of NEUWOGES' supervisory board meeting of 16 December 1997, p. 2.

⁽¹⁰⁵⁾ Minutes of NEUWOGES' supervisory board meeting of 30 October 1997, p. 3.

7.3.2. Outright sale alternative

- (161) A second serious alternative would have been an outright sale of both building and land. The crucial question is whether such a sale would have been more beneficial.

7.3.2.1. Assessment in the light of the 1997 and 2007 valuations

- (162) In attempting to compare the value of the sale-and-lease-back transaction for NEUWOGES and the benefits it could have obtained from an outright sale, the crucial question is what price NEUWOGES could have obtained from a 'normal' sale. The two valuations, from 1997 and 2007, have a certain role to play in this context.
- (163) NEUWOGES commissioned the two studies for the purpose of estimating the 1997 value of the property (buildings and land) in question. One study was carried out by an in-house expert in 1997, and the other retrospectively by an independent expert in 2007. The 1997 valuation estimated the value at EUR [...], whereas the 2007 study resulted in an estimate of EUR [...] ⁽¹⁰⁶⁾. Both studies included separate valuations of the buildings (1997: EUR [...]; 2007: EUR [...]) and the land (1997: EUR [...]; 2007: EUR [...]). Both studies are based on essentially the same methodology, the gross rental method (*Ertragswertverfahren*).
- (164) The Commission considers that, since the 2007 valuation was prepared only after the sale-and-lease-back transaction took place, it cannot be relied upon for determining the value of the property in 1997, as known to NEUWOGES at the time. NEUWOGES could not, then, have based its decision on whether or not to engage in the sale-and-lease-back transaction with BAVARIA on the retrospective 2007 valuation.
- (165) At the same time, the Commission considers that the 1997 valuation is not a reliable indicator either of the value of the property in 1997, as known to NEUWOGES at that time, since the formal investigation procedure has revealed that NEUWOGES' management was well aware that the 1997 valuation was unreliable at the time at which it entered into the contracts under investigation. The following observations are instructive:

(a) Rent

The 1997 valuation assumes rent levels of between EUR [...] and EUR [...] per m². At the same time, the first rent table for the City of Neubrandenburg, valid from 1 January 1998 onward and based on 1997 data, indicated average rent levels for modernised apartments of between EUR 3,90 and EUR 4,38 per m². NEUWOGES, as a large real-estate company active in Neubrandenburg, would necessarily have been aware of the average rent levels in the city, and ought therefore to have based its evaluation of the property on this data. Indeed, the sale-and-lease-back contract envisaged average rent levels of EUR [...] per m² for the period after modernisation (i.e. from 1999 onwards and thus two years later than the data underlying the first rent table). This figure was in line with the rent table.

(b) Modernisation costs

While the 1997 valuation was carried out in the spring of 1997 and assumed total modernisation costs of EUR [...], NEUWOGES' management indicated in a letter to BAVARIA written *at the same time* (March 1997) that it estimated the modernisation costs at EUR [...]. It is thus clear that NEUWOGES was well aware that the 1997 valuation severely underestimated the necessary modernisation costs. The lump sum agreed between BAVARIA and NEUWOGES' subsidiary, BRG, for the modernisation of the property was significantly higher still (EUR [...]), demonstrating that, when NEUWOGES concluded the contracts with BAVARIA, it knew that the 1997 valuation had underestimated the modernisation costs by almost EUR 10 million.

(c) Remaining useful life

With the envisaged modernisation in view, the 1997 valuation estimated the remaining useful life to be between 55 and 70 years. It must be noted in this context that the low estimated modernisation costs in the 1997 valuation do not fit easily with the assumption that the modernisation would significantly extend the economic lifespan of the buildings.

⁽¹⁰⁶⁾ NEUWOGES' submission of 5 November 2007, Annexes 2 and 6.

(d) Land value

It must be noted that, in evaluating the land in question, the 1997 valuation did not take into account value-reducing factors (in contrast, they were taken into account in the 2007 valuation). Such factors include existing infrastructure that cannot be moved or removed (sewage systems, pipes) and the fact that the plot of land was of an inconvenient shape. These factors typically lead to a reduction in the value of the land. As the owner of the land, NEUWOGES must have been aware of these factors and must therefore have known that the 1997 valuation overestimated the land value.

- (166) In conclusion, NEUWOGES was demonstrably aware that some of the key assumptions underlying the 1997 valuation, especially regarding the modernisation costs, were unreliable. The Commission therefore concludes that the 1997 valuation is not a reliable indication of the value of the property in 1997, as known to NEUWOGES at the time.
- (167) At the same time, the Commission is of the opinion that, on the basis of the information available to NEUWOGES at the relevant time, the *ex-ante* estimate of the property value that a MEO in the position of NEUWOGES might reasonably have obtained would probably have been very similar to that contained in the retrospective 2007 valuation. As happened with the retrospective 2007 valuation, a MEO in the position of NEUWOGES would have based its *ex ante* expectations regarding achievable rent on the relevant rent table, would have estimated the modernisation costs as being closer to those agreed between BAVARIA and BRG, and would have adjusted the land value by taking into account value-reducing factors of which it was aware. In addition, a MEO in the position of NEUWOGES would have carefully evaluated the remaining useful life in the light of the envisaged modernisation and of comparison data (as was done in the 2007 evaluation), so that it is reasonable to conclude that a MEO in the position of NEUWOGES would have based its valuation on estimates of the remaining useful life similar to those contained in the retrospective 2007 valuation.
- (168) The Commission thus considers that a MEO in the position of NEUWOGES would reasonably have estimated the value of the property, before concluding the sale-and-lease-back transaction, to have been approximately EUR [...] (as was the case in the 2007 valuation).

7.3.2.2. Comparison of outright sale and sale-and-lease-back

- (169) To recap: the total value of the sale-and-lease-back transaction for NEUWOGES was EUR [...]. In contrast, the above analysis revealed that NEUWOGES would realistically have had to assume a value for the property of EUR [...], which was a mere [...] % higher than the value of the sale-and-lease-back transaction. This small difference does not, however, mean that a MEO would have necessarily chosen the outright sale alternative:
- (a) First, it must not be overlooked that the outright sale alternative at issue related to an outright sale of the buildings and attached land, whereas BAVARIA bought only the buildings, while merely acquiring the rights to lease the land for 75 years. The land as such remained in the ownership of NEUWOGES. The land alone was estimated by NEUWOGES to have a value of EUR [...] (as in the 2007 valuation). While it is difficult to put a precise figure on the value that NEUWOGES maintained by merely leasing the land rather than selling it, it must be concluded that NEUWOGES' retaining ownership of the land justified a somewhat lower transaction price.
- (b) Second, it must be observed that there is some doubt as to whether the price that a MEO in the position of NEUWOGES would have estimated could actually have been achieved. The only concrete purchase offer that NEUWOGES has submitted information on came from Felske Immobilien, which apparently offered a price of EUR [...] per m², resulting in a total purchase price of EUR [...] ⁽¹⁰⁷⁾. This offer was well over EUR 1 million lower than the price that a MEO in the position of NEUWOGES would have estimated.
- (c) Third, NEUWOGES, in estimating the profits that it expected to make from the general management contract, erroneously calculated profits only up to and including 2027. However, as the duration of the general management contract was 30 years from the end of the modernisation works (i.e. 30 years from the beginning of 1999), the calculation should have included profits up to and including 2028. Correcting the estimate in this way would add to the value of the sale-and-lease-back transaction.

⁽¹⁰⁷⁾ Submission 97/97 to NEUWOGES' supervisory board of 17 April 1997, p. 3.

(d) In calculating the cash value of the future ground rent payments by BAVARIA to NEUWOGES, it was assumed, for the sake of simplicity, that the cost of living would not change and that the payments would therefore not need to be adjusted. It is more realistic, however, to assume that the cost of living will generally rise, so that the payments due in the future will probably turn out to be higher than assumed. This would again lead to an increase in the value of the contract.

- (170) In light of these considerations, it must be concluded that preferring the sale-and-lease-back transaction to attempting an outright sale was economically reasonable.

7.3.3. Conclusion

- (171) After comparing the value of the sale-and-lease-back transaction for NEUWOGES with the value of possible alternative actions, it must be concluded that the transaction was such that a MEO would also have entered into it.

7.4. BENCHMARKING

- (172) After having determined that choosing the sale-and-lease-back transaction over other alternatives was behaviour that a MEO would reasonably have engaged in, the Commission also examined, as a precautionary measure, whether the transaction corresponded to other contracts in evidence at the relevant time in the relevant market and whether there were other indications to undermine the Commission's conclusion that the sale-and-lease-back transaction was in keeping with the principle of conduct by a MEO.
- (173) The available information on comparable transactions relates to sale-and-lease-back agreements concluded by BAVARIA around the same time as the adoption of the measure. These contracts can indicate whether the sale-and-lease-back transaction in question was of a type that was also chosen by other market participants, including private undertakings, thereby pointing towards market conformity (section 7.4.1). In addition, the limited bidding process carried out by NEUWOGES and a comparison with other financing transactions can shed some light on the market conformity of the transaction in question (sections 7.4.2 and 7.4.3).

7.4.1. Comparison contracts

- (174) Contracts related to three comparable transactions ([...]) were submitted for the purpose of comparison. However, only the [...] and [...] contracts date from around the same time as the conclusion of the sale-and-lease-back transaction between BAVARIA and NEUWOGES and can thus be taken into account. It must first be noted that both of these transactions differ from the transaction in question with respect to duration, indexation of the fixed leasing payment, and modernisation. NEUWOGES refers in particular to the difference in the indexation rate ([...]: 1,5 % per year; [...]: adjustment to changes in the cost of living) to prove that the general management contract contained provisions that were not common market practice at the relevant time (1997/98).
- (175) BAVARIA indicates that the [...] and [...] transactions were examples of the implementation of its 'real-estate leasing model'⁽¹⁰⁸⁾, which suggests that the provisions of these contracts were established on the basis of calculations similar to those underlying the NEUWOGES/BAVARIA sale-and-lease-back transaction.
- (176) As discussed above (see recital 131), NEUWOGES could apparently choose the contract parameters freely within the framework of the leasing model offered by BAVARIA. This means that NEUWOGES could have chosen a lower indexation or a higher deduction for costs. The consequence would, of course, have been a lower upfront cash payment. It can be assumed that the same was true for [...] and [...].
- (177) Since the contract partners were apparently free to choose the precise parameters of their transaction within the framework of the model offered by BAVARIA, it does not seem central to the market conformity of the NEUWOGES/BAVARIA sale-and-lease-back transaction whether the parameters chosen by NEUWOGES were the same as those chosen by the parties to the [...] and [...] transactions. These choices simply reflected strategic business decisions by the parties involved. What is more relevant is the fact that all these transaction were based on the same transaction model.
- (178) To the extent that the [...] and [...] contracts are based on the same underlying calculation model — which in the light of the available information there is no reason to doubt — they point towards the market conformity of the transaction model underlying the NEUWOGES transaction as well. In this context it is significant that the 'real-estate leasing model' was apparently chosen by both public ([...]) and private ([...]) undertakings, and was offered both to undertakings wishing to qualify for debt relief under the Inherited Debt Support Law and to parties that did not come within the provisions of that law.

⁽¹⁰⁸⁾ Germany's submission of 11 July 2008, pp. 10-11.

7.4.2. Bidding process

7.4.2.1. Background

- (179) As already indicated, NEUWOGES did not undertake a fully-fledged, open, transparent, unconditional and non-discriminatory tender with a view to privatising the buildings eventually sold to BAVARIA. However, NEUWOGES did initially solicit offers from 72 potential buyers. NEUWOGES claims that it chose the recipients more or less at random and that the selection could not be considered as representative of the entire market. Further contacts resulted after these initial calls for expression of interest were sent out, inter alia, with BAVARIA, which had not been among the recipients of the initial letter.

7.4.2.2. Result of the bidding process

- (180) Of the unknown number of offers received, five were considered 'useable' ⁽¹⁰⁹⁾. Of these, two were nevertheless rejected because the potential buyers could not present a full offer 'because of time constraints'. Two were furthermore rejected for economic reasons. The fifth offer, from Felske Immobilien was rejected because the price offered was considered too low (Felske had offered EUR [...] per m², resulting in a total buying price of EUR [...]). In addition to these five offers, three further bids were made, coming from BAVARIA and two other unsolicited bidders. While negotiations were also initiated with one of the other two unsolicited bidders, this bid was eventually also rejected for unspecified economic reasons ⁽¹¹⁰⁾.
- (181) Once the final negotiations had been concluded, NEUWOGES' board had to approve the contracts. When presenting the contracts to the board, the management argued that a higher sale price could not be obtained because the contracts concerned only a lease of the land (as opposed to an outright sale), BRG would be hired to carry out the modernisation works, and NEUWOGES would continue to manage the buildings for a further 30 years ⁽¹¹¹⁾. When asked about the difference from the 1997 valuation, the management again stated that a higher price could not be achieved for this transaction ⁽¹¹²⁾.

7.4.2.3. Assessment

- (182) While this bidding process cannot be classified as an open, transparent, non-discriminatory and unconditional tender, it nevertheless provides some indication of what offers were available on the market. In this regard it is also significant that apparently a number of unsolicited bids were received, showing that potential buyers not among the 72 originally contacted companies also had an opportunity to learn of the process and participate.
- (183) The assessment of the bids by NEUWOGES indicates that NEUWOGES perceived BAVARIA's bid to be the best available on the market at the relevant time (1997/98). NEUWOGES' argument that at least the Felske bid was actually better is unsustainable. While it is true that the price apparently offered by Felske (EUR [...]) was higher than the upfront payment eventually made by BAVARIA (EUR [...]), it must be pointed out that the sale-and-lease-back transaction has to be assessed as a whole and that its total value (EUR [...]) was higher than the price offered by Felske.
- (184) In this light, it can be stated that, even though the bidding process carried out was not such as to constitute proof in itself that BAVARIA's bid was the best available on the market, it points in this direction. In any event, the limited bidding process provides no substantiated indication that a better offer was available to NEUWOGES at the relevant time (1997/98).

7.4.3. Other types of transactions available at the relevant time

7.4.3.1. Assessment framework

- (185) It is helpful to assess the transaction in question against different, but generally similar, types of transactions offered on the market at the relevant time (1997/98).
- (186) The transaction in question is a typical sale-and-lease-back transaction. Sale-and-lease-back agreements are, by nature, *financing transactions*. By buying a property from the lessee, the lessor provides the lessee with liquidity and/or finances major investments, such as the modernisation of old buildings. In order to continue using the property, for commercial or other purposes, the lessee then leases the property back, thereby (fully or partly) paying back the lessor's investment over the duration of the lease contract.

⁽¹⁰⁹⁾ Submission 97/97 to NEUWOGES' supervisory board of 17 April 1997, p. 2.

⁽¹¹⁰⁾ See Submission 110/97 to NEUWOGES' supervisory board of 30 October 1997, p. 3.

⁽¹¹¹⁾ Submission 114/97 to NEUWOGES' supervisory board of 12 December 1997, p. 3.

⁽¹¹²⁾ Minutes of NEUWOGES' supervisory board Meeting of 16 December 1997, p. 5.

- (187) Being a financing transaction, a sale-and-lease-back agreement has a certain similarity with bank loans and mortgages. There are, however, some important differences that need to be kept in mind. A sale-and-lease-back transaction enables the seller/lessee to finance major investments and gain instant liquidity without having to rely on own capital. This means that own capital and the additional liquidity obtained are available for other investments, or that the lessee can finance investments even where a traditional loan would not be available because of the lack of own capital or a high degree of indebtedness. As the buyer/lessor has to re-finance its own initial investment and make a profit, the leasing rate is typically somewhat higher than the interest rate on a comparable bank loan (as explained in further detail in the following section). At the end of the lease contract, the lessee either has to repurchase the property or it remains in the ownership of the lessor and is available for further use. This means that the leasing rate depends on the residual value of the property at the end of the lease contract concluded between the two parties. As the residual value is often difficult to predict, especially in the case of long-term leases, it represents a risk factor for the lessor that is reflected in the leasing rate. No such risk is involved in traditional bank loans, and only to a certain degree in mortgages.
- (188) The consequence is that the leasing rates and the interest rates for loans/mortgages are not entirely comparable. By comparing the leasing rate for the transaction in question with the average interest rates on loans/mortgages available at the relevant time (1997/98), it is not possible to determine precisely whether the leasing rate charged was in line with the market conditions at the relevant time (1997/98). It is, however, possible to say whether the leasing rate was so high that it appears that no MEO would reasonably have engaged in the transaction.

7.4.3.2. Assessment

- (189) In the transaction in question, the leasing rate was initially set at [...] % p.a. of the total investment volume. Due to the indexation of the amount owed by [...] % p.a., the leasing rate will rise to [...] % at the end of the contract, resulting in an average leasing rate of [...] % p.a. For the sake of comparison, if NEUWOGES had chosen not to index the leasing rate, it would have been set at [...] % p.a. over the entire duration of 30 years. The 'premium' is then the cost of choosing lower leasing rates at the beginning, and higher leasing rates towards the end, of the contract, rather than stable rates throughout.
- (190) It must first be pointed out that Rostock Regional Court assessed the leasing rate against interest rates for other transactions. It observed that the development of the interest rates on mortgages over a time span of 30 years was difficult to predict, but that interest rates of over 10 % could be expected in periods of high interest rates. It observed that the average leasing rate charged to NEUWOGES could not, then, be seen as being out of line with market terms.
- (191) Only fairly general data is available for comparison. Of all the data gathered by the German Bundesbank for January 1998 (when the transaction in question was concluded), two types of interest rates can be considered relevant. First, the interest rates for 'mortgage loans secured by residential real estate with interest rates fixed for 10 years' are of interest, since NEUWOGES too would use residential real estate as collateral for a loan (regardless of whether or not such a loan would meet all the formal conditions of a mortgage). Second, the interest rates for 'long-term fixed-rate loans to enterprises and self-employed persons, EUR 500 000 and over but less than EUR 5 million' could also be suitable for a comparison, since NEUWOGES can be considered as an enterprise (while mortgages are usually taken out by private individuals who actually live in the property themselves rather than renting it out).
- (192) According to the Bundesbank, in January 1998 German mortgage loans with a 10-year fixed interest rate had an average interest rate of 6,40 % p.a. At that time, interest rates for this type of loan normally spanned a range of 6,17 % p.a. to 6,97 % p.a. For long-term fixed-rate loans, the average interest rate in January 1998 was 6,35 % p.a. and spanned a range of 5,55 % p.a. to 7,73 % p.a. The Bundesbank does not specify the average duration of a 'long-term' loan. However, it can be assumed that it would not be more than 10 years and would probably be shorter than that ⁽¹¹³⁾.

⁽¹¹³⁾ Banks usually prefer to use variable-interest loans as this reduces the interest-rate risk they run. If they grant fixed-interest loans, it is in their interests to limit the duration of the contract in order to reduce this risk. For loans to enterprises, it is common to use revolving loan contracts where, upon expiry of the initial loan contract, a new contract is automatically started (provided that the firm's creditworthiness has not deteriorated) with a revised interest rate (reflecting the market conditions at that time). In addition to interest-rate risk, banks also bear credit risk, and this is a further reason for limiting the duration of loan contracts with enterprises (since the amounts involved are significantly higher than in a mortgage contract, which usually has a duration of 20 to 30 years).

(193) A comparison of the leasing rate paid by NEUWOGES with the available interest rates from the Bundesbank for loans that were concluded in the same time period (i.e. January 1998) must take the following elements into account:

- The average yearly leasing rate over the 30-year contract period is [...]%. However, as discussed above, this rate is the result of NEUWOGES' choosing to pay a lower leasing rate at the beginning of the contract period, offset by a higher leasing rate later on. This choice comes at a cost, because if NEUWOGES had opted for a flat leasing rate from the start it would have had to pay a rate of only [...]% per year⁽¹¹⁴⁾. The figures from the Bundesbank are for fixed-rate loans, meaning that the interest rate is equal in each of the years. If it is assumed that NEUWOGES would have been in a position to negotiate a loan with similar payment conditions (i.e. lower interest payments at the start and higher payments towards the end), this would also have come at a cost (for the same reasons as for BAVARIA)⁽¹¹⁵⁾. The Bundesbank interest rates should therefore be compared with the flat leasing rate of [...]%.
- The leasing rate has been fixed for a period of 30 years. Although it is indexed each year, it was perfectly possible, as early as at the start of the contract, to calculate the average leasing rate for the duration of the contract. The Bundesbank interest rates for mortgages are fixed for only 10 years (as explained above, it is not known for which period the interest rates for enterprises are fixed, but it can be assumed that the period is of no more than 10 years). The most suitable benchmark would be interest rates fixed for 30 years, but these figures are not published by the Bundesbank. In general, fixed-interest rate loans become more expensive the longer their duration. For example, the Bundesbank figures for January 1998 show that a mortgage with a 5-year fixed rate had an average interest rate of 5,85 %, compared to 6,40 % for a loan with a 10-year fixed rate. Therefore, it can be safely assumed that the interest on a fixed-interest loan of 30 years' duration would have been considerably higher than the Bundesbank averages of 6,35 % and 6,40 %.
- The Bundesbank figures provide both an average rate and a range of interest rates based on a large number of German loan contracts concluded in January 1998. The leasing rate that applied to NEUWOGES implicitly reflects the inherent risk of the transaction for BAVARIA. BAVARIA's greatest exposure was to credit risk, i.e. the risk that NEUWOGES would go bankrupt or otherwise not fulfil the obligation to make the required leasing payments. Similarly, a bank would have made an assessment of NEUWOGES' creditworthiness before granting a loan. Clients with a lower creditworthiness (or a higher credit risk for the bank) are usually charged a higher interest rate to compensate for the additional risk⁽¹¹⁶⁾. As discussed above (see section 7.3.1), NEUWOGES had a limited ability to obtain new loans because of its relatively high degree of indebtedness and the fact that its own capital was tied up in other investment projects. If, however, a bank had been prepared to grant a loan to NEUWOGES, it would have taken these elements into account when setting the interest rate. Loans to companies with a relatively high level of debt and a low own-capital contribution to the investment have higher interest rates. Because of this, any comparison of the leasing rate paid by NEUWOGES and the interest rates on loans available on the market should focus on the higher end of the Bundesbank interest-rate range⁽¹¹⁷⁾.
- As mentioned above, a leasing company has to refinance its initial investment (in this case mainly the purchase price for the apartment blocks and the costs of modernisation). The interest rate it has to pay for its own refinancing will depend on several factors, such as its size, its level of debt, the property in its portfolio, etc. In any event, this interest rate is just the starting point, as the leasing company (BAVARIA) also needs to be compensated for the risks it bears. These can include interest-rate risk (the risk that it will have to refinance its investment on the basis of a variable interest rate, while the lease payments have a fixed rate), credit risk (the possibility, as discussed above, that NEUWOGES will go bankrupt and that BAVARIA will not be able to

⁽¹¹⁴⁾ The reason for this premium (i.e. the higher average leasing rate compared to a fixed rate from the start) is that BAVARIA agreed to postpone part of the leasing payments to the later years of the contract period. If it had received those payments without this 'delay', it could have invested that money and earned a return on it or repaid its own loan and hence saved on interest. Postponing part of the payments thus entails a cost for BAVARIA, which is transferred to NEUWOGES via a higher average leasing rate.

⁽¹¹⁵⁾ This would no longer be a 'true' fixed rate loan (i.e. with equal yearly interest rates) but a loan where the different yearly interest rates are fixed in advance (hence, it is also not a variable rate loan).

⁽¹¹⁶⁾ If the risk is considered too high, the client's application for a loan will normally be refused. If the risk is deemed acceptable, a higher interest rate is charged and additional measures can be taken. This can include requiring additional collateral, granting a lower amount than requested, or adding conditions to the loan contract that enable the bank to monitor the borrower's financial situation.

⁽¹¹⁷⁾ See also the Pestel study cited above, published in June 1996, which assumed that housing companies in East Germany could obtain loans on the open capital market at 7,5 % interest.

recover the lease payments still due), and residual value risk (the uncertainty about the value of the property after the lease contract has expired). The leasing company is also likely to have certain overhead costs which would also be reflected in the leasing rate⁽¹¹⁸⁾. Finally, the leasing company also intends to make a profit and will take account of this factor in setting the leasing rate⁽¹¹⁹⁾. Even if BAVARIA had been in a position to refinance its investment at an interest rate lower than that which NEUWOGES would have been charged for a bank loan, the refinancing interest rate would have had to be increased in the light of these different elements (risk premium, costs and profit) in order to obtain the applicable leasing rate, which could have ended up being higher than the interest rate on a traditional loan.

- (194) Taking into account all of the above elements, a leasing rate of [...] % p.a. for a fixed leasing payment (or even of [...] % for a leasing payment indexed at [...] %, although this figure appears less suitable for comparison purposes) appears rather reasonable when compared to the Bundesbank figures for loans. The Bundesbank figures should be adjusted to reflect, for example, a fixed-rate duration of 30 years. While the correction required to arrive at a suitable benchmark cannot be precisely quantified, the difference between the average interest rates for loans and mortgages and the leasing rate seems sufficient to conclude that there are no indications that the BAVARIA leasing rate was too high. Accordingly, the Commission concludes that the leasing rate applied by BAVARIA was in line with market conditions at the relevant time (late 1997/early 1998).

7.4.4. Conclusion

- (195) The available information indicates that the NEUWOGES/BAVARIA deal was within the range of transactions that a MEO would reasonably have engaged in. The comparison contracts, the bidding process, and the comparison with other financing instruments all suggest that the transaction conformed to market conditions at the time and that the BAVARIA model was not overpriced.

7.5. SUPPLEMENTARY ASSESSMENT: REMAINING STATE AID ELEMENTS AND COMPATIBILITY WITH THE INTERNAL MARKET

- (196) The Commission's primary analysis thus demonstrates that NEUWOGES' decision to enter into the sale-and-lease-back transaction was in line with the MEO principle, which means that the transaction did not confer an advantage on BAVARIA and that no aid was therefore granted to BAVARIA. Nevertheless, the Commission has also examined whether a different result — namely that an advantage had in fact been granted to BAVARIA by NEUWOGES — would have necessarily resulted in finding that the transaction amounted to state aid incompatible with the internal market. On the hypothetical assumption that NEUWOGES had not complied with the MEO principle and that an advantage had thus been granted to BAVARIA, the Commission therefore examined whether the measures amounted to state aid in favour of BAVARIA and whether this aid could be declared compatible with the internal market.

7.5.1. Remaining state aid elements

7.5.1.1. Undertaking

- (197) Public funding granted to an entity can be classified as state aid only if that entity is an 'undertaking' within the meaning of Article 107(1) TFEU. The Court of Justice has consistently defined an undertaking as any entity engaged in an economic activity⁽¹²⁰⁾. An economic activity is any activity that consists in offering goods and services on the market⁽¹²¹⁾.
- (198) BAVARIA is involved in a series of economic activities, such as commercial investment in real estate and the leasing of such real estate to commercial and private customers. BAVARIA is thus an undertaking within the meaning of Article 107(1) TFEU.

⁽¹¹⁸⁾ Such costs would come on top of the costs charged by a bank when granting a loan. This is because, when the leasing company refinances its investment, it also has to pay for the bank's costs (and takes account of this factor in setting its leasing rate). It also has to bear its own overhead costs.

⁽¹¹⁹⁾ In the loan scenario, a client contributes to the bank's profit via the interest rate. In the leasing scenario, the client in essence contributes both to the bank's profit (as the leasing company refinances its investment with the bank, and then passes on this cost to the lessee) and to that of the leasing company itself. The fact that companies are willing to pay these additional costs indicates that the services provided by leasing companies have an added value for lessees.

⁽¹²⁰⁾ Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 74.

⁽¹²¹⁾ Case C-118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7.

7.5.1.2. Use of state resources and imputability

- (199) The measure must be imputable to the State and be financed from state resources. According to the case law of the Court of Justice in *Stardust Marine* ⁽¹²²⁾, state aid that is not financed directly from the national budget can fulfil this criterion if funds are subject to the control of the State and the decision to transfer these funds is imputable to the State.
- (200) NEUWOGES is 100 % owned by the City of Neubrandenburg and is thus a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC ⁽¹²³⁾, as referred to by the Court in the *Stardust Marine* judgment. The City of Neubrandenburg holds all the shares in NEUWOGES and, being the sole shareholder, can exercise significant control over the Supervisory Board and in the general meeting of shareholders. Therefore, the Commission concludes that the City is able to control the use of NEUWOGES' funds. Consequently, the sale-and-lease-back transaction involved state resources.
- (201) As regards imputability to the State, the Commission notes that the available information indicates that the City of Neubrandenburg was significantly involved in the conclusion of the sale-and-lease-back transaction. Entering into this transaction required the approval of NEUWOGES' Supervisory Board, whose members acted on behalf of the City. The records also show that the Supervisory Board was actively involved in negotiating the contracts. The Commission therefore finds that the conclusion of the sale-and-lease-back contract is imputable to the State.

7.5.1.3. Selectivity

- (202) Under Article 107(1) TFEU, a measure counts as state aid only if it favours 'certain undertakings or the production of certain goods'. Hence, only measures granting undertakings a selective advantage come under the heading of state aid.
- (203) Since the measure in question was a bilateral transaction between NEUWOGES and BAVARIA, any advantage granted by NEUWOGES to BAVARIA would have been selective, in that no other undertakings would have had access to it.

7.5.1.4. Distortion of competition and effect on trade

- (204) Public support to undertakings amounts to state aid within the meaning of Article 107(1) TFEU only if it 'distorts or threatens to distort competition' and only insofar as it 'affects trade between Member States'. A measure granted by a State is considered to distort or to threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ⁽¹²⁴⁾. Distortion of competition is thus assumed to take place as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.
- (205) The case-law of the European Courts has established that any grant of aid to an undertaking exercising its activities in the internal market can be liable to affect trade between Member States ⁽¹²⁵⁾.
- (206) BAVARIA competes for investors and investment opportunities with other real-estate funds and corporate investors from Germany and other Member States of the Union. A financial advantage granted to BAVARIA would strengthen that undertaking's competitive position and would therefore be liable to distort competition. Since the market for real-estate investments is Union-wide, any financial advantage for BAVARIA would strengthen the latter's market position in comparison with its competitors from other Member States, thereby having an impact on trade between Member States.

7.5.1.5. Conclusion

- (207) Assuming that, contrary to the Commission's primary conclusion outlined above, the sale-and-lease-back transaction did not comply with the rational MEO principle and therefore granted an advantage to BAVARIA, it would have to be concluded that the sale-and-lease-back transaction involved state aid. Consequently, it must be assessed whether, on this hypothesis, the state aid could be considered as being compatible with the internal market.

⁽¹²²⁾ Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR-I 4397.

⁽¹²³⁾ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

⁽¹²⁴⁾ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11; Joined Cases T-298/97, T-312/97, etc. *Alzetta Mauro and others v Commission* [2000] ECR II-2325, paragraph 80.

⁽¹²⁵⁾ Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 2671, paragraphs 11 and 12; Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities* [1998] ECR II-717, paragraphs 48-50.

7.5.2. *Compatibility with the internal market pursuant to Article 107(3)(c) TFEU*

- (208) Under Article 107(3)(c) TFEU, an aid measure may be considered compatible with the internal market where it 'facilitate[s] the development of certain economic activities or of certain economic areas, where [it] does not adversely affect trading conditions to an extent contrary to the common interest'. The application of Article 107(3)(c) requires the Commission to weigh the positive and desired effects of an aid measure against the adverse effect on trading conditions that results from its implementation.
- (209) For an aid measure to withstand that test, it must comply with five cumulative conditions. First, the aid measure must serve a well-defined objective of common interest. Second, it must be an appropriate instrument for achieving that objective. Third, it must be necessary and have an incentive effect. Fourth, it must proportionate. Fifth, it must not affect trading conditions to an extent contrary to the common interest.

7.5.2.1. *Objective of common interest*

- (210) Under Articles 3 and 174 TFEU, economic and social cohesion is a Union objective. Strengthening economic and social cohesion implies the improvement of the urban environment and the quality of life of urban dwellers. Cohesion policy can help create sustainable communities by ensuring that economic, social and environmental issues are tackled through integrated strategies for renewal, regeneration and development in both urban and rural areas. This can be accomplished in several ways ⁽¹²⁶⁾.
- (211) The Commission observes that NEUWOGES' statutory purpose is to secure a 'sufficient housing supply' in the region in which it is active. The Commission also observes that, in concluding the sale-and-lease-back transaction, NEUWOGES pursued certain public policy objectives. NEUWOGES explains that:
- in the 1990s, after German reunification, it was an important political project to bring housing conditions in East Germany into line with those in West Germany, with the consequence that buildings in East Germany were hurriedly privatised and modernised, regardless of whether or not this made economic sense;
 - the efforts to privatise and modernise the buildings that were the subject of the sale-and-lease-back transaction were also directed at enhancing the future prospects of the City of Neubrandenburg: by offering people high-quality, affordable housing and by privatising it (as BAVARIA was obliged to do), NEUWOGES hoped to make Neubrandenburg more attractive to its citizens.
- (212) Finally, the Commission observes that BAVARIA accepted the obligation to attempt to sell a certain number of the apartments to the current tenants. In doing so, BAVARIA could not ask for a price freely determined by the market, but rather had to respect certain price ceilings ⁽¹²⁷⁾. The contract imposing these conditions thus granted a certain advantage to the current tenants of the buildings in question.
- (213) If the sale-and-lease-back transaction between NEUWOGES and BAVARIA were, in actual fact, classified as state aid, which it is not, this aid would have been granted in pursuit of the policy objectives listed above. Supplying a region with sufficient housing, helping to achieve a national public policy objective (bringing the housing conditions in East Germany into line with those in West Germany following reunification), enhancing the future prospects of the City of Neubrandenburg by offering its population attractive and affordable housing (including by favouring the current tenants of the buildings in question) all qualify as well-defined objectives of common interest. The Commission therefore considers that the measure is to be regarded as pursuing an objective of common interest.

7.5.2.2. *Appropriateness of the measures*

- (214) It is not disputed that the sale-and-lease-back contract concluded by NEUWOGES and BAVARIA achieved the desired objectives, in that the transaction ensured that the buildings bought by BAVARIA were comprehensively modernised, privatised and offered to the current tenants at a capped price, and that this led to the increased supply of quality housing in the region, thereby enhancing the City of Neubrandenburg's future prospects.

⁽¹²⁶⁾ Commission Decision C(2011) 4940 final of 5 October 2011 in Case SA.31877 – The Netherlands: Land sale and housing development Apeldoorn (OJ C 343, 23.11.2011, p. 11), recitals 47 and 48.

⁽¹²⁷⁾ See Part V, Section 3(2) of the land-lease and sale contract.

- (215) In seeking a buyer for the buildings and evaluating its options, NEUWOGES took a series of steps that, in effect, ensured that, if the sale-and-lease-back transaction involved any aid, this would be limited to the amount necessary to achieve the desired objectives. In particular, NEUWOGES carried out a limited bidding process, negotiated the terms of the transaction with BAVARIA over several months, and was finally convinced that the transaction represented the best offer on the market. There is, then, no indication that, even if aid was involved in the sale-and-lease-back transaction, this aid exceeded the minimum required. The analysis above (see section 7.3) comparing the sale-and-lease-back transaction to various alternatives (such as a loan-based modernisation of the buildings or an outright sale) demonstrated that no alternative was available that would have achieved the same objectives without aid being granted or with a lower amount of aid being granted. The sale-and-lease-back transaction and any aid it may have contained were thus appropriate instruments for achieving the objectives of common interest.

7.5.2.3. Necessity and incentive effect

- (216) Assuming that the sale-and-lease-back transaction involved state aid, it must further be examined whether this aid had an incentive effect. NEUWOGES and BAVARIA negotiated the terms of the transaction over several months. It appears that BAVARIA would not have entered into a transaction that did not fit in with its 'real-estate leasing model'. If the transaction that was eventually concluded, which was based on BAVARIA's 'real-estate leasing model', involved state aid, then there is no doubt that, without this aid, BAVARIA would not have engaged in the transaction.

7.5.2.4. Proportionality

- (217) The Commission has already indicated that the policy objectives pursued by NEUWOGES in entering into this transaction must be viewed as being important. The modernisation and privatisation of the buildings, including their sale at a capped price to the tenants, made an important contribution to improving economic and social cohesion within the Union. At the same time, the amount of aid in favour of BAVARIA contained in the sale-and-lease-back transaction — if any — was, at most, limited — a state of affairs that also limited any distortion of competition by the measure. In this light, any aid that may have been contained in the sale-and-lease-back transaction between NEUWOGES and BAVARIA was proportionate to the objective pursued.

7.5.2.5. No effect on trading conditions that is contrary to the common interest

- (218) It should again be pointed out that the amount of aid in favour of BAVARIA involved in the sale-and-lease-back transaction — if any — was, at most, limited. The effect of the measure on trading conditions was thus also limited. While any aid contained in the sale-and-lease-back transaction would have improved the competitive position of BAVARIA, which was at least potentially in competition with other undertakings (including undertakings from other Member States), the extent of this effect depends on the amount of aid received. Since BAVARIA's competitive position would thus have been only marginally improved, it can be concluded that the sale-and-lease-back transaction, even if it contained aid, did not affect trading conditions to a degree contrary to the common interest.

7.5.3. Conclusion concerning the remaining state aid elements and compatibility with the internal market

- (219) On the basis of the reasons stated in section 7.5.2, the Commission has concluded that, if the sale-and-lease-back transaction granted an advantage to BAVARIA, it would amount to state aid within the meaning of Article 107(1) TFEU. The Commission further finds, however, that any state aid contained in the transaction would be compatible with the internal market under Article 107(3)(c) TFEU.

7.6. CONCLUSION REGARDING THE EXISTENCE OF AID AND COMPATIBILITY WITH THE INTERNAL MARKET

- (220) On the basis of the analysis of the value of the sale-and-lease-back transaction for NEUWOGES, the comparison with possible alternative transactions, and the examination of the transaction's conformity to market practices, it can be concluded that the transaction complies with the MEO principle. In concluding the sale-and-lease-back transaction, NEUWOGES' actions were such as a MEO would have chosen to engage in. Crucially, it is apparent neither that an economically more attractive option was available, nor that, in the light of the available benchmarks and of the other offers that had emerged from the bidding process, the conditions of the sale-and-lease-back transaction at the relevant time (1997/98) were out of line with market conditions.

- (221) It must therefore be concluded that the transaction with NEUWOGES did not confer an advantage on BAVARIA, since NEUWOGES' behaviour corresponded to that of a MEO. As the measure in question did not grant an advantage, it does not fulfil one of the conditions for being classified as state aid and does not, therefore, constitute state aid within the meaning of Article 107(1) TFEU.
- (222) In addition to the primary finding that the sale-and-lease-back transaction did not confer an advantage on BAVARIA and did not, therefore, involve state aid, the Commission reaches the additional conclusion that if the sale-and-lease-back transaction did, however, confer an advantage on BAVARIA, the transaction would indeed amount to state aid. This state aid would, however, be compatible with the internal market under Article 107(3)(c) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The legal transaction concluded on 21 January 1998 between Neubrandenburger Wohnungsgesellschaft mbH, Bavaria Immobilien Trading GmbH & Co, Immobilien Leasing Objekt Neubrandenburg KG and Bavaria Immobilien Beteiligungsgesellschaft mbH & Co. Objekte Neubrandenburg KG in the form of a land-lease and sale contract and a general management contract does not constitute state aid within the meaning of Article 107(1) TFEU.

Article 2

If, however, the transaction concluded on 21 January 1998 between Neubrandenburger Wohnungsgesellschaft mbH, Bavaria Immobilien Trading GmbH & Co, Immobilien Leasing Objekt Neubrandenburg KG and Bavaria Immobilien Beteiligungsgesellschaft mbH & Co. Objekte Neubrandenburg KG in the form of a land-lease and sale contract and a general management contract does constitute state aid within the meaning of Article 107(1) TFEU, this aid is compatible with the internal market within the meaning of Article 107(3)(c) TFEU.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 16 September 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

COMMISSION DECISION (EU) 2015/508**of 1 October 2014****on the alleged infrastructure aid implemented by Germany in favour of Propapier PM2 GmbH —
State aid SA.36147 (C 30/10) (ex NN 45/10; ex CP 327/08)***(notified under document C(2014) 6847)***(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 regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union ⁽¹⁾,

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

Whereas:

1. PROCEDURE

- (1) By letter of 29 October 2008 the Commission received a complaint from the Smurfit Kappa Group (hereinafter: 'Smurfit Kappa', or 'the complainant'), alleging that infrastructure aid had been granted to Propapier PM2 GmbH. The complaint was registered under the reference CP 327/08 and transferred to the register for unlawful aid (with reference NN 45/10).
- (2) By letter dated 27 October 2010 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the alleged aid.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the alleged aid.
- (4) Germany submitted comments by letter dated 28 January 2011 (non-confidential version received on 31 January 2011). The Commission also received comments from the following interested parties: a joint comment from the German municipal associations Deutscher Städtetag, Deutscher Landkreistag and Deutscher Städte- und Gemeindebund, as well as the association of municipal undertakings (*Verband kommunaler Unternehmen* —VKU) on 11 February 2011, and from the complainant on 14 February 2011 (non-confidential version received on 1 March 2011). The Commission forwarded these to Germany, which was given the opportunity to react; Germany's comments were received on 13 April 2011 (non-confidential version received on 26 April 2011).
- (5) On 17 January 2013 a meeting took place between the Commission's departments and the German authorities. By letter of 25 February 2013 the German authorities provided further information. The Commission departments requested additional information by letter dated 26 April 2013, which Germany provided by letter dated 14 May 2013.
- (6) By e-mail dated 23 May 2013 the Commission requested further information, which was provided by Germany by e-mails dated 24 May 2013, 27 May 2013 and 28 May 2013.
- (7) After a meeting on 6 June 2013 between the Commission's departments, the German authorities and representatives of the beneficiary company, and also technical experts, Germany announced potential further comments. Following a further information request dated 15 October 2013, Germany provided extensive additional comments by e-mails dated 4 November 2013, 13 December 2013 and 18 December 2013, and 6 January 2014 and 24 April 2014.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ C 7, 12.1.2011, p. 10.

⁽³⁾ Cf. footnote 2.

2. DESCRIPTION OF THE MEASURES

- (8) Propapier PM2 GmbH (hereinafter: 'Propapier') belongs to Progroup AG (hereinafter: 'Progroup'). Progroup produces and sells corrugated case material (CCM) and corrugated board through its subsidiaries. The complainant, Smurfit Kappa, is one of the largest paper producers in the European Union.
- (9) On 2 April 2008 the Commission approved ⁽⁴⁾ regional aid for the construction of a paper mill for producing CCM and of a related power plant by Propapier in a newly opened extension of the existing industrial park 'Industriegebiet am Oder-Spree-Kanal' in Eisenhüttenstadt/Brandenburg, an area which at the time was eligible for regional aid pursuant to Article 107(3)(a) TFEU.
- (10) The complainant alleged that certain infrastructure projects financed by State resources in the newly extended industrial park where the new Propapier plant is situated are exclusively intended for the paper mill and therefore should qualify as dedicated infrastructure and State aid for the benefit of Propapier.
- (11) The complainant specified the following infrastructure projects (see Section 2.1 below): the construction of a waste water treatment plant, the construction of a car park, a new connecting road and the widening and deepening of the Oder-Spree Canal.
- (12) Furthermore, the complainant argued that the tariffs charged for the use of the waste water treatment plant are advantageous to Propapier (see Section 2.2 below).

2.1. AID FOR THE CONSTRUCTION OF THE WASTE WATER TREATMENT PLANT AND OTHER INFRASTRUCTURE

- (13) In July 2008 the *Land* of Brandenburg awarded a direct grant of EUR 33 808 200 ⁽⁵⁾ from resources of the Joint Federal/*Länder* programme 'Improvement of Regional Economic Structures' (*Ausbau der kommunalen wirtschaftsnahen Infrastruktur im Rahmen der Gemeinschaftsausgabe* — GA) (hereinafter: 'Gemeinschaftsausgabe scheme' ⁽⁶⁾) for the construction of a new waste water treatment plant in an extension of the industrial area on the Oder-Spree Canal in Eisenhüttenstadt. It should be noted in this connection that the Gemeinschaftsaufgabe scheme for the financing of the construction or extension of waste water treatment plants was the subject of State aid case N 644e/02 ⁽⁷⁾ in which the Commission in 2003 established for the programming period 2004 to 2006 that public support from the scheme did not constitute State aid within the meaning of Article 107(1) TFEU in favour of the owner and operator of the waste water treatment plant.
- (14) In this 2003 decision, the Commission considered the grants from the version of the scheme applicable from 2004 to 2006 to be an internal transfer of State resources and not State aid to owners and operators primarily because the recipients were not economic operators and the service was a typical public service of general interest to be provided by the municipalities. Under the scheme's conditions, the recipient must be either a local authority (*Gebietskörperschaft*) or a municipal special purpose association under public law (*Zweckverband*) which is subject to supervision by the municipality. For eligibility, no legal, personal or business relationship may exist between the beneficiary of the measure, i.e. waste water treatment plant, and the user of the plant.
- (15) The grant covered 80 % of the total eligible costs of EUR 42 260 340. The beneficiary of the grant is the 'Trinkwasser- und Abwasserzweckverband Oderaue Eisenhüttenstadt' (hereinafter: TAZV), an inter-municipal association governed by public law, which is in charge of the supply of drinking water and the treatment of waste water. TAZV is both the owner and operator of the waste water treatment plant and bore the remaining 20 % of the total public financing of the investment.

⁽⁴⁾ Commission decision in State aid case N 582/07 (OJ C 131, 29.5.2008, p. 6). After a challenge by competitor Smurfit Kappa, the General Court annulled the Commission decision by judgment of 10 July 2012 in Case T-304/08 *Smurfit Kappa Group plc v Commission*. On 15 May 2013 the Commission opened a formal investigation into the notified regional aid granted to Propapier (State aid case SA.23827 (2013/C), OJ C 230, 8.8.2013, p. 39). The opening decision in State aid case SA.23827 (2013/C) stated that if, after a formal investigation in State aid case SA.36147 (C 30/10), the Commission were to conclude that other aided investments constituted a single investment project together with the Propapier paper plant investment, or that additional aid was granted to Propapier in the form of infrastructure measures, then the combined aid package would have to be assessed for compliance with point 67 of the RAG.

⁽⁵⁾ Germany reported in its submission of 15 May 2013 that an amount of EUR 30 849 271 had been paid out for eligible costs amounting to EUR 38 561 588.

⁽⁶⁾ Development of municipal economic infrastructure pursuant to Part II, Section 7(e) of the Framework plan under the joint Federal Government/*Länder* scheme for improving regional economic infrastructure: Construction or extension of waste water and refuse elimination and processing installations.

⁽⁷⁾ Commission Decision C(2003)1999 of 9 July 2003 in State aid case N 644e/02 (OJ C 197, 21.8.2003, p. 12).

- (16) The granting was subject to the condition that by 15 August 2008 the legal and financial requirements for the settlement of a main investor (in this case, Propapier) were proven. Construction of the plant began in October 2008 and its entry into service took place in March 2010.
- (17) The complainant claims that the TAZV plant constitutes dedicated infrastructure, as Propapier will use practically all of its waste water treatment capacity. According to the complainant, the plant was originally designed for Propapier as a waste water treatment plant and was a condition precedent for the establishment of a paper mill in the region (paper production being highly water-intensive).
- (18) As regards the other infrastructure projects, the complainant argues that the creation of a car park adjacent to Propapier's site, the construction of a new road connecting the industrial area with the B-112 motorway, and the widening/deepening of the Oder-Spree Canal were infrastructure measures dedicated to Propapier. In the opening decision, the Commission came to the preliminary conclusion that these did not provide a selective advantage to Propapier and hence did not constitute dedicated infrastructure, but it nevertheless invited third parties to comment on these measures as well.

2.2. REDUCED FEES FOR USE OF THE WASTE WATER TREATMENT PLANT

- (19) A further element of the complaint concerning the waste water treatment plant is that the tariff of EUR 0,95 per cubic metre to be charged to Propapier for the use of the plant is lower than what a private investor would charge for such services.
- (20) The calculation of the user fees is governed by the relevant act, the Brandenburg Municipal Charges Act, (*Kommunalabgabengesetz für das Land Brandenburg* ⁽⁸⁾) (hereinafter: KAG Brandenburg). Paragraph 6 of the KAG Brandenburg provides that the calculation of the charges for the use of the plant has to cover, but must not exceed, all eligible costs of the relevant waste water treatment plant (construction, maintenance and repair, operating, personnel and charge management costs), imputed interest and cost-accounting depreciation. However, subsidies which the municipality receives from other public sources (in this case, the grant of EUR 33,8 million from the Gemeinschaftsaufgabe scheme) must not ⁽⁹⁾ be taken into account in calculating the imputed interest on capital invested. The complainant takes the view that the subsidy received by TAZV from resources of the Gemeinschaftsaufgabe scheme is passed on from the beneficiary TAZV to the users of the waste water treatment plant in the form of reduced waste water fees.

3. GROUNDS FOR INITIATING THE PROCEDURE ⁽¹⁰⁾

- (21) The alleged measures qualify as State aid if the following conditions are met: (i) the aid has to be granted by an act of a Member State or out of State resources; (ii) it has to confer an economic advantage on the undertaking; (iii) the advantage has to be selective; and (iv) the measure distorts or threatens to distort competition and affect inter-State trade. The existence of State aid is established when the conditions laid down in Article 107(1) TFEU are met on a cumulative basis.
- (22) It was undisputed in the opening decision that all the measures in question involved the use of State resources and that they could potentially distort competition in the internal market.
- (23) The Commission noted that, with respect to the elements of the allegation, it is necessary to distinguish between: (1) potential State aid to TVAZ for the construction of the waste water treatment plant; and (2) potential aid to Propapier in the form of reduced waste water treatment charges.

⁽⁸⁾ *Kommunalabgabengesetz für das Land Brandenburg* (KAG). The version in force at the time of the opening decision was the KAG of 31 March 2004 (GVBl.I/04, No 08, p. 174), as last amended by Article 1 of the law of 27 May 2009 (GVBl.I/09, No 07, p. 160).

⁽⁹⁾ Paragraph 6 of the KAG in force at the time of the opening decision reads in this respect:

Bei der Ermittlung der Verzinsung und der Abschreibungen bleibt der aus Beiträgen und bei der Verzinsung zusätzlich auch der aus Zuschüssen Dritter aufgebrauchte Eigenkapitalanteil außer Betracht.

(Translation: When calculating interest rates and depreciation, no account shall be taken of the share of equity derived from contributions or, in the case of interest rates, the share of equity derived from third-party subsidies.)

The KAG as amended on 5 December 2013 (GVBl.I/13, [40]) reads:

Bei der Ermittlung der Verzinsung und der Abschreibungen bleibt der aus Beiträgen aufgebrauchte Eigenkapitalanteil außer Betracht (Abzugskapital). Die Gemeinden und Gemeindeverbände können ganz oder teilweise 1) Zuschüsse Dritter als Abzugskapital behandeln, 2) von einer Auflösung des Abzugskapitals zur Ermittlung der Verzinsung absehen, soweit dadurch die dauerhafte Bedienung des Kapitaldienstes nicht gefährdet wird.

(Translation: When calculating interest rates and depreciation, no account shall be taken of the share of equity derived from contributions (deducted capital). The municipalities and municipal associations can treat all or part of grants from third parties as deducted capital, and can exclude deducted capital from bearing interest, in so far as the permanent principal repayment is not compromised).

⁽¹⁰⁾ The opening decision discussed extensively EU and German legislation applicable to waste water treatment, i.e. Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ L 135, 30.5.1991, p. 40), Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1), the German Federal Water Act (*Wasserhaushaltsgesetz*), the Brandenburg Water Act (*Brandenburgisches Wassergesetz*) and the KAG Brandenburg. See more in recital 40 of the present Decision.

(24) The opening decision also examined whether the construction of

(i) the waste water treatment plant; and

the other infrastructure projects in the newly extended industrial park where the new Propapier plant is situated, namely:

(ii) the new car park;

(iii) the new road; and

(iv) the widening and deepening of the Oder-Spree Canal;

created a selective advantage or constituted infrastructure dedicated to Propapier⁽¹¹⁾. Given that, under Article 107(1), a measure can only qualify as State aid if it is selective (i.e. it must treat differently undertakings that are in a comparable legal and factual situation with regard to the objective of the measure, the Commission had to assess whether Propapier has been selectively favoured by the measures.

(25) The Commission has already approved regional investment aid for Propapier. Given that the measures for the other infrastructure projects are to be carried out in an assisted region eligible for regional aid pursuant to Article 107(3)(a) TFEU and are alleged to be closely linked/dedicated to an investment project which benefits from regional aid, the Commission took the preliminary view that, if they are proven to be selective in favour of Propapier, they would form part of the investment project of Propapier and would therefore need to meet the requirements of the Guidelines on National Regional Aid for 2007-2013⁽¹²⁾ (hereinafter: RAG). The Commission expressed doubts regarding the compatibility of any investment aid in the form of dedicated infrastructure, in particular with regard to compliance with the rules on maximum State aid intensity and incentive effect.

(26) Under the applicable rules of the RAG, aid beneficiaries who have received investment aid may benefit from additional operating aid. The compatibility of the operating aid with the internal market, however, has to be assessed independently of the compatibility of the investment aid, on the basis of the criteria laid down in Section 5 of the RAG. The Commission concluded in the opening decision that, should Propapier benefit from operating aid in the form of reduced waste water treatment charges which did not reflect the market economy investor principle, this operating aid could not be considered to be in conformity with the rules of the RAG and the Commission's practice in approving operating aid. Indeed, although the aid beneficiary was situated in a region which was eligible for operating aid (Article 107(3)(a) TFEU-region), other key criteria for the compatibility of the operating aid with the internal market were not met. There was no indication that the operating aid would be justified in terms of its contribution to regional development or its nature, or that its level was proportional to the handicaps it sought to alleviate. In addition, the operating aid would neither be temporary, nor reduced over time. The Commission therefore raised doubts as to the fundamental compatibility with the internal market of any operating aid in the form of reduced charges.

3.1. GRANTS FOR PUBLICLY FUNDED INFRASTRUCTURE PROJECTS, INCLUDING THE WASTE WATER TREATMENT PLANT

3.1.1. Car park, widening/deepening of the Oder-Spree Canal, new road

(27) In the course of the preliminary assessment, it was established that the capacity of the car park did not correspond to the allegation of the complainant and that it was not located in immediate proximity to Propapier's premises. In addition, it was established that it was generally accessible and served not only the industrial park 'Industriegebiet am Oder-Spree-Kanal', but also other inner-city commercial locations, and that its capacity should enable

⁽¹¹⁾ The last three elements were expressly listed as specific grounds for initiating the formal investigation procedure. Although the issue of whether or not the waste water treatment plant was dedicated infrastructure was raised only in the context of the issue of whether or not the reduced fees constituted aid (see recitals 86-89 of the opening decision), the complainant repeated this element of its original complaint during the formal investigation procedure. This element (together with all other elements of the complainant's arguments) was forwarded to Germany, which also addressed this issue in its responses. In view of the fact that Germany had ample opportunity to address the allegations relating to the dedicated nature of the waste water treatment plant, the Commission does not believe that the examination of this question should be outside the scope of the present Decision.

⁽¹²⁾ OJ C 54, 4.3.2006, p. 13.

the municipality to close down car parks for trucks in the city centre. Besides, Propapier was constructing its own car park which would also be accessible to trucks. For these reasons, it seemed that the construction of the car park probably did not give Propapier a selective advantage.

- (28) With regard to the construction of the new road connecting the industrial area with the B-112 motorway, the Commission noted that the construction of the road reduced traffic and air pollution in the centre of Eisenhüttenstadt since trucks heading for the industrial area could avoid the city centre, and that it shortened the time needed to drive to the nearest regional centre. Therefore, it seemed that the construction of the new road probably did not constitute a selective advantage for Propapier.
- (29) As regards the widening and deepening work on the Oder-Spree Canal, the Commission noted that this was not undertaken in order to provide a selective advantage to Propapier, but that it was part of the necessary regular maintenance of the waterway system. Therefore, it seemed that the widening and deepening of the Oder-Spree Canal probably did not constitute a selective advantage for Propapier.
- (30) At the time, however, the Commission considered that it could not be entirely excluded that Propapier benefited from these infrastructure measures to a greater extent than other undertakings.
- (31) Before taking a final view on the presence of aid with respect to these measures, the Commission invited interested third parties to present their views. At the same time, it invited Germany to provide, during the formal investigation procedure, more information on the creation of the car park, the construction of the new road and the widening/deepening of the Oder-Spree Canal.

3.1.2. Grant for the construction of the waste water treatment plant

- (32) In its opening decision, the Commission concluded that, if the aid scheme in case N 644e/02 were to be regarded as aid in the meantime due to the development of the internal market, it would be seen as existing aid to TAZV.
- (33) The Commission expressed doubts, however, as to whether or not the waste water treatment plant constituted dedicated infrastructure. In this connection it was noted that, besides Propapier, there were only two additional users of the plant, namely the Canadian photovoltaic component supplier 5N PV and the energy provider EnBW. Furthermore, it was not known how much of the capacity of the waste water treatment plant was actually allocated to these two customers. On the basis of the information available at the time, the Commission was not in a position to assess whether the construction of the new waste water treatment plant was necessary with regard to only these two undertakings. Furthermore, one of these two additional users, the power plant operated by EnBW, was directly involved in the Propapier project as the power plant provided the energy supply for the production processes of the paper mill ⁽¹³⁾.
- (34) The Commission further noted that, if the actual share of Propapier amounted to 90 % of the sewage capacity as alleged by the complainant, it should be questioned whether this fact in itself did not provide sufficient evidence that the plant actually was solely or at least predominantly intended (and thus dedicated) to serve Propapier. Germany's argument in this respect that the construction of the waste water treatment plant would be used by additional users in the future therefore had to be examined further.
- (35) It was also noted that it should be taken into account how many investors could be located in the industrial park 'Industriegebiet am Oder-Spree-Kanal' and how much capacity on average they would use. In this regard Germany was requested to provide more detailed information on the overall plan for the development of the industrial area and the remaining capacity of the waste water treatment plant which could be allocated to potential users. Germany was also requested to provide more information as regards the technical feasibility of the modular approach in building the treatment plant ⁽¹⁴⁾.
- (36) As explained above, the Commission took the preliminary view that, if the measures for the infrastructure projects were proven to be selective, they would form part of the investment project of Propapier and would need to meet the requirements of the RAG, in particular its rules on the State aid intensity ceiling and incentive effect.

⁽¹³⁾ It is to be noted that the complaint refers to the power plant that was originally part of the notified project of the Propapier investment project. However, Germany has informed the Commission about the subsequent change of the project (eliminating the power plant from the scope of the notification) and reduced the aid that was originally approved. Thus, the Commission saw no reason to pursue the complaint with regard to this issue.

⁽¹⁴⁾ See recitals 87 and 88 of the opening decision.

3.2. REDUCED FEES FOR USE OF THE WASTE WATER TREATMENT PLANT

- (37) Germany took the view that, as with the measure for the construction of the waste water treatment plant, if the fees to be charged by Propapier entailed aid it would constitute existing aid. Germany expressed the view that the Commission's decision in case N 644e/02, which authorised the 'Gemeinschaftsaufgabe' scheme, also covered indirect effects of the scheme.
- (38) The Commission, however, concluded in the opening decision that possible aid in the form of reduced fees was not covered by decision N 644e/02, and if the fee constituted State aid that State aid would be new aid.
- (39) In trying to assess whether the charges set provided an economic advantage to Propapier, the Commission in its opening decision expressed doubts as to whether the fees charged by TAZV reflected the full costs and whether a private investor would have set the charges at the same level.
- (40) The Commission expressed the view that the fees charged to Propapier did not cover the full cost for the waste water treatment, as Germany acknowledged that these fees covered only 20 % of imputed interest on capital invested, since the 80 % subsidy which the municipality received from other public sources for the construction of the plant must not be taken into account for the calculation of imputed interest. In this respect, the Commission in its opening decision first established that neither Directive 2000/60/EC (hereinafter: 'the EU Water Framework Directive') ⁽¹⁵⁾, nor the KAG Brandenburg appeared to require that fees for the use of a waste water treatment facility should cover the full costs ⁽¹⁶⁾. The opening decision, however, referred to the *InfraLeuna* ⁽¹⁷⁾ and *Kimberly-Clark/Scott* ⁽¹⁸⁾ cases, in which charges set at the level of full costs were considered to correspond to the costs normally included in the budget of an undertaking.
- (41) The complainant argued that, in order to establish the advantage, the level of the charges actually paid by Propapier should be compared with the level of the charges that a private investor, placed in the same situation as TAZV, would have charged.
- (42) Germany suggested comparing the fees paid by Propapier to the average price observed in the sector and quoted a study which found the average price in the sector to be between EUR 0,24 and EUR 1 ⁽¹⁹⁾.
- (43) The Commission observed in the opening decision that it appeared that the private investor principle might be applicable to the present case. However, it expressed doubts as to whether the use of a benchmark could exclude the presence of aid as the data presented appeared to be skewed. Even if the quoted fees from other municipalities were to reflect the full costs, different prices appeared to reflect different local realities, which for a private investor would justify different price levels. As a result, the Commission at the time doubted that the presence of an advantage for Propapier could be excluded on the basis of these data.
- (44) As explained in recital 26, if the measure indeed constitutes new State aid within the meaning of Article 107(1) TFEU, the Commission has doubts about its compatibility with the internal market under Article 107(3) TFEU. If the fees turn out to constitute regional operating aid, there are doubts as to their compatibility as they are neither temporary nor reduced over time, nor do they seem to be targeted to compensating specific (unproven) handicaps of the region.

4. COMMENTS BY GERMANY AND THIRD PARTIES ON THE OPENING DECISION

4.1. DO THE PUBLICLY FUNDED INFRASTRUCTURE PROJECTS CONSTITUTE DEDICATED INFRASTRUCTURE FOR THE BENEFIT OF PROPAPIER?

4.1.1. Car park

Comments from the complainant

- (45) In its opening decision the Commission did not accept the number of parking spaces submitted by the complainant. According to the complainant these figures (parking for 186 cars and 71 trucks) are taken from the preliminary development plan commissioned by the city of Eisenhüttenstadt.

⁽¹⁵⁾ Regarding the recovery of the costs for water services, Article 9 of the EU Water Framework Directive states that 'Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle'.

⁽¹⁶⁾ See recital 69 of the opening decision.

⁽¹⁷⁾ OJ L 260, 6.10.1999, p. 1, in particular Section II.4.4 and Section IV.3.3.1.

⁽¹⁸⁾ OJ L 12, 15.1.2002, p. 1, in particular recitals 196 and 201.

⁽¹⁹⁾ Germany also argued prior to the opening decision that in the *Lenzing Lyocell* case (OJ L 38, 8.2.2001, p. 33, recital 41), the Commission accepted evidence submitted by Austria showing that, in the second half of the 1990s, EUR 0,50 per cubic meter was the normal market price for waste water treatment. However, the Commission in the opening decision held that the *Lenzing Lyocell* case concerned a factual situation that pre-dated the present case by more than 10 years, and concerned a different Member State.

- (46) The complainant argues that Propapier's original building plans do not mention the construction of a private car park, and that, even if Propapier is building its own car park, the so-called public car park still predominantly benefits Propapier: there is a sign allocating parking spaces to trucks for the power plant and the paper mill. In addition, the car park is in the immediate vicinity of Propapier's premises (extending right up to the paper mill boundaries and adjacent to the power plant, which was initially part of Propapier's project). The car park does not offer any rest facilities that can normally be expected from a public car park of this kind.
- (47) The complainant claims that the location of the car park is inconvenient and too remote to serve other inner-city commercial locations and allow the municipality to close down car parks for trucks in the city centre.

Comments from Germany

- (48) According to Germany, the car park does not constitute a selective advantage for Propapier. It is generally accessible and serves not only the Oder-Spree-Kanal industrial area. Germany adds that Propapier has its own parking space (213 spaces for cars and 27 for trucks) and that a building permit has already been issued for additional space for 120 cars.
- (49) Germany disagrees with the complainant's allegations that the car park is predominantly benefiting Propapier and that the location of the car park is inconvenient and too remote to serve other inner-city commercial locations in the city of Eisenhüttenstadt.
- (50) Germany explains that the sign — allocating parking spaces to trucks for the power plant — to which the complainant refers, was temporary and resulted from construction works in the power plant. These works were completed at the end of March 2011. Access to the car park is indicated along the new road, and does not refer to any specific company or installation.

4.1.2. Road

Comments from the complainant

- (51) The complainant opposes Germany's claims that the new road was meant to connect the industrial area with the B-112 motorway; according to the complainant, the road stops a few metres behind the paper mill, without visible plans to continue it, and if it was ever continued, it would not serve other undertakings as there are none in the area in which it could be extended.
- (52) Consequently, the complainant is of the opinion that the car park and the road provide Propapier with a selective advantage and are dedicated to the use of Propapier.

Comments from Germany

- (53) Germany argues that the new road will connect the current industrial park 'Industriegebiet am Oder-Spree-Kanal' and its northern expansion areas to the B-112 motorway. It reduces traffic and air pollution in the centre of Eisenhüttenstadt, enables trucks to avoid the city centre, and will reduce journey times for industrial and commercial traffic to Frankfurt (Oder) by at least one third. It is part of the overall development of the industrial area, which was planned back in 1993, and also gives enterprises in Frankfurt better access to Eisenhüttenstadt inner port. Germany claims that the road was already planned in the Oder programme of the *Land* government.
- (54) It offers further development options for the ArcelorMittal and other industrial areas. The road was built in two stages; after some delay due to technical difficulties, the last Section was completed in 2013.

4.1.3. Widening/deepening of the Oder-Spree Canal

- (55) In 2008, the City of Eisenhüttenstadt extended the industrial park 'Industriegebiet am Oder-Spree-Kanal' with a view to attracting firms. Germany argues that the widening and deepening work on the Oder-Spree Canal is part of the necessary regular maintenance of the waterway (which constitutes part of the Trans European Network TEN). Since 2003, sluices have been developed along the entire canal (currently the Kersdorf sluice, the construction of the Fürstenwalde sluice has been postponed). Germany claims that there is no link with the establishment of Propapier and no selective advantage for Propapier.

4.1.4. Does the waste water treatment plant constitute dedicated infrastructure to the benefit of Propapier?

Comments from the complainant

- (56) The complainant claims that the aid cannot fall under the scheme declared to be non-aid in the decision in case N 644e/02 since this scheme was not applicable when the investment aid for the construction of the TAZV waste water treatment plant was granted, as it expired at the end of 2006.

- (57) The complainant also points out that the scheme is also not applicable because the waste water treatment plant does not provide a public service, but was built solely for predominant use by Propapier.
- (58) The complainant suggests that the paper industry normally has its own waste water treatment plants for recycled paper mills, also in Germany, and therefore the German argument that companies are obliged to connect to the public sewage system is not valid.
- (59) The complainant argues that the waste water treatment plant does not constitute part of a general economic development plan of the industrial area that would include all the potential investors in the park, but was developed and presented at the same time as the Propapier paper mill and the power plant, back in 2007. The Eisenhüttenstadt municipal draft decision on the development of the industrial park, dated 7 November 2007, refers to only two or three investors. The complainant claims that Eisenhüttenstadt only started promotional activities for the industrial area in 2010, and suggests that the city only started to look for new investors after Smurfit Kappa lodged its complaint.
- (60) The complainant considers that the specific construction features of the TAZV plant clearly show that it was specifically tailored to the needs of Propapier. The technical characteristics of waste water treatment plants are very sector-specific. Waste water treatment plants for recycled paper mills normally comprise an anaerobic and an aerobic treatment phase, whereas standard communal sewage systems often only provide the aerobic treatment phase. The fact that the TAZV waste water treatment plant comprises both phases provides for the complainant an additional argument that it cannot be regarded as serving the public interest, but constitutes dedicated infrastructure for Propapier.
- (61) The complainant is of the opinion that it is highly unlikely that capacity needs other than those of the Propapier paper plant (and its complementary power plant, now owned by EnBW) were taken into account when the plant was designed. The complainant argues that EnBW is not an independent user, since the power plant investment is in fact closely linked to the paper plant project and would not exist without the Propapier plant.
- (62) The complainant remarks that the other investor in the area, 5N PV, uses only a negligible percentage of the available sewage capacity of the TAZV, and that its waste water treatment needs could have been covered by the already existing waste water treatment plant. In fact, as 5N PV had already been operating since May 2008, two years before the new TAZV plant became operational, it had initially used the existing waste water treatment plant.
- (63) The complainant alleges that no forecasts exist of the expected sewage capacity needs for potential new investors, and that no information is given on whether and when this additional capacity would be operational. The complainant notes that currently there is in any case hardly any spare capacity left. The complainant also refers to a press article (*Märkische Oderzeitung* of 3 February 2011) reporting on a technical fault in an aeration tank, indicating that all the available tanks are needed for the current industrial users.
- (64) According to the complainant, Germany implicitly confirmed that no other company will use the waste water treatment plant, by stating that the fees for the new TAZV plant are lower than those for the existing plant because the new plant does not require an expensive system of sewers between single users (hereby confirming that no new user will be added).
- (65) According to the complainant, TAZV figures show that Propapier uses at least 90 % of the daily capacity of the plant.
- (66) The complainant alleges that the modularity of the waste water treatment plant claimed by Germany is purely theoretical and does not lead to economies of scale, since a second module would cost 80-90 % of the first. The relatively high costs for adding modules support the finding that the initial investment of EUR 42 million principally benefits Propapier as a selective measure.
- (67) The complainant suggests that the fact that the new TAZV plant is built in the immediate vicinity of the Propapier plant, next to the power plant and the paper mill, allows Propapier to reuse the biogas resulting from the anaerobic treatment of its waste water.
- (68) On the basis of the above, the complainant concludes that the TAZV plant constitutes dedicated infrastructure to the benefit of Propapier, and that the public funding of the construction of the waste water treatment plant constitutes investment aid to Propapier. The complainant claims that the Commission should therefore assess whether this measure, in combination with the regional investment aid granted for the Propapier paper mill (State aid case SA.23827), meets all the requirements of the RAG.

Comments from Germany

- (69) Measures granted under scheme N 644e/02 are not aid.

Public infrastructure available to all under the same conditions

- (70) Germany argues that the waste water treatment plant is not dedicated to Propapier: it constitutes public infrastructure falling under hazard defence and serves environmental protection as well as protection of the population against diseases. All current and future undertakings established in the Oder-Spree-Kanal area have the right to connect to and use the municipal waste water treatment plant under the same conditions. Fees are calculated according to the same principles defined by law. Waste water treatment in Germany is the responsibility of the municipalities, and connection to and use thereof is obligatory. Users cannot opt for any other service provider than the municipal body.
- (71) Germany rejects the complainant's assertion that paper mills normally have their own sewage systems and are not obliged to connect to the communal sewage system, and states that Propapier is obliged by law ⁽²⁰⁾ to connect to and to use the TAZV plant. Exceptions to the obligation to connect are very limited (only when impossible or unreasonable). There are only limited publicly available data on waste water treatment of paper producers, but those data show that a large number of paper mills are connected to communal waste water treatment plants.

Infrastructure not specifically set up for Propapier

- (72) Germany disagrees with the complainant's statement that the TAZV plant was tailored to the technical needs of Propapier: the two-stage treatment of waste water is not specific to the paper industry but is common in many different industrial sectors, and several communal sewage plants comprise treatment of the waste water in two stages. The technical characteristics of the TAZV plant (two-stage biological process) were based on current technical standards, taking into account that a substantial part of the waste water would be highly polluted. Germany admits that communal sewage plants which treat only sanitary waste water or lightly polluted water do not normally have an extra pretreatment stage, but emphasises that the two-stage treatment is common practice for those which have to treat industrial waste water. Germany provided a list of 18 paper plants in Germany producing recycled paper and connected to communal sewage plants, claiming that both types of communal sewage plants (one-stage or two-stage) are in use in the paper sector.
- (73) According to Germany, the waste water treatment plant forms part of a bundle of general infrastructure measures undertaken to develop the Oder-Spree-Kanal area. None of these measures are dedicated to any single undertaking. Decisions about construction, connection to and use of the plant fall outside the discretion of Propapier or potential users.
- (74) Germany rejects the allegation that the TAZV waste water treatment plant was constructed specifically for Propapier. Germany explains that the construction was already planned in the context of other potential investments in 2004-2006, long before the arrival of Propapier.
- (75) Germany explains that the existing capacity of waste water treatment infrastructure outside the industrial area was limited, and that its residual available capacity would only be sufficient to cover the needs of one additional (minor) investor; Germany confirms that 5N PV was indeed initially connected to the existing plant.
- (76) Germany argues that the fact that the establishment of Propapier prompted the start on construction of the long-planned waste water treatment plant cannot be understood as a selective advantage for Propapier. Germany refers to the Opinion of Advocate General van Gerven, who confirmed in Case C-255/91 (*Matra v Commission*) ⁽²¹⁾ that it is inevitable that in the start-up period the infrastructure is mainly used by the first company that has settled in the newly set-up industrial zone. This will however change if the region develops, as hoped for.

⁽²⁰⁾ Cf. paragraph 12(2) of the *Kommunalverfassung des Landes Brandenburg* (BbgKVerf) in connection with paragraphs 7(1) and 8f of the statutes of the TAZV waste water treatment plant in the Eisenhüttenstadt industrial area.

⁽²¹⁾ Opinion of Advocate General van Gerven of 28 April 1993 in Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 28.

- (77) Germany reports that all three undertakings currently established in the industrial park 'Industriegebiet am Oder-Spree-Kanal', namely Propapier, 5N PV and the EnBW power plant, are connected to and use the waste water treatment plant. Germany explains that several further establishments have been considered at different times (one or two fuel surrogate plants, a photovoltaic glass plant, investment proposals made to several investors in different sectors, and several potential investors have visited the site) but that, especially in the light of the crisis which has affected disadvantaged areas particularly badly, the further development of the industrial area will take time.

Current capacity

- (78) Germany rejects the allegations by the complainant that Germany has not indicated the waste water capacity for the TAZV plant users, that Propapier uses at least 90 % of the available capacity, and that there is no spare capacity.
- (79) Germany maintains that, in its current configuration, the TAZV waste water treatment plant does have spare capacity for potential new investors. The three current users together use a capacity of (< 500) (*) m^3/h , and the maximum capacity of the TAZV plant is $638 \text{ m}^3/\text{h}$. The total capacity use is thus approximately (60-80) % and there is spare capacity of approximately (150-250) m^3/h . The average capacity used by Propapier is (300-500) m^3/h , and the maximum is (400-500) m^3/h . Propapier thus uses (< 70) % on average and a maximum of (< 70) % of the total capacity of the TAZV plant.

Modular design of the TAZV plant

- (80) Germany argues that the TAZV plant was intended from the outset to be extended in modular stages along with the step-by-step development of the Oder-Spree-Kanal industrial area. The modular planning of the plant is reflected in the 2007 TAZV abstract, which refers to potentially highly polluted water from the paper industry, bio-ethanol production and other industrial sectors.
- (81) Germany explains that essential parts of the plant in the current phase are already dimensioned for maximal capacity after expansion: e.g. the nominal diameter of the 5 km pipe conducting the water to the Oder after treatment is more than three times larger than necessary for the current construction phase (it can carry a volume of $1\,945 \text{ m}^3/\text{h}$, whereas the current maximum capacity of the plant is only $638 \text{ m}^3/\text{h}$), and TAZV has an option to expand the waste water treatment plant on a 3,3 ha adjacent land plot. Potential users will also have equal access to the waste water treatment plant after such modular expansion.
- (82) Germany therefore maintains that the current high capacity utilisation share of the waste water treatment plant by Propapier is not proof of a selective advantage, but reflects only a snapshot picture, as the infrastructure is designed — through modular expansion — to serve further users under the same conditions. This will take time, because the waste water treatment plant is part of an overall economic development plan for the region, involving several expansion areas in different phases. The current situation with only three established investors is a transitional phase in the development of the industrial areas in this region since 1994. Approximately half of the Oder-Spree-Kanal industrial area (35 ha) is still available for new investors. Germany estimated in 2011 that this space would be occupied within a period of five years, and adds that further expansion would then still be possible in the new areas 'Nordost' (40 ha) and 'Nord' (160 ha).
- (83) Germany rejects the complainant's view that the modular design of the TAZV plant will not lead to economies of scale. The German authorities explain that the modular extension of the TAZV plant is feasible in three phases, and for substantially lower costs per added m^3 capacity compared with the initial investment:

— Phase 1 (capacity increase of 33 %, adding 213 m^3) is feasible within a few months and would cost EUR 1,2 to 1,5 million, for an extra industrial area of approximately 19 ha,

— Phase 2 (capacity increase of 69 %, adding 426 m^3) is feasible within a few months and would cost EUR 5,3 to 5,6 million, for an extra industrial area of approximately 38 ha,

(*) Covered by the obligation of professional secrecy.

— Phase 3 (expansion on adjacent land; capacity increase of 100 %, adding 638 m³) would cost EUR 17-18 million, for an extra industrial area of approximately 57 ha. A 100 % capacity increase would require exercising the option on the adjacent land plot and would cost up to EUR 18 million.

- (84) Germany argues that the modular design of the waste water treatment plant is in line with the need to use resources efficiently and economically, and is to be seen in the context of previous over-dimensioning of waste water treatment plants in the new German *Länder*. To sanction such modular design as a selective advantage would in fact be an invitation to uneconomically oversize public infrastructure. In addition, the fees would not cover the costs for such oversizing.
- (85) To characterise the current limitation of the plant as a selective advantage would result in encouraging uneconomic oversizing of infrastructure.
- (86) Germany claims that the press article referred to by the complainant (see recital 63) is not relevant. According to Germany, to install an additional unused basin just for technical incidents would be contrary to the rules of frugal and economic planning imposed by the *Gemeinschaftsaufgabe*.
- (87) The complainant stated that users of the new TAZV plant pay lower fees than those of the existing municipal plant because the new plant does not need an extensive pipe system to connect all users. Germany rejects the conclusion by the complainant that this shows that no new users can be added to the new plant. Germany holds that new industrial users can easily be connected, and that any limitation is mainly defined by the size of the pipe conducting the treated water to the Oder.
- (88) Germany rejects the allegation by the complainant that Propapier can use the biogas produced by the TAZV plant. There is no possibility for the waste water treatment plant users to use the biogas. TAZV uses the biogas in its own 3 MW power plant.
- (89) Germany rejects the allegation that it only started to promote the industrial park to other potential investors after Smurfit Kappa's complaint: as early as 1998, Eisenhüttenstadt entrusted the Investor Centre Ostbrandenburg with the promotion of industrial and commercial areas, including the Oder-Spree-Kanal area. Planning documents for the industrial park 'Industriegebiet am Oder-Spree-Kanal' have existed since 1995.
- (90) Germany concludes that the TAZV plant does not constitute dedicated infrastructure to the benefit of Propapier.
- (91) Germany also concludes that the infrastructure measures in the extended industrial park 'Industriegebiet am Oder-Spree-Kanal' (construction and provision of waste water treatment plant and the other measures — parking, road, deepening/widening of the canal) are general development measures which do not constitute a selective advantage for Propapier and are not dedicated to the use of Propapier. In Germany's view, the fact that the infrastructure is currently used only by a limited number of primary settlers is a normal transitional stage in such a development process.

4.2. IS THERE AN ADVANTAGE TO PROPAPIER THROUGH REDUCED FEES FOR THE USE OF THE WASTE WATER TREATMENT PLANT?

Comments from the complainant

- (92) The complainant agrees with the Commission's position as expressed in the opening decision (see recital 63 of the opening decision and recital 38 of this Decision) that aid scheme N 644e/02 does not cover the fees for the use of the waste water treatment plant. The fees should therefore reflect the total cost of the use. The fact that the calculation of the fees is based on legislation (*Kommunalabgabengesetz*) does not justify lower fees and the resulting advantage for Propapier.
- (93) The complainant argues that the waste water treatment plant does not provide a public service, but was built solely for predominant use by Propapier.
- (94) According to the complainant, the three tests (full cost test, private investor test, benchmark prices) proposed by the Commission in its opening decision all show that the fees charged provide Propapier with an economic advantage.

Full cost test

- (95) The complainant further argues that not only Article 9 of the EU Water Framework Directive, but also the fact that most recycled paper mills have their own waste water treatment plant, favour the calculation of full costs. The fee paid by Propapier covers only 20 % of imputed interest on equity capital, and does not take account of the share of equity derived from the 80 % public contribution to the construction cost of the waste water treatment plant.

Private investor test

- (96) The complainant considers that, normally, a private operator or a paper mill owner wants to at least cover their full costs, and therefore this test corresponds to the above full cost analysis.

Benchmark prices

- (97) The complainant agrees with the Commission's position as expressed in the opening decision that it is not likely that the use of benchmark prices can exclude the presence of aid. Comparing only paper mills using municipal sewage systems would not be representative, because most paper mills have their own waste water treatment plant.
- (98) The complainant claims that Germany submitted only highly selective information on sewage fees paid by other paper mills (a study, a comparison with Spreetal/Schwarze Pumpe tariffs, and an old decision from 1990), and that these examples cannot constitute a basis for establishing a benchmark, inter alia, because these fees depend on subsidies and investment costs, and legislation may differ from one region to another. The complainant makes a comparison with its own plant using the municipal sewage system in (confidential information), and calculates that taking into account a construction investment of EUR 42 million (as in Eisenhüttenstadt) Propapier would have to pay EUR 4/m³, which is far above what it now pays.
- (99) The complainant claims that the article quoted by Germany was published in 2004 and is based on a study published in 2002 using data from 2000/2001. The complainant refers here to Annex 6 to Germany's submission of 30 January 2009, containing an article from the online news source 'Das Papier 2004-T174' ⁽²²⁾. According to the complainant, the study covers only seven anonymous paper mills, and it is unclear whether they operate their own waste water treatment plant or are connected to the municipal system, and whether the costs considered include operational costs only (excluding capital or other non-operational costs). If the study compares only paper mills using their own waste water treatment facilities, capital costs should be included.

Comments from Germany

- (100) Germany maintains its view that any State aid advantage resulting from the fees charged for the use of the TAZV plant would not constitute State aid as, in Germany's view, the Commission's decision in case N 644e/02 also covers indirect effects of the Gemeinschaftsaufgabe scheme, i.e. the fees). Germany further argues that the measure, which was considered in case N 644e/02 not to constitute State aid, could not become State aid at the level of the user. According to Germany, the Commission changed its approach regarding the issue of whether or not aid to an infrastructure operator can be passed on to the user of an infrastructure only after the General Court ruled on the Flughafen Leipzig-Halle GmbH case ⁽²³⁾.
- (101) Germany admits that the decision in case N 644e/02 had expired when the support was granted to TAZV. However, it points out that the relevant legal provision on which the decision in case N 644e/02 was based was identical to the one on the basis of which the measure for TAZV was granted. The legal basis has merely been updated, but its content has remained unchanged. Therefore, Germany argues, the mere updating of a legal basis does not automatically lead to qualification as State aid.
- (102) Germany emphasises that the cost calculation is transparent and defined by law.

No economic advantage for Propapier

- (103) Germany explains its views on the three possibilities for calculating the fee for a company using waste water treatment services (recital 68 of the opening decision): full cost method, private investor price, benchmark price.

⁽²²⁾ Available online at www.ipwonline.de

⁽²³⁾ Joined Cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v Commission* and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, later confirmed by the judgment of the Court of Justice of 19 December 2012 in Case C-288/11 *P Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*.

Applying the full cost method, there is no advantage

- (104) Germany disagrees that the fee paid by Propapier does not cover the full cost. The cost calculation is prescribed by law (according to which it should in principle cover the costs, except that subsidies from third parties are not taken into account for the calculation of imputed interest ⁽²⁴⁾). The law lays down that costs should be covered but must not be exceeded. All costs incurred by TAZV are covered, including interest on the TAZV part of the capital invested. Calculation of fictitious interest on subsidies from the *Land* would not be justified because TAZV did not incur such costs.
- (105) Propapier enjoys no selective advantage as the fees are the same for all users of the newly built plant.
- (106) Whether the fee would have been higher without the subsidies from the Gemeinschaftsausgabe scheme for the construction of the waste water treatment plant depends on many factors, such as the availability of other financing, among other things.
- (107) Neither the 'polluter pays' principle nor the EU Water Framework Directive obliges the authorities to include subsidies in the calculation of interest on capital invested. The EU Water Framework Directive stipulates that costs of the water services should be recovered, but gives the Member States leeway regarding the manner of implementation. In the present case all costs of TAZV (the water service) are covered. The polluter pays principle is not absolute but has to be 'taken into account'. In the present case, it is taken into account through the calculation of all TAZV costs.
- (108) The EU Water Framework Directive refers to an 'adequate' contribution. Germany notes that, compared with other regions in Germany or the European Union, the fee for Propapier is relatively high. Germany further notes that the EU Water Framework Directive also states that Member States may have regard to the social, environmental and economic effects of covering costs as well as the geographic and climatic conditions of the regions affected.
- (109) Germany claims that comparison with the Kimberly-Clark or InfraLeuna cases (see also recital 70 of the opening decision) is not appropriate. The Kimberly-Clark case concerned a preferential tariff for one company, which gave rise to the suspicion that not all costs were covered. In the present case, all costs are covered and tariff conditions are the same for all users. In the Kimberly-Clark case an industrial zone was being developed for the specific needs of one company, while in the present case the industrial area is being developed for several settlers.
- (110) The InfraLeuna decision concerns the price setting of private companies for the use of private infrastructure, while the present case relates to the use of municipal infrastructure and non-market-related fees which are prescribed by law. In the present case, the users bear all the costs which a waste water service company would normally have to bear. In a non-liberalised waste water treatment market, the cost items to be taken into account are the same for all companies and are prescribed by law (the Brandenburg KAG).
- (111) The Wagner and Weida Leder decisions cited in the opening decision (recital 71 and footnote 19) concern subsidies for the construction of private waste water treatment plants. In the present case, however, Propapier does not receive subsidies for voluntary private investments, but it pays user fees which are imposed on it by law.

The private investor test is not applicable

- (112) Germany considers that water is not a normal commercial product. The waste water treatment sector in Germany is organised as a regional monopoly of public municipal bodies. Waste water treatment in Germany is therefore not an economic activity but a mandatory public authority task for the municipalities. TAZV acts as a public authority and not as an undertaking whose conduct can be analysed applying the market investor test. In Germany, there is an obligation to connect and use. Users cannot opt for a service provider other than the municipal body. The fees are prescribed by law and decided by the authorities. The fees cannot exceed costs.
- (113) The waste water treatment sector in Germany is accessible to private enterprises only to a limited degree. They can act only as manager, operator or concessionaire of a waste water treatment plant in the technical fulfilment of the legal provisions. Responsibility for the task remains, however, with the municipality and the municipality is not legally obliged to put the contract out to tender. Besides, private companies can execute technical tasks (or, in exceptional cases, charge fees), but the fees cannot exceed their costs in this case either. TAZV has not transferred any technical tasks to third parties.

⁽²⁴⁾ Germany submitted a summary of German legislation and the texts of laws relating to the fee calculation in all 16 federal states. Imputed interest on subsidies cannot be taken into account according to any of these laws. See Annex 10 to the submission by Germany dated 1 November 2013.

- (114) As the fees are prescribed by law and cannot exceed the costs of the infrastructure, there is no market in which waste water fees can be set by private companies with a view to profit-making. There is no competition between private companies or between private and public companies to have more users.
- (115) Germany is of the opinion that in such a case it is not possible to compare the operator's conduct with the conduct of a private investor. The private investor test is therefore not applicable.

Benchmark prices

- (116) Because of the obligation to connect to the waste water treatment plant, there is no competition and to that extent no market price either that could be used as a benchmark for assessing advantage under the State aid rules.
- (117) Germany rejects the complainant's statement that only a few paper mills use municipal waste water sewage systems and that therefore it would not be representative for the sector to only use data from those paper mills as a benchmark.
- (118) In its comments, Germany made the correction that Propapier does not pay a fee of EUR 0,95/m³ (as stated in recitals 72 and 80 of the opening decision), but since 2010 a fee of EUR 1,18/m³. Compared with other locations in the European Union, this is high or at least not unusual. According to a survey by the German association of paper producers, undertaken among 77 German paper companies, representing 68 % of the sector, the average fee for the year 2007 was EUR 1,12/m³ (varying between EUR 0,31/m³ and 2,20/m³). The fee paid by Propapier is within the spread and above the average of that sample.
- (119) In later submissions, Germany informed the Commission that the fee was increased in 2012 to EUR 1,41/m³, in order to cover losses in the start-up years of the waste water treatment plant. As there had been some savings related to energy costs, and in line with the legal obligation that the fees have to cover but must not exceed the costs, since the beginning of 2013 the fee had been set at EUR 1,39/m³. In addition, Propapier has to pretreat the waste water before conducting it into the TAZV plant. The costs for the pre-treatment amount to approximately EUR (...) /m³, which brings the total cost for waste water treatment for Propapier to EUR (...) /m³, compared with an average cost in the sector (in 2010) of EUR 1,27/m³.
- (120) Germany claims that comparison with fees paid by other paper producers in the European Union is the correct benchmark for verifying whether there is an economic advantage, and that the Commission's doubts that such a comparison would not be correct are unfounded.
- (121) Germany indicates that the examples it communicated to the Commission are average prices based on full cost values. It claims that it had no reason to believe that these fees contained State aid.
- (122) Germany argues that the example of Lenzing Lyocell⁽²⁵⁾ is valid, even if related to 10 years ago (Propapier pays more than double the fee but the fees have not risen by more than 100 % in the last 10 years).

Existing aid

- (123) Germany advances two arguments in support of its view that the fees, if they constitute aid, would constitute existing aid pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999.
- (124) Germany explains that the Commission concluded in 2003 in its decision in case N 644e/02 that the Gemeinschaftsausgabe scheme did not constitute State aid to the operators of waste water treatment plants, if they were constituted — as in the case of TAZV — in the form of a 'Zweckverband' (a municipal association under public law for a special purpose). The Commission based this assessment on the fact that the 'Zweckverband' was subject to oversight by the municipality, and that it was carrying out a public service. However, as the Commission itself pointed out in recital 57 of the opening decision, even if the scheme should have been seen in the meantime as aid due to the evolution of the internal market, it would be existing aid pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999.

⁽²⁵⁾ See footnote 19 for an explanation of the relevance of this case.

- (125) As explained in recital 100 of the present Decision, according to Germany, the decision in case N 644e/02 also covers indirect effects of the Gemeinschaftsaufgabe scheme, i.e. the fees. The fees never required separate notification, as the regulation relating to the fee calculation constitutes implementation of the scheme.
- (126) With reference to the line of argument that the fees constitute existing aid, Germany states that the fees constitute aid that existed before the entry into force of the Treaty establishing the European Economic Community on 1 January 1958. Aid that existed before the entry into force of that Treaty also remains existing aid in the event of subsequent modifications, as long as the actual substance of the original aid scheme is not altered ⁽²⁶⁾. Clarifications of general specifications applicable before 1 January 1958 do not constitute new aid that should be notified to the Commission ⁽²⁷⁾.
- (127) Germany explains that municipal charges laws already existed prior to the entry into force of the EEC Treaty in 1958 and continued to be applicable thereafter. §6(2) of the current KAG Brandenburg dates back, due to the fact that Brandenburg is situated in a part of the territory of the former Kingdom of Prussia, to the municipal charges law for the Kingdom of Prussia of 14 July 1893 (PrKAG) and the municipal charges law for Bavaria (BayGAG). Germany based this argument on the following sub-arguments:
- (a) These laws continued to be in force between 1919 and 1933 and from 1933 to 1945.
- (b) Today's Municipal Charges Acts of the old German *Länder* date back to the PrKAG.
- (c) There is historical continuity between the KAG Brandenburg and the PrKAG, regardless of the special position of the new states due to the division of Germany.

Sub-argument (a):

- (128) The PrKAG already included the possibility for municipalities to charge fees for the use of public infrastructure. The municipal charges regulation that has been in force in Bavaria since 1938 (and was the basis for a series of similar regulations in other states of southern Germany) also provides for this possibility ⁽²⁸⁾. Pursuant to the PrKAG, the fees are normally calculated in such a way that the management and operational costs of the facility, including expenditure on interest and repayment of capital, are covered. Although the text of the PrKAG states only that the fees must cover the interest on capital (used for the infrastructure), later interpretations from the post-war period on the PrKAG implied that an interest rate on grants from third parties was not provided for under the PrKAG.
- (129) The PrKAG or comparable existing state laws were not expressly repealed either by the Weimar Republic or after the seizure of power by the national socialists. Thus, these laws remained in force after 1918.

Sub-argument (b):

- (130) After the Second World War, the PrKAG continued to be in force in the form of state laws (*Landesrecht*) under the German Constitution of 1949, which permitted the continuation of laws that did not contradict the Constitution (Article 123 of the Basic Law), and through provisions which allowed the federal states to enact laws in certain areas. This development makes it clear that the PrKAG was in force in the German *Länder* before the entry into force of the Treaty establishing the European Economic Community.
- (131) After the creation of the Federal Republic of Germany in 1949, the PrKAG was gradually replaced in individual West German *Länder* by the various Municipal Charges Acts. With the replacement of the PrKAG by these state laws in the 1960s and 1970s, the system was clarified and the terminology adapted, but the actual substance of the law remained intact. In particular, third party subsidies remained outside the scope of imputed interest ⁽²⁹⁾. Under the PrKAG interest was only to be calculated for debt. The calculation of interest in the state laws was extended to equity, but neither the PrKAG nor the German *Länder* laws provided for calculated interest on grants.

⁽²⁶⁾ See *Gibraltar v Commission*, judgment of the Court of First Instance in Joined Cases T-195/01 and T-207/01 [2002] ECR II-2309, paragraph 111.

⁽²⁷⁾ Judgment of the Court of Justice in Case C-44/93 *Namur-Les Assurances du Crédit SA v Office National du Ducroire et al.* [1994] ECR I-3829, paragraph 29.

⁽²⁸⁾ Although the Bavarian law only states that municipalities are entitled to collect charges, a court ruling on its implementation refers to the relevant paragraph of the PrKAG for the principles of calculation of the charge.

⁽²⁹⁾ See page 36 of the Legal Reasoning behind the Municipal Charges Act of North Rhine-Westphalia, LT-Drs 5/810.

- (132) Germany therefore considers that today's Municipal Charges Acts of the old German *Länder* constitute a continuation of the provisions of the PrKAG. Germany suggests that for the purposes of this case it is particularly important to look at the Municipal Charges Act of North Rhine-Westphalia of 1969 ⁽³⁰⁾, which served as a model for the KAG Brandenburg, and which replaced the PrKAG of 1906. The substance of the KAG Brandenburg remains the same as that of the PrKAG despite the necessary adaptation of the terminology (see recital 128 of the present Decision). It is important to note that the municipal charges acts of other federal states are also based on the PrKAG, which they also replaced (e.g. Rhineland-Palatinate, Schleswig Holstein, Hessen).

Sub-argument (c):

- (133) Germany considers that the KAG Brandenburg has a special status resulting from the post-war division of Germany. The years following the foundation of the German Democratic Republic (GDR) put an end to municipal self-government with its independent sphere of activity in Brandenburg and the other East German *Länder*. Regulations were enacted at central government level. However, the Law on Municipal Constitution ⁽³¹⁾ of 17 May 1990 (enacted by the national chamber of the GDR before German reunification on 3 October 1990) restored municipal self-government and provided that municipalities must cover the costs of their operation from their own resources. For this, they became entitled to collect remuneration and charges for the provision of services.
- (134) The KAG Brandenburg of 27 June 1991 was modelled on the Municipal Charges Act of North Rhine-Westphalia with virtually identical provisions.
- (135) Germany argues that, despite the different evolution of the law in the former GDR, it would not be justified to treat the municipal charges acts of the East German States and those of the West-German States differently. It is clear that the KAG Brandenburg follows the legal tradition of the PrKAG and breaks with the legal heritage of the former GDR. There is also no institutional continuity between the GDR (waste) water treatment system and the current Brandenburg waste water treatment system. The Law on Municipal Constitution of 17 May 1990 was the foundation for the enactment of municipal charges acts in the new federal states. These acts were similar to those of the old federal states, which in turn date back to the PrKAG. This was an inevitable consequence of the new federal states joining the Federal Republic of Germany under the Constitution ⁽³²⁾. This is especially clear from the development of the KAG Brandenburg, as described above. The KAG Brandenburg is in line with the legal tradition of the Municipal Charges Act of North Rhine-Westphalia and the PrKAG. The division of Germany and the resulting discontinuation of legal development in the East German federal states should not be allowed to lead to a disadvantage in the context of the interpretation of the KAG Brandenburg.
- (136) Hence there is historical continuity between the KAG Brandenburg and the PrKAG.
- (137) Germany further argues that the both the principle of equivalence and that of cost recovery existed already before the EEC Treaty came into force in 1958. The principle of equivalence requires that a charge should be proportionate to the service provided by the public authority. This is part of the concept of the rule of law, which is enshrined in the German Constitution. The principle of cost recovery follows from the PrKAG. Even if the principle is not strictly applied in all charge calculations, the charges revenue of a municipality would not significantly exceed its costs.

Observance of the principle of protection of legitimate expectations and the general principle of equal treatment

- (138) Germany also claims that, if the Commission were to consider that the fees charged to Propapier contained operating aid, recovery of these aid components would be contrary to both the principle of legitimate expectations and the general principle of equal treatment.
- (139) The principle of legitimate expectation means that: (1) a Union body must have given rise to justified expectations; and (2) a prudent economic operator could not have predicted the adoption of a measure likely to affect its interests.
- (140) Given that the Gemeinschaftsaufgabe scheme (approved by the decision in case N 644e/02) was not considered to be aid, Propapier could have a justified expectation that it was not benefiting from State aid. Earlier, there was no doubt about the compatibility of these measures with Union law as no similar measures had been subject to scrutiny by the European Commission.

⁽³⁰⁾ Paragraph 6(1) KAG NW and Paragraph 6 KAG Brandenburg: The estimated charges shall not exceed the estimated cost of the facility or installation ('Die veranschlagten Gebühren sollen die voraussichtlichen Kosten der Einrichtung oder Anlage nicht übersteigen'). Paragraph 6(2) KAG NW and Paragraph 6(2) KAG Brandenburg: The costs include charges for third party services, depreciation and amortisation, which are to be applied evenly on the anticipated useful life or performance of the facility, as well as a reasonable return on the capital invested. Interest on contributions or grants from third parties are not taken into account. ('Zu ansatzfähigen Kosten gehören (...) Entgelte für in Anspruch genommene Fremdleistungen, Abschreibungen, die nach der mutmaßlichen Nutzungsdauer oder Leitungsmenge gleichmäßig zu bemessen sind, sowie eine angemessene Verzinsung des aufgewandten Kapitals. Bei der Verzinsung bleibt der aus Beiträgen und Zuschüssen Dritter aufgebrauchte Eigenkapital außer Betracht').

⁽³¹⁾ Gesetz über die Selbstverwaltung der Gemeinden und Gemeindeverbände in der DDR vom 17 Mai 1990.

⁽³²⁾ Under Article 23, second sentence of the Basic Law in the version dated 23 May 1949.

- (141) Recovery of the aid element not included in these fees after a finding that they constituted operating aid would also be contrary to the principle of equal treatment, which requires that identical facts be treated in the same manner. Recovery would provide an advantage to the competitors of Propapier.

4.3. COMMENTS FROM THE GERMAN MUNICIPAL ASSOCIATIONS AND THE VKU

- (142) The German municipal associations and the VKU fully embrace the comments made by Germany in its submission of 28 January 2011, for which they collaborated. They specifically refer to the comments stating that waste water treatment in Germany is a sovereign non-economic task of the municipalities. The municipalities carry out the organisation and the financing of this task within the framework of their constitutional local self-government, in the interest of the citizen.
- (143) The German municipal associations and the VKU explain that §6(2)(5) KAG Brandenburg, according to which the charges for the waste water treatment plant have to cover the costs, imputed interest and imputed depreciation, but subsidies are not to be taken into account for the calculation of interest on capital invested, is in the interest of the consumer. Since subsidies from third parties do not constitute own capital invested by the municipalities, consumers should not pay interest to the municipalities on these subsidies.

5. ASSESSMENT OF THE MEASURE UNDER THE STATE AID RULES

- (144) The measures in question qualify as State aid if the following conditions are met: (i) the aid has to be granted by a Member State or out of State resources; (ii) it has to confer an economic advantage on undertakings; (iii) the advantage has to be selective, and (iv) the measure distorts or threatens to distort competition and affect trade between Member States. The existence of State aid is established when the conditions laid down in Article 107(1) of the TFEU are satisfied on a cumulative basis.
- (145) Already in the opening decision, it was undisputed that all the measures in question involved the use of State resources and that they could potentially distort competition and trade in the internal market.
- (146) The Commission notes that, with respect to the elements of the complaint, it is necessary to distinguish between: (1) alleged State aid to Propapier through dedicated infrastructure measures (construction of the waste water treatment plant, as well as certain other infrastructure projects in the newly extended industrial park where the new Propapier plant is situated); and (2) alleged aid to Propapier in the form of reduced waste water treatment charges.

5.1. ARE THE PUBLICLY FUNDED INFRASTRUCTURE PROJECTS GENERAL INFRASTRUCTURE OR INFRASTRUCTURE DEDICATED TO THE BENEFIT OF PROPAPIER ONLY?

- (147) The Commission has considered in the past that public authorities can carry out work to develop their land. They can, for instance, finance investments into infrastructure which will benefit the population as a whole. Moreover, the Commission considers that the reason for setting up such infrastructure is irrelevant, provided it is in the interests of the local community as a whole. However, if such infrastructure will serve the needs of a private company only, that company is responsible for funding it. This follows from the fact that, where State aid is concerned, the Commission's remit is to analyse the impact of the measures concerned in practice, rather than the objectives pursued. In the present case, the Commission therefore takes the view that it is a matter of analysing which infrastructure is of benefit to the community as a whole (including Propapier) and which is of use only to Propapier. It is only the latter which should be financed by Propapier⁽³³⁾.
- (148) The Commission observes that the car park, the road and the Oder-Spree Canal are not operated by undertakings within the meaning of EU competition law, because their use is free of charge. Therefore, the issue of State aid to the owners and operators of those infrastructures does not arise in this case.

5.1.1. Car park

- (149) The complainant claims that the location of the car park is inconvenient and too remote to serve other inner-city commercial locations and allow the municipality to close down car parks for trucks in the city centre. Germany has indeed not demonstrated the opposite, but the fact that a car park is in the immediate vicinity of an undertaking does not automatically mean that it is dedicated to that undertaking or would benefit predominantly that undertaking. The sign to which the complainant refers (see recital 46), allocating parking spaces to trucks for the power plant, was used only on a temporary basis owing to construction works in the power plant, which were completed at the end of March 2011. The Commission notes that the car park is freely accessible and access to it is signposted on the public road without any references to a specific company. And whether it offers rest facilities or not is not relevant for its qualification as general infrastructure.

⁽³³⁾ Commission Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in 'Terra Mítica SA', a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), recital 64.

- (150) Germany has submitted sufficient evidence that the car park was not built specifically for Propapier but was part of the economic development plan for the industrial park. Moreover, Propapier has private parking for 27 trucks and 213 cars. An additional 120 parking spaces for cars are planned (the building permit has been issued). Germany confirmed already at the time of the opening decision that Propapier's own parking capacity was sufficient to accommodate its employees, suppliers and visitors.
- (151) On the basis of the above, the Commission confirms its provisional view expressed in the opening decision and decides that **the car park is not dedicated to Propapier and involves no State aid.**

5.1.2. Road

- (152) The road is a public road. It is part of the overall development of the industrial area, which was already planned in 1993, long before the settlement plans of Propapier. Contrary to the complainant's submissions, the road does not stop a few metres behind the Propapier paper mill, but it connects the current Oder-Spree-Kanal industrial area and its northern expansion areas to the B-112 motorway. The last Section was completed in 2013. The new road can serve other undertakings since it offers further development options for the ArcelorMittal and other industrial areas. It may cut driving time for industrial and commercial traffic to Frankfurt (Oder), and also provides better access for enterprises in Frankfurt to the Eisenhüttenstadt inner port.
- (153) The Commission therefore confirms its provisional view expressed in the opening decision and decides that **the road is not dedicated to Propapier and involves no State aid.**

5.1.3. Widening/deepening of the Oder-Spree Canal

- (154) The complainant alleged in its complaint that the infrastructure works for the widening and deepening of the Oder-Spree Canal were exclusively dedicated to Propapier and involved State aid to Propapier. The City of Eisenhüttenstadt did extend the industrial park 'Industriegebiet am Oder-Spree-Kanal' in 2008 with a view to attracting firms. Since 2003 sluices have been built along the entire canal (which constitutes part of the Trans-European Network TEN). There is, however, no indication of a causal link between these infrastructure works and the settlement of Propapier or that these works would offer a selective advantage to Propapier, and the Commission agrees with Germany that the widening/deepening of the Oder-Spree Canal is part of the necessary regular maintenance of the waterway.
- (155) The Commission therefore confirms its provisional view expressed in the opening decision and decides that **the widening/deepening of the Oder-Spree Canal does not constitute a selective advantage for Propapier and involves no State aid.**

5.1.4. Waste water treatment plant

- (156) The Commission notes that the capacity of existing waste water treatment infrastructure outside the extended Oder-Spree-Kanal industrial area is limited. The residual available capacity of the existing waste water treatment plant in Eisenhüttenstadt could only fulfil the needs of a small additional investor, but would not be sufficient to meet needs if a large or several smaller industrial investors were to settle in the new area.
- (157) The Commission also notes that the TAZV waste water treatment plant was not constructed specifically for Propapier. The construction was already planned in the context of other potential investments in 2004-2006, long before the arrival of Propapier. Germany submitted evidence showing that the waste water treatment plant was planned as part of the economic development of the industrial park 'Industriegebiet am Oder-Spree-Kanal'. Germany also produced evidence of several publicity campaigns to attract investors to the extended Oder-Spree Canal industrial area, which have however not been successful to date since the regional authorities have not yet managed to attract additional investors to the area (apart from Propapier, EnBW and 5N PV).
- (158) Even though the waste water treatment plant is technically — given its anaerobic first treatment stage — designed to deal with waste water from heavy industrial polluters such as producers of CCM from recycled fibre, an anaerobic first treatment stage would also be useful for other users producing industrial waste water with a high level of organic pollution, such as companies from the beverages and food industry. Furthermore, for industrial waste water with high organic pollution, waste water treatment plants with an anaerobic first stage offer a number of important economic and environmental advantages.

- (159) Although as currently sized the TAZV plant mainly serves the needs of Propapier, it is also used — under the same conditions — by the two other companies settled in the area. Its modular design allows for its extension to additional users. Even without modular expansion, there is currently some (20-40) % spare capacity available for additional investors, with potential for doubling the present total capacity (see recitals 80 to 84). The waste water treatment plant is open to all users on a non-discriminatory basis — new investors settling in the park are obliged by law to connect to and use the plant — and it can also deal with waste water from companies not involved in paper production.
- (160) The Commission is of the view that the fact that the TAZV plant is at present predominantly (< 70) % on average and (< 70) % maximum) used by Propapier does not therefore necessarily mean that it constitutes dedicated infrastructure, as its modular design makes sense from an economic point of view in times of limited public budgets. Contrary to the complainant's claim, the cost of doubling the capacity of the TAZV plant, which is estimated by Germany to amount to less than 50 % of the initial investment cost, shows that the modular concept allows for realising economies of scale.
- (161) The fact that the regional aid for the construction of the plant was granted subject to the settlement of a main investor, in this case Propapier, in the extended business park, is considered by the Commission to constitute good public management of scarce resources since it makes sense not to start building a major public infrastructure without ensuring that it will be used, and not to over-dimension it.
- (162) The statement that paper mills normally have their own waste water treatment plants can be rejected on the basis of the figures presented by Germany. Although in-house waste water (pre-)treatment plants exist in the paper industry as well as in other industries, this in itself is not an indication that, in cases where industrial users use the municipal waste water treatment plant, an advantage is transferred from the State to the users, as users cover the costs over time with their fees.
- (163) The Commission therefore concludes that **the waste water treatment plant constitutes general infrastructure** and thus the grant to TAZV does not constitute investment aid to Propapier. Unlike in the case of the car park, the road and the Oder-Spree Canal, the operator of the waste water treatment plant exercises an economic activity, because it offers a service (waste water treatment) against remuneration in the market. The Commission has found, however, that any aid granted to TAZV would in any event constitute existing aid (recitals 51 to 57 of the opening decision). Therefore, there is no need to further assess potential aid to TAZV in the present Decision.
- (164) To sum up, the Commission concludes that the various infrastructure projects financed by State resources in the newly extended industrial park where the Propapier plant is situated are **not exclusively dedicated to the paper mill and therefore should not qualify as dedicated infrastructure and State aid to the benefit of Propapier**. This means that these aided investments do not constitute a single investment project within the meaning of paragraph 60 of the RAG with the regional investment aid approved for the paper mill of Propapier in the final Decision SA.23827 (2013/C) (see footnote 4). Thus, the assessment of the investment aid for Propapier which was the subject matter of that decision remains unaffected by the present Decision.

5.2. DO THE REDUCED FEES FOR THE USE OF THE WASTE WATER TREATMENT PLANT CONSTITUTE STATE AID?

- (165) Regarding Germany's argument that, if a measure was granted to the operator under a scheme found to be a non-aid scheme, no 'aid' could be passed on to the user of the infrastructure, the Commission would point out again that the decision on scheme N 644e/02 did not state whether or not fees charged for the use of the infrastructure might constitute State aid to the users of the infrastructure. The Commission maintains its position expressed in the opening decision that no regulation on charges, which would be applicable to the grants under the notified scheme, had been brought to its attention and that therefore the decision authorising the scheme cannot be viewed as implicitly authorising possible aid of which the legal basis would be the Municipal Charges Act.

- (166) Article 107(1) TFEU lays down that any aid granted by a Member State or through State resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the internal market.
- (167) It must be pointed out that the existence of State aid has to be established irrespective of: (1) whether or not the EU Water Framework Directive and German legislation implementing the directive require the recovery of full costs of the provision of waste water treatment services; and (2) whether the fees comply with the provisions of these laws. In other words, measures fully complying with both the EU Directive and the applicable German legislation may still constitute State aid, if all the conditions laid down in Article 107(1) TFEU (see recital 144) are satisfied.

State resources and imputability

- (168) The charges to be paid for using the waste water treatment plant are determined and collected by the municipality, in accordance with paragraph 6 of the *Kommunalabgabengesetz Brandenburg*. Setting the rate of the fees below the level a private investor would have charged would entail the municipality foregoing revenues.
- (169) Thus, the measure would be granted by the State or through State resources as determined by Article 107(1) TFEU since the income of the municipality would fall owing to the advantage granted to Propapier.
- (170) Setting the fees at an advantageous level would also be imputable to the State, as it is the result of an act of a public authority, i.e. the municipality of Eisenhüttenstadt.

Economic advantage

- (171) As explained in the opening decision ⁽³⁴⁾ the Commission was to assess whether the level at which the waste water treatment charges for Propapier are set provides a (selective) economic advantage to Propapier.
- (172) It is established case law that the concept of ‘advantage’ embraces not only positive benefits, such as subsidies, but also measures which, in various forms, reduce the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect ⁽³⁵⁾.
- (173) Applied to the present case, the question therefore arises whether the waste water treatment charges for Propapier are lower than what a similar undertaking would have to pay under normal market conditions, in other words, whether the level of charges is in line with the market economy operator principle. This can, in the Commission’s view, be determined in two alternative ways:

— comparing the price paid by Propapier to a benchmark price which can be typically observed in the Member State in question for waste water treatment,

— an *ex ante* profitability analysis that shows that a private operator would have charged the same level of prices.

Benchmark price

- (174) In view of the organisation of the market, as described by Germany (see recitals 112-113), and in view of the fact that operators, even if private, cannot set the prices for their services freely since they are bound by law by the KAG Brandenburg, the Commission is of the view that it is not possible to establish benchmark prices that a private operator would have charged under normal market conditions.
- (175) The Commission further notes that Germany provided data on prices paid by undertakings in the sector where Propapier is active. Although Germany claims that the benchmark prices it presented are averages which reflect full costs, there is no indication as to whether or not these fees contain State aid. The Commission’s doubts regarding the usefulness of these data as a basis for comparison have not been alleviated. This is primarily because the Commission believes these prices may reflect different cost realities and may or may not include State aid.

⁽³⁴⁾ See recitals 66 to 68 of the opening decision.

⁽³⁵⁾ Judgment of the Court of Justice in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECR I; Case C-200/97 *Ecotrade v AFS* [1998] ECR I-7907, paragraph 34; and Case C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 15.

Ex ante profitability analysis

- (176) Given the absence of reliable market benchmarks, the Commission takes the view that the fact that a transaction is in line with market conditions can be established on the basis of another generally accepted, standard assessment methodology. The Commission considers that, for infrastructure which is open to all and not dedicated to a specific user, the market investor/operator test is satisfied if the users of the infrastructure incrementally contribute, from an *ex ante* viewpoint, to the profitability of the operator ⁽³⁶⁾.
- (177) This is the case where the operator's commercial arrangement with the individual user allows the operator to cover all costs stemming from this arrangement with a reasonable profit margin on the basis of sound medium-term prospects ⁽³⁷⁾.
- (178) This assessment should moreover take into account all revenue and all expected incremental costs incurred by the operator in relation to the activity of the specific user ⁽³⁸⁾.
- (179) Such incremental costs encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs, arising from the presence of the user ⁽³⁹⁾. In contrast, costs which the operator would have to incur anyway, independently of the arrangement with the user, should not be taken into account.
- (180) On the basis of these factors, the Commission takes the view that the market investor/operator test is satisfied, i.e. **the reduced fee does not confer an advantage on Propapier** for the following reasons:
- (a) it is concluded above that the waste water treatment plant is open to all and is not dedicated to Propapier;
- (b) the fee paid by Propapier includes operating costs, maintenance and repair costs, personnel and charge management costs, imputed depreciation, and also imputed interest on 20 % of the investment capital invested in the waste water treatment; it thus covers all incremental costs incurred by the operator of the waste water treatment plant in relation to the activity of Propapier.
- (181) As regards the reasonable profit margin that the user fees should cover in addition to the incremental costs, the charges in the present case cover not only the incremental costs but also imputed interest on 20 % of the investment capital. Whereas this is not expressly identified as reasonable profit for the purposes of the incremental cost approach defined above, it provides the operator with additional income just as a reasonable profit would do.
- (182) Given that the fee does not confer an advantage and therefore does not constitute State aid, it was not necessary for the Commission to evaluate the question whether or not the fees constitute existing aid (see recitals 123 to 137) or operating aid (see recital 26), or to address the issue of compatibility of such operating aid with the internal market. In view of this finding, the Commission can also leave open the question whether or not recovery of the fees (had they been found to constitute operating aid) would be contrary to the principles of legitimate expectations and equal treatment.

6. CONCLUSION

- (183) The Commission thus concludes that neither the construction of the TAZV waste water treatment plant, nor the construction of the car park, nor the new road, nor the widening and deepening of the Oder-Spree Canal constitute dedicated infrastructure.
- (184) The Commission also concludes that the waste water treatment fees do not contain State aid. The market investor/operator principle is satisfied and therefore no economic advantage is provided for Propapier PM2 GmbH,

⁽³⁶⁾ See point 63 of the Commission Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

⁽³⁷⁾ Idem.

⁽³⁸⁾ For instance, if the operator needs to expand or adapt the infrastructure mainly to accommodate the needs of a specific user, such costs should be taken into consideration when calculating the incremental costs. See sentence 4 of Paragraph 64 of the Commission Guidelines on State aid to airports and airlines.

⁽³⁹⁾ See point 64 of the Commission Guidelines on State aid to airports and airlines and recital 94 of the Commission decision in case SA.1885 — C 5/08 (ex NN 58/07) — Denmark — Illegal subsidy arrangements by Aarhus Airport Ltd in favour of Ryanair.

HAS ADOPTED THIS DECISION:

Article 1

The infrastructure measures implemented by Germany do not constitute dedicated infrastructure for Propapier PM2 GmbH. The fees charged by TAZV to Propapier for the use of the waste water treatment plant do not involve State aid. Therefore, the infrastructure measures and fee setting rules do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

ISSN 1977-0677 (electronic edition)
ISSN 1725-2555 (paper edition)



Publications Office of the European Union
2985 Luxembourg
LUXEMBOURG

EN