

Official Journal of the European Union

L 179



English edition

Legislation

Volume 58

8 July 2015

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⁽¹⁾ Text with EEA relevance

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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.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/1071**of 1 October 2014****on State aid SA 26190 (2012/C) (ex 2011/NN) implemented by Germany for Saarbrücken Airport and airlines using the airport***(notified under document C(2014) 5062)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) In a parliamentary question of 2008, MEP Hiltrud Breyer raised the issue of the public financing of Verkehrsholding Saarland ('vh Saar'), of Saarbrücken Airport and of the discounts granted to the airlines using the airport ⁽³⁾. The parliamentary question was answered by Commissioner Tajani on 5 September 2008. In addition, the question was registered as a complaint under CP 171/2008.
- (2) The parliamentary question alleged that vh Saar had received EUR 11 million from Saarland's State budget in the form of a capital increase. It was alleged that these funds were used to cover losses of the airport's operating company, which belonged to a subsidiary of vh Saar. The airport operator, its parent company and vh Saar were claimed to be connected via profit and loss transfer agreements ('P&L agreements'). This construction allegedly served the purpose of covertly and permanently subsidising the unprofitable airport.
- (3) The Commission requested further information from Germany on 31 July 2008, 24 September 2010, 24 March 2011, and 8 August 2011. Germany responded to these requests and provided further information on 4 November 2008, 17 January 2011, 14 June 2011, and 7 October 2011.
- (4) By letter dated 22 February 2012, the Commission informed Germany that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.

⁽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 Articles are in substance identical. For the purposes of this Decision references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

⁽²⁾ OJ C 213, 19.7.2012, p. 1.

⁽³⁾ E-3778/08, 8 July 2008.

- (5) The Commission decision to initiate the procedure ('opening decision') was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the alleged aid.
- (6) The Commission received comments from one interested party — Air Berlin — on 20 August 2012. It forwarded them to Germany on 1 October 2012, which was given the opportunity to react within one month; Germany's comments were received by letter dated 29 October 2012. Private individuals sent their comments within the framework of the procedure, stating that the public financing granted to the airport constituted State aid.
- (7) Following the opening of the formal investigation procedure the Commission requested further information on 24 February 2012, 23 April 2012, 16 October 2012, 26 November 2013 and 14 March 2014. Germany responded to these requests and submitted further information on 17 April 2012, 4 May 2012, 14 December 2012, 14 January 2014 and 3 April 2014.
- (8) On 24 February 2014 the Commission informed Germany that the 2014 Aviation Guidelines ⁽⁵⁾ were adopted on 20 February 2014 and invited Germany to submit comments within 20 working days as of the publication of the new Aviation Guidelines in the Official Journal. Germany replied on 6 May 2014.
- (9) The 2014 Aviation Guidelines were published in the *Official Journal of the European Union* on 4 April 2014 ⁽⁶⁾. They replaced the 2005 Aviation Guidelines ⁽⁷⁾.
- (10) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within 20 working days of the publication date of this notice ⁽⁸⁾. Air Berlin submitted comments on 5 May 2014.
- (11) On 17 June 2014, Germany informed the Commission that it exceptionally accepts that this decision is adopted in the English language.

2. DESCRIPTION OF THE MEASURES AND GROUNDS FOR INITIATING THE PROCEDURE

2.1. BACKGROUND OF THE INVESTIGATION

2.1.1. HISTORY AND DEVELOPMENT OF SAARBRÜCKEN AIRPORT

- (12) Saarbrücken Airport is the airport of the capital of the *Land Saarland*, Saarbrücken. According to publicly accessible information, the airport was inaugurated in 1928 and operated until 1939, when it was closed after the outbreak of the war. The airport resumed operations in 1966, when a modern runway suitable for medium range aeroplanes was constructed. In 1999 the construction of a new terminal commenced, requiring an investment of approximately EUR 11,8 million. The new terminal, which according to publicly available information was designed for up to 800 000 passengers per year ('pax') was opened in May 2005. However, due to limitations arising from the security infrastructure, Germany submits that the airport's actual capacity is only 700 000 pax.
- (13) Tables 1 and 2 indicate the development of the airport in terms of passenger numbers and aircraft movements. Air freight is of no great significance at Saarbrücken Airport.

Table 1

Passenger numbers 1998–2012 ⁽¹⁾

Year	Commercial Scheduled	Commercial Charter	Comm. Total	Non-Comm.	Total
1998	126 231	293 449	419 680	10 070	429 750

⁽⁴⁾ Cf. footnote 2.

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

⁽⁶⁾ See footnote 5.

⁽⁷⁾ OJ C 113, 15.4.2014, p. 30.

⁽⁸⁾ See footnote 7.

Year	Commercial Scheduled	Commercial Charter	Comm. Total	Non-Comm.	Total
1999	134 228	308 634	442 862	3 810	446 672
2000	149 693	332 902	482 595	1 971	484 566
2001	141 676	338 354	480 030	831	480 861
2002	144 542	316 757	461 299	946	462 245
2003	135 100	323 083	458 183	1 502	459 685
2004	128 498	331 355	459 853	1 560	461 413
2005	136 178	350 052	486 230	1 256	487 486
2006	125 188	295 033	420 221	1 422	421 643
2007	176 690	173 263	349 953	639	350 592
2008	360 694	157 226	517 920	368	518 288
2009	335 684	134 249	469 933	214	470 147
2010	331 780	159 469	491 249	166	491 415
2011	368 314	84 000	452 314	1 338	453 652
2012	364 076	61 353	425 429	414	425 843

⁽¹⁾ <http://www.flughafen-saarbruecken.de/index.php?id=372>

Table 2
Aircraft movements ⁽¹⁾

Year	Commercial Scheduled	Commercial Charter	Comm. Total	Non-Comm.	Total
1998	7 240	6 021	13 261	7 558	20 819
1999	7 491	7 192	14 683	7 280	21 963
2000	7 970	8 171	16 141	4 972	21 113
2001	6 740	4 624	11 364	3 582	14 946
2002	7 979	3 957	11 936	3 228	15 164
2003	7 256	4 377	11 633	3 378	15 011
2004	6 531	4 032	10 563	3 201	13 764
2005	6 291	4 453	10 744	3 458	14 202
2006	6 469	4 539	10 980	4 047	15 055

Year	Commercial Scheduled	Commercial Charter	Comm. Total	Non-Comm.	Total
2007	7 046	4 011	11 057	3 464	14 521
2008	11 173	3 475	14 648	2 596	17 244
2009	9 686	2 912	12 598	3 093	15 691
2010	8 775	4 983	13 758	2 487	16 245
2011	7 307	4 641	11 948	2 535	14 483
2012	6 567	3 398	9 965	2 359	12 324

⁽¹⁾ http://www.flughafen-saarbruecken.de/index.php?id=daten_fakten

- (14) The most significant developments for the airport were the departure of Hapag Lloyd in 2006 on the one hand and the establishment of Air Berlin in 2007 on the other. The charter airline Hapag Lloyd (now 'TUIFly') had, until it decided to relocate its operations to the nearby located Zweibrücken Airport, contributed more than 190 000 passengers to Saarbrücken's total traffic. The establishment of Air Berlin, on the other hand, signalled a significant increase in the scheduled flights traffic at Saarbrücken. In consequence, while until 2006 charter traffic dominated operations at Saarbrücken Airport, scheduled flights traffic is since 2007 responsible for the majority of passengers at Saarbrücken.
- (15) As regards the future, Germany submitted that according to the most recent air traffic projection (August 2010), passenger numbers can be expected to rise to [...] (*) passengers in the year 2020.

2.1.2. GEOGRAPHICAL LOCATION AND CATCHMENT AREA

- (16) Saarbrücken Airport is located approximately 10 km to the south-east of the City of Saarbrücken. The nearest other airports are ⁽²⁾:
- Zweibrücken Airport (approximately 39 km, or approximately 29 minutes by car),
 - Metz–Nancy–Lorraine Airport (approximately 96 km, or approximately 61 minutes by car),
 - Luxembourg Airport (approximately 121 km, or approximately 77 minutes by car),
 - Frankfurt–Hahn Airport (approximately 128 km, or approximately 85 minutes by car),
 - Strasbourg Airport (approximately 140 km, or approximately 91 minutes by car),
 - Frankfurt (Main) Airport (approximately 163 km, or approximately 92 minutes by car),
 - Karlsruhe/Baden–Baden Airport (approximately 161 km, or approximately 104 minutes by car).
- (17) Germany submitted that the large majority of passengers are from the region. It is asserted that 71 % of passengers are from *Saarland*, 15 % from the western part of *Rhineland–Palatinate* (including the Zweibrücken region) and around 14 % stem from France, Luxembourg and the Trier region. The projected increase of the passenger numbers is also expected to result from an increase of demand from the *Saarland* region.

2.1.3. LEGAL AND ECONOMIC SET-UP OF SAARBRÜCKEN AIRPORT

- (18) In 1997, the Flughafen Saarbrücken GmbH, previously owner and operator of the Airport, was split up into two separate companies: the Flughafen Saarbrücken Betriebsgesellschaft mbH ('FSBG') was charged with operating the airport, while the Flughafen Saarbrücken Besitzgesellschaft mbH ('FSBesitzG') owned the airport and was in charge of maintaining the infrastructure. In return for operating and commercially exploiting the airport, the FSBG had to pay a leasing payment to FSBesitzG.

(*) Business secret.

(2) Source: fastest route according to Google Maps.

- (19) Until 30 June 2007, the FSBG was 48 % owned by the FSBesitzG, 51 % by the Fraport AG (operator of Frankfurt (Main) Airport) and 1 % by the City of Saarbrücken. The FSBesitzG was, in turn, 99,9 % owned by *vh Saar* and 0,1 % by the *Land Saarland*. The *vh Saar* was at all times owned directly by the *Land Saarland*.
- (20) On 30 June 2007, the Fraport AG sold its share in the FSBG to the FSBesitzG, who subsequently owned 99 % of the FSBG. At the beginning of 2008, the two companies were merged to re-establish the Flughafen Saarbrücken GmbH (hereafter: 'FSG'), thereby essentially recreating the situation as it existed before the partial privatisation to Fraport AG in 1997. Since 2008 and until now, FSG is 100 % owned by *vh Saar*.
- (21) **vh Saar** was established by the *Saarland* Ministry for Economy and Finance in 1996. The company's purpose is 'the coordination of the activities incurred with the construction, extension and operation of public airports and ports in the *Saarland*'. The conclusion of a contract of domination with FSG was foreseen in the statutes of *vh Saar*. The board of directors and the supervisory board are nominated by the *Saarland* State Government as the sole shareholder. Apart from the FSG, *vh Saar* is also the owner of *Hafenbetriebe Saarland GmbH* (hereafter: 'HSG'), owner and operator of various ports in *Saarland*.
- (22) **FSBesitzG** was established on 4 July 1997 as the legal successor of the original FSG. Its purpose was the 'construction, maintenance and lease of the Airport and the shareholding in the [FSBG]'. The supervisory board was appointed by the *Saarland* Government, and its chairman chosen by the *Saarland* Ministry responsible for the aviation sector. The company's management was bound to instructions received by the Ministry of Economy and Finance as regards the exercise of its voting rights in the shareholder assembly of FSBG.
- (23) **FSBG** was established on 4 July 1997. Its purpose was the operation of Saarbrücken Airport. The management was appointed by a 75 % majority of the shareholder assembly. The supervisory board consisted of 10 members, five of which were appointed by Fraport AG and FSBesitzG, respectively. Since 2006, the board has consisted of six members, two of which were appointed by Fraport AG and four by FSBesitzG.
- (24) **FSG** was established on 30 August 2008. Its purpose is the operation of Saarbrücken Airport for civil aviation and connected ancillary businesses. The members of the board of directors and the supervisory board are nominated by the *Saarland* State Government. The chairman of the supervisory board is appointed by the Ministry responsible for aviation.

2.2. MEASURES UNDER INVESTIGATION AND REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

- (25) The Commission investigated several measures involving Saarbrücken Airport. The Commission assessed whether those measures constituted State aid, and whether any such State aid could be considered compatible with the internal market.
- (26) The following measures were investigated as potentially constituting State aid to *vh Saar*, FSG, and FSBesitzG:
- (a) the financing of *vh Saar*, FSG, and FSBesitzG by the *Saarland*;
 - (b) the transfer of various plots of land to FSBesitzG by the *Saarland*;
 - (c) guarantees on loans granted by the *Saarland* to the benefit of *vh Saar* and FSBesitzG.
- (27) The leasing contract between FSBesitzG and FSBG was investigated as potentially constituting State aid to FSBG.
- (28) The following measures were investigated as potentially constituting State aid to various airlines operating at Saarbrücken Airport:
- (a) the discounts introduced in 2007 for airlines taking up operations at Saarbrücken for the first time, serving new routes, or increasing their passenger numbers;
 - (b) the contract on start-up aid between FSBesitzG and Cirrus Airlines;
 - (c) the marketing agreement between FSG and Air Berlin.

2.2.1. FINANCING OF VH SAAR, FSG, AND FSBESITZG

Detailed description of the measure

- (29) The vh Saar is financially connected to its subsidiary — until 30 August 2008 the FSBesitzG and since then the FSG — via a P&L agreement, the consequence being that the vh Saar covered all losses incurred by these companies. At the same time, vh Saar received profits generated by its second subsidiary — HSG — and direct capital injections from its sole shareholder, the *Land Saarland*. These funds ensured that the vh Saar always had the means to cover the FSBesitzG/FSG losses. The P&L agreement was originally concluded between vh Saar and FSBesitzG's legal predecessor, the FSG, on 1 January 1997. After the re-establishment of the FSG, it succeeded the FSBesitzG in the contract.
- (30) The FSBG, legally separate from the FSBesitzG until 2008, regularly earned a profit until 2006. The profits were either distributed to the shareholders (until 30 June 2007, FSBesitzG and Fraport AG), in which case they were administered as revenue in the shareholders' balance sheets in the following year, or reinvested. In 2007, after FSBesitzG had become the sole shareholder of FSBG, the significant annual loss was covered by a corresponding capital injection by FSBesitzG. FSBesitzG and FSBG merged at the beginning of 2008, with the result that the combined loss would now be covered by vh Saar.
- (31) Since the year 2000, the losses of the FSBesitzG/FSG and corresponding capital injections by vh Saar, financed from capital injections received from the *Saarland* and other revenues, developed as follows:

Table 3

Annual losses FSBesitzG/FSG in EUR

Year	FSBesitzG	FSG
2000	– 2 168 916	
2001	– 2 785 473	
2002	– 4 164 538	
2003	– 3 099 253	
2004	– 2 770 680	
2005	– 3 917 320	
2006	– 8 400 703	
2007	– 8 171 099	
2008		– 4 548 264
2009		– 9 306 512
2010		– 8 805 707
2011		– 10 065 522
2012		– 18 449 926
Total (2000-2009)	– 49 332 758	
Total (2000-2012)	– 86 653 913	

(32) FSG's estimated loss for the year 2013 amounts to EUR 9 427 000.

(33) During 2000–2012, the EBITDA of FSBesitzG/FSG developed as follows:

Table 4
EBITDA development in EUR ⁽¹⁾

Year	EBITDA
2000 (*)	937 000
2001 (*)	– 156 000
2002 (*)	– 832 000
2003 (*)	56 000
2004 (*)	704 000
2005 (*)	– 732 000
2006 (*)	– 5 307 000
2007 (*)	– 4 392 000
2008	– 1 840 000
2009	– 5 237 000
2010	– 5 237 000
2011	– 3 528 000
2012	– 4 937 700
Total	– 30 501 700

⁽¹⁾ EBITDA including public funding and compensation for activities that fall within public policy remit or are considered as SGEI; see submission of information by Germany of 5 May 2012, Annex II.

(*) As the owner and the operator were separate companies in these years (FSBesitzG and FSBG), EBITDA listed is the sum of the EBITDA of both companies.

(34) For the year 2013, FSG's EBITDA is estimated to be negative again, amounting to EUR – 5 144 000.

(35) Germany submitted that over the period 2000–2009, the majority of the costs can be traced back to investment in and maintenance of infrastructure, interest payments on loans taken up in order to finance infrastructure investments, and expenditure for safety/security purposes. The total costs for these activities are asserted to amount to approximately [...]. These costs are said to be unrelated to the provision of airport services, but stem exclusively from the creation and operation of infrastructure.

Table 5
Infrastructure and Safety/Security Costs 2000–2009

1	Other Infrastructure Investment	[...]
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2	Other Infrastructure Maintenance	[...]
	Other Infrastructure Total (1 and 2)	[...]
3	Total Costs of Capital ⁽¹⁾	[...]
4	Safety/Security Infrastructure Investment	[...]
5	Safety/Security Other	[...]
	Safety/Security Total (4 and 5)	[...]
	Total (1 to 5)	[...]

⁽¹⁾ Germany submits that due to the accounting system used, the costs of capital cannot be individually allocated to safety/security or other infrastructure.

(36) Germany ⁽¹⁰⁾ specified that in the period 2000–2009 the following investment and maintenance activities were conducted:

(i) *Construction of a new terminal with auxiliary facilities in 2000 (net costs of around [...]).*

(37) The annual capacity of the old terminal was 390 000 passengers per year ⁽¹¹⁾. It was for the first time exceeded in 1996. In that year the annual passenger number at Saarbrücken Airport reached 395 000 passengers and continued growing until 2000 when it reached 484 566 passengers. According to Germany, the old terminal was frequently congested in particular during the main travel time months (summer period), which caused long waiting times, overcrowded passengers areas or passengers waiting outside the terminal. In addition the old terminal did not comply anymore with the security requirements. The new terminal is equipped with a new security system. The old terminal serves now as a waiting and gate area.

(ii) *Implementing of the runway and safety area in 2009–2010 (net costs incl. electro works around [...])*

(38) In 2009–2010 the runway and safety area was implemented, which comprised a number of construction and security measures which were taken to increase the security of the airport infrastructure and make them compliant with the applicable security requirements. In particular the location of the runway lights was adjusted to give better signals to the pilots, the runway guard lights were installed and the superstructure of the runway curve was adjusted to the needs of modern aircrafts.

(iii) *Maintenance of the runway in 2009 (net costs of around [...])*

(39) Also in 2009–2010 the runway was maintained to avoid damage to the aircraft operating at the airport.

Reasons for opening the formal investigation procedure

Existence of aid

(40) The opening decision first observed that the financing of vh Saar by the *Saarland* and of FSBesitzG/FSG by vh Saar involved a transfer of State resources, either directly or because vh Saar was fully controlled by the *Saarland* and its actions imputable thereto. The activities of FSBesitzG, FSG, and FSG as well as possibly those of vh Saar itself also amounted to economic activities.

(41) The opening decision explained that on the basis of the available information, it appeared that vh Saar did not itself incur an advantage, as it apparently passed all funds received from the *Saarland* on to FSBesitzG/FSG. Germany was asked to provide further information on whether vh Saar retained any of the State funds received for another purpose or activity. As regards FSBesitzG/FSG, the opening decision observed that the funds received from vh Saar lowered the costs that the airport would have normally had to bear, thereby constituting an economic advantage.

⁽¹⁰⁾ Submission of information by Germany of 17 January 2011, attachment 6, and of 16 April 2012, p. 9.

⁽¹¹⁾ Submission of Information by Germany of 16 April 2012, p. 9.

- (42) The opening decision next assessed whether the financing could be characterised as compensation for a service of general economic interest (SGEI) following the *Altmark* jurisprudence. It was observed that on the basis of the available information, the fourth *Altmark* criterion did not seem to be fulfilled. More particularly, it was observed that the operation of the airport was never tendered out, nor was the financing based on an analysis of the costs that a typical undertaking, well-run and adequately provided with the necessary means, would have incurred. As the *Altmark* criteria are cumulative, this finding was sufficient for the preliminary conclusion that the financing could not be considered as an SGEI compensation pursuant to that jurisprudence.
- (43) On the basis of the available information, it also did not appear that the financing could be justified as being in line with the behaviour of a rational market economy operator (MEO). In particular, it was observed that Germany had not presented a business plan or any other documentation showing that a profit could be expected. On the contrary, the increasing annual losses rather indicated that the airport would not be viable without financial support from the Saarland via vh Saar, which might indicate the airport was an undertaking in financial difficulties. The Commission therefore took the preliminary position that the financing of the airport by vh Saar did not comply with the MEO test and asked Germany to comment on the financial situation of the airport.
- (44) It was finally noted that the financing was selective, that the measure distorted or threatened to distort competition, and that based on its close proximity to a number of airports in other Member States, there seemed to be an effect on intra-Union trade. The Commission therefore reached the preliminary conclusion that the financing indeed amounted to State aid pursuant to Article 107(1) of the Treaty.

Compatibility

- (45) The opening decision first discussed whether the financing of the airport could be qualified as compatible aid under the 2005 SGEI Decision⁽¹²⁾. It observed that no information was made available demonstrating that without the airport the region in which it is located would be so isolated that its social and economic development would be harmed. At it appears that the catchment area of Saarbrücken Airport could also be served by other airports in the region, the Commission reached the preliminary conclusion that defining the operation of Saarbrücken Airport as a SGEI under the 2005 SGEI Decision constituted a manifest error.
- (46) The opening decision observed further that, in any event, the airport was not properly entrusted with the SGEI of providing airport services, that it was not clear that the financing was limited to the airport's core activities, and that the compensation parameters were not defined in advance. Accordingly, the Commission reached the preliminary conclusion that the financing did not fulfil the conditions of the 2005 SGEI Decision.
- (47) It was also analysed whether the conditions laid down in Section 4.2 of the 2005 Aviation Guidelines were met. These conditions are similar to those contained in the 2005 SGEI Decision. The lack of a proper entrustment act and the lack of provisions limiting the financing to the airport's core activities, inter alia, led to the preliminary conclusion that the financing could not be found compatible pursuant to Section 4.2 of the 2005 Aviation Guidelines.
- (48) The opening decision further analysed whether the financing could be compatible pursuant to Section 4.1 of the 2005 Aviation Guidelines. It observed that the P&L agreement did not specifically serve the purpose of financing infrastructure investments, but simply covered all losses stemming from the activities of the airport. It further noted that such an instrument could hardly have an incentive effect in terms of investments and observed that Germany predicted only a positive EBITDA for 2020, but not a positive overall result. Finally, it was considered that the operation of the airport appeared to negatively affect the operation of the nearby airport in Zweibrücken. The Commission therefore expressed its doubts as regards the compatibility of the financing pursuant to Section 4.1 of the 2005 Aviation Guidelines.
- (49) The opening decision finally addressed on the possible compatibility of the financing pursuant to the Rescue & Restructuring Guidelines⁽¹³⁾. Germany was asked to clarify whether the airport could be considered an undertaking in difficulties and, if so, whether measures in accordance with the Rescue & Restructuring Guidelines had been taken.

⁽¹²⁾ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

⁽¹³⁾ Communication from the Commission: Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty (2004) (OJ C 244, 1.10.2004, p. 2).

- (50) In conclusion, the Commission adopted the preliminary position that the financing of vh Saar, FSBesitzG, and FSG by means of direct grants to vh Saar by the *Saarland* and capital injections by vh Saar into FSBesitzG/FSG constituted State aid. It also expressed its doubts, based on the information available, regarding the compatibility of this aid with the internal market.

2.2.2. THE TRANSFER OF VARIOUS PLOTS OF LAND TO FSBESITZG

Detailed description of the measure

- (51) Since 1998, Germany transferred various plots of land to the airport, which according to the submission of Germany had a total value of EUR 240 000. Of the various plots of land, only three were transferred after the year 2000. According to Germany, these plots of land had a combined value of [...]. In the years 2002 and 2003, two plots of lands were transferred [...] and in the year 2004, the airport bought one plot for a price of [...].

Reasons for opening the formal investigation procedure

Existence of aid

- (52) The opening decision first observed that the transfer of State-owned land amounted to a transfer of State resources. Because the operation and construction of airport infrastructure must be considered as a task falling within the ambit of State aid control only from the date of the judgment in *Aéroports de Paris* (12 December 2000), only transfers that took place after that date were relevant for a State aid analysis, Germany was asked to clarify which plots of land were transferred after 2000 and how much they were worth. The Commission observed further that the transfer did not comply with the MEO test, was selective, and, for the same reasons mentioned as regards the general financing, distorted competition and affected intra-Union trade.
- (53) Germany argued that the transferred land was at least partially needed for safety or security reasons (such as construction of security fences), with the consequence that these measures could not constitute State aid for the purposes of Article 107(1) of the Treaty. The Commission asked Germany to clarify exactly which measures were directly related to air traffic safety and the exercise of sovereign prerogatives, and expressed its doubts that the construction of security fences merely served the purpose of ensuring secure airport operations, thereby falling also within the remit of costs necessarily linked to the economic activity of operating an airport. Germany was further asked to explain whether the public financing of activities falling within the public policy remit is regulated in the same way with regard to all German airports, or whether some airports had to bear costs themselves that were covered by the State for other airports.
- (54) Accordingly, the opening decision reached the preliminary conclusion that the transfer of land constituted State aid for the purposes of Article 107(1) of the Treaty.

Compatibility

- (55) The opening decision recalled that it is the Member States' responsibility to invoke possible grounds of compatibility and to demonstrate that the relevant conditions are fulfilled. It was noted that since Germany did not believe that the transfer of land in question amounted to State aid, they had not presented any arguments regarding compatibility. The Commission asked Germany to explain whether the transfer of land could be compatible pursuant to the Rescue & Restructuring Guidelines. The Commission further stated that, based on the information available at the time of adopting the opening decision, it had doubts about the compatibility of the measure with the internal market.

2.2.3. GUARANTEES ON LOANS TO THE BENEFIT OF VH SAAR AND FSBESITZG

Detailed description of the measure

- (56) The *Land Saarland* granted guarantees to FSBesitzG on three occasions (two guarantees in the year 1998, one in the year 1999), each time without receiving any remuneration. Additionally, the *Saarland* issued two letters of comfort as security for two loans taken up by vh Saar. vh Saar transferred these loans to FSBesitzG.

Table 6

Guarantees and Letters of Comfort

Year	Loan Amount (EUR)	Duration of Loan	Beneficiary
1998	[...]	30 Dec. 2017	FSBesitzG
	[...]	1 Oct. 2017	FSBesitzG
1999	11 453 000	—	FSBesitzG
2005	3 700 000	31 Jan. 2021	vh Saar
2006	10 000 000	31 Aug. 2039	vh Saar

Reasons for opening the formal investigation procedure*Existence of aid*

- (57) The opening decision noted that, for the same reasons as mentioned in recital 52, only guarantees granted after the year 2000 were relevant for the State aid assessment. Due to the information available at the time, the Commission assumed that the guarantee covering a loan amounting to EUR 11 453 000 had been granted after 2000. It explained that since the guarantee for this loan, as well as the comfort letter issued for the 2005 and 2006 loans taken out by vh Saar, covered 100 % of the loans and that since the *Saarland* had not received any remuneration for the guarantee/comfort letters, they appeared to constitute State aid pursuant to the Guarantee Notice⁽¹⁴⁾. Regarding selectivity, distortion of competition and effect on trade, the same considerations applied as those which were outlined with respect to the FSBesitzG/FSG's general financing by vh Saar.

Compatibility

- (58) The opening decision assumed that the guarantee for the loan amounting to EUR 11 453 000 was granted after 2000. Noting that the underlying loan served to finance the new terminal building, the opening decision assessed the compatibility of the guarantee pursuant to Section 4.1 of the 2005 Aviation Guidelines. It reached the preliminary conclusion that it was doubtful whether the new terminal served a clearly defined objective of public interest (since it was not clear that other nearby airports could not serve Saarbrücken Airport's catchment area as well), whether the terminal was necessary for the functioning of the airport, whether it had satisfactory medium-term prospects (since Germany had not submitted any data on when the airport would become profitable), whether all users had equal and non-discriminatory access to the infrastructure (since it was not clear that all received the same advantages as Cirrus and Air Berlin), and finally whether it affected the development of trade to an extent contrary to the Union interest.
- (59) As regards the 2005 and 2006 letters of comfort, the opening decision observed that Germany had not explained what purpose the underlying loans served. For this reason, and as Germany had not submitted arguments on the compatibility of these measures, the Commission reached the preliminary conclusion that the State aid involved in these measures was incompatible with the internal market.

2.2.4. THE LEASE CONTRACT BETWEEN FSBESITZG AND FSBG**Detailed description of the measure**

- (60) After the original FSG was split into FSBesitzG and FSBG in 1997, the FSBG leased the airport infrastructure from FSBesitzG. Under the lease contract of 7 July 1997, FSBG had to pay a fixed annual amount of [...] per year plus turnover tax. On 3 August 2006, FSBG and FSBesitzG signed a new lease contract, retroactively applicable as from 1 July 2006.

⁽¹⁴⁾ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

- (61) Under the 2006 contract, the fixed annual lease payment was set at [...] per year. In addition, the FSBG had to transfer a certain percentage of its annual profit [...].
- (62) Based on these contracts, FSBG paid the following amounts as rent for the airport infrastructure to FSBesitzG:

Table 7

Lease Payments made by FSBG

Year	Lease Payment
2000	[...]
2001	[...]
2002	[...]
2003	[...]
2004	[...]
2005	[...]
2006	[...]
2007	[...]

- (63) As FSBG and FSBesitzG merged at the beginning of 2008, no further leasing payments were due after that date.

Reasons for opening the formal investigation procedure*Existence of aid*

- (64) The opening decision first observed that the modified lease contract was concluded between FSBesitzG and FSBG, thus without direct involvement of any public authorities. However, it noted that FSBesitzG was owned entirely by public authorities (0,1 % belonged to the *Saarland* directly, 99,9 % belonged to *vh Saar*, which itself belonged 100 % to the *Saarland*), making it a public undertaking. It further noted that due to the various control mechanisms, the *Saarland* had comprehensive control over the FSBesitzG and reached the preliminary conclusion that, if the lease contract would be found to have granted FSBG an advantage in the form of below-market-price leasing rates, this advantage involved a transfer of State resources and was imputable to the State.
- (65) The opening decision then outlined that from 2000 onwards, FSBG had to be considered as engaging in economic activities and therefore constituting an undertaking. At the time of the opening decision, the Commission had not received any information on the lease contracts before 2000 and whether the lease contract that existed until 2006 had been amended after 2000. The contract that was in force until 2006 could therefore have constituted existing aid. Germany was asked to provide further information on this question.
- (66) As regards the question of whether the lease contract granted FSBG an advantage, the opening decision outlined the Commission's doubts as to whether the lease payments made by FSBG were in line with market conditions. It accordingly asked Germany for comprehensive information on the financial relations between FSBesitzG and FSBG as well as on the determination of the terms of the lease contract and the economic rationale underpinning them.
- (67) On the basis of these considerations, the opening decision reached the preliminary conclusion that the lease payments made by FSBG contained an element of State aid.

Compatibility

- (68) The opening decision points out that it reached the preliminary conclusion that the lease payments contain State aid in the sense of operating aid, as the below-market-price payments reduced the operating costs the FSBG had to bear. The opening decision pointed out that such operating aid is, in principle, not compatible with the internal market and requested Germany to clarify whether this aid could fall under the Rescue & Restructuring Guidelines or to present other arguments on compatibility.

2.2.5. DISCOUNTS FOR AIRLINES

Detailed description of the measure

- (69) Until 2007, the applicable schedule of airport charges in Saarbrücken did not envisage any discounts for airlines. On 1 April 2007, FSBG introduced a new schedule, which provided for a series of discounts available to airlines that fulfilled certain conditions. This schedule was also adopted by FSBesitzG/FSG after the merger of the two companies.
- (70) The 2007 schedule introduced three types of discounts. The first two could not be cumulated, while the third could be additional to any other discounts received.
- (a) Discounts for new airlines: for airlines operating from Saarbrücken for the first time, a reduction of aircraft movement, start/landing, and passenger charges by 50 % in the first year, 30 % in the second year, and 20 % in the third year, were offered.
- (b) Discounts for new destinations: discounts of the same magnitude and on the same charges were offered for airlines serving new destinations, that is to say destinations that had not been served in at least the previous 12 months.
- (c) Reimbursement for increase of passenger numbers: airlines that transported between 60 000-100 000 pax, or more than 100 000 pax during one calendar year, received a reimbursement of 5 % or 10 % respectively of the passenger charges they paid during that year.

Reasons for opening the formal investigation procedure*Existence of aid*

- (71) The opening decision assumed that the new schedule of 1 April 2007 was adopted by FSBesitzG. On this basis, the opening decision proceeded to recall that due to the comprehensive control that the public authorities enjoyed over FSBesitzG, the introduction of this new schedule was imputable to the State. To the extent that the schedule provided for below-market-price charges, the schedule therefore constituted a transfer of State resources that was imputable to the State.
- (72) Germany submitted that the discounts were motivated by economic considerations and complied with the MEO test. The opening decision stressed, however, that Germany had so far not provided sufficient information to allow the Commission to fully assess this claim. Germany was therefore asked to provide comprehensive information on the costs and revenues of the airport, in particular those related to commercial passenger aviation. In addition, the Commission sought clarification on whether the schedule of charges was applied without discrimination between airlines.
- (73) The opening decision concluded by expressing that it was doubtful whether discounts in the schedule of 1 April 2007 could be justified on the basis of the MEO test and that it could therefore not be excluded that the airlines in question received an advantage. As the discounts were also liable to distort competition and effect trade between Member States, the Commission reached the preliminary conclusion that the discounts constituted State aid.

Compatibility

- (74) The opening decision assessed whether the discounts could qualify as compatible start-up aid pursuant to Section 5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed doubts as to whether the various conditions for the compatibility of start-up aid were fulfilled.

(75) In particular, the opening decision observed that:

- (a) It was doubtful whether the discount for an increase in passenger numbers fulfilled the condition of point (c) of point 79 of the 2005 Aviation Guidelines since it did not require a new route or frequency.
- (b) It was doubtful whether the discount for an increase in passenger numbers fulfilled the condition of point (d) of point 79 of the 2005 Aviation Guidelines since it was not degressive and of limited duration.
- (c) It was doubtful whether all the discounts fulfilled the condition of point (f) of point 79 of the 2005 Aviation Guidelines since there was no obligation on airlines to repay any of the discounts received if they operated from Saarbrücken for at least three years.
- (d) It was doubtful whether the discounts for new routes and new airlines fulfilled the condition of point (g) of point 79 of the 2005 Aviation Guidelines since they were not dependent on passenger numbers.
- (e) It was doubtful whether at least the discounts for an increase in passengers fulfilled the condition of point (i) of point 79 of the 2005 Aviation Guidelines since it did not include the requirement of a prior business plan.
- (f) It was doubtful whether all the discounts fulfilled the condition of point (j) of point 79 of the 2005 Aviation Guidelines since none of the required information appeared to have been published.
- (g) It was doubtful whether all the discounts fulfilled the condition of point 80 of the 2005 Aviation Guidelines since it was not clear whether they could be cumulated and since it appeared that at least the discount for increased passenger numbers could be combined with the two others.

(76) As the cumulative conditions for compatible start-up aid did not appear to be fulfilled and since no other compatibility grounds were apparent, the Commission reached the preliminary conclusion that the discounts constituted incompatible State aid.

2.2.6. START-UP AID TO CIRRUS AIRLINES

Detailed description of the measure

- (77) On 27 January 2005, FSBesitzG signed a start-up contract with Cirrus Airlines Luftfahrtgesellschaft mbH ('Cirrus') with a duration of one year. The purpose of the contract was the increase of passenger numbers for the route to [...]. The contract stated that an increase of passengers would only be possible if ticket prices were reduced considerably so that Cirrus became attractive for passengers. It explained further that this project would incur high losses in the start-up phase. Therefore the airport was ready to support the project with a start-up financing.
- (78) The start of flight operations was set for 29 March 2005. The contract was based on a business plan which contained the passenger numbers and average net yields. The contract determined also the type of aircraft to be used.
- (79) The contract obliged Cirrus to provide scheduled flights between Saarbrücken and [...] with a frequency of [...] flights on [...] days per week, [...] flights [...]. The contract stated explicitly that Cirrus [...]. The contract was subsequently extended and modified various times and finally expired on 31 December 2006.
- (80) The remuneration due pursuant to the contract was calculated in accordance with the following formula:

[...]

Over the course of the duration of the contract, the annual amount of remuneration paid out to Cirrus by FSBesitzG was as follows:

Table 8

Payments to Cirrus Airlines in EUR

Year	Net Remuneration	Gross Remuneration
2005	[...]	[...]
2006	[...]	[...]

Reasons for opening the formal investigation procedure*Existence of aid*

- (81) The opening decision first noted that the decision of FSBesitzG involved a transfer of State resources and was imputable to the State. Cirrus was also clearly an undertaking carrying out economic activities. The question was then whether the contract granted Cirrus an advantage that Cirrus could not have otherwise obtained on the market. As Germany had not provided any explanation as to why the contract was concluded, it was asked to clarify whether it believed that in concluding the contract FSBesitzG acted like a rational MEO and, if so, to provide documentation supporting this view.
- (82) The opening decision pointed out that, at the time the decision was adopted, the Commission had not received any indication that Germany had compared expected costs and revenues arising from this contract. On this basis, it preliminarily concluded that the contract with Cirrus constituted State aid.

Compatibility

- (83) The opening decisions assessed whether the contract with Cirrus could qualify as compatible start-up aid under Section 5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed doubts as to whether the various conditions for compatible start-up aid were fulfilled.
- (84) In particular, the opening decision observed that the contract with Cirrus apparently failed to fulfil the following conditions:
- (a) point (c) of point 79 of the 2005 Aviation Guidelines, since the Cirrus route between Saarbrücken and [...] apparently already existed and no information was provided on new frequencies that could lead to a passenger increase;
 - (b) point (d) of point 79 of the 2005 Aviation Guidelines, since the contract did not appear to be either degressive or truly time-limited, given that it had been extended various times, and because it was not clear whether Cirrus had demonstrated the long-term profitability of the route;
 - (c) point (e) of point 79 of the 2005 Aviation Guidelines, since the contract did not limit the support to additional start-up costs;
 - (d) point (f), first subparagraph of point 79 of the 2005 Aviation Guidelines, since the contract had no fixed end date and did not limit the aid amount by reference to the costs;
 - (e) point (f), third subparagraph of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether the time for which the aid was granted to Cirrus was substantially less than the period during which Cirrus committed to operate from Saarbrücken;
 - (f) point (g) of point 79 of the 2005 Aviation Guidelines, since the aid appeared to be linked to the development of the number of passengers transported;
 - (g) point (h) of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether the contract had been published before its conclusion and made available to other airlines as well;

- (h) point (i) of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether FSBetriebG had access to a business plan of Cirrus and whether the airport had investigated the effects of the aid on competing routes;
 - (i) point (j) of point 79 of the 2005 Aviation Guidelines, since the required list of subsidised routes had apparently not been published;
 - (j) point (k) of point 79 of the 2005 Aviation Guidelines, since it was doubtful whether Germany had put in place the required appeal procedure;
 - (k) point 80 of the 2005 Aviation Guidelines, since it appeared that Cirrus had combined the aid pursuant to the contracts with that pursuant to the 2007 schedule of charges.
- (85) As the cumulative conditions for compatible start-up aid did not appear to be fulfilled and since no other compatibility grounds were apparent, the Commission reached the preliminary conclusion that the contract with Cirrus constituted incompatible State aid.

2.2.7. MARKETING AGREEMENT WITH AIR BERLIN

Detailed description of the measure

- (86) On 6 April 2011, FSG signed a Marketing Agreement with Air Berlin PLC & Co. Luftverkehrs KG ('Air Berlin'), with a duration until 2 May 2014. The Agreement obliged Air Berlin to deliver marketing and publicity services to FSG. The agreement stated: [...] FSG expected that the increased frequencies would trigger higher revenues from aviation and non-aviation activities. Additionally, Air Berlin was obliged to promote the two connections from and to Saarbrücken (information of the frequencies increase in the press, by emails, briefings of travel agencies, magazines, print media, at the check-in, on board, on the radio, etc.). FSG remunerated Air Berlin for the marketing service with a total of [EUR 800 000–EUR 1 700 000].

Reasons for opening the formal investigation procedure

Existence of aid

- (87) Similar to the Cirrus contract, the marketing agreement concluded with Air Berlin also raised the question whether that agreement was in line with market conditions. All other conditions, such as the imputable transfer of State resources and selectivity were assumed to be fulfilled.
- (88) Germany had submitted that it had conducted a cost-benefit analysis which demonstrated that the contract was profitable for the airport in the long term. It had not, however, provided that analysis, which prevented the Commission from assessing how the airport calculated the expected costs and revenues arising from the contract. Noting further that the only advantage accruing to the airport from the contract appeared to be the expected increase in passengers, the contract itself seemed to be nothing more than an additional discount on the airport charges, which were even cumulated with the discounts already available under the 2007 schedule of charges.
- (89) On the basis of these considerations, the opening decision reached the preliminary conclusion that the marketing agreement with Air Berlin granted the latter a selective advantage. As all the other elements of State aid were also preliminarily found to be present, the Commission reached the preliminary conclusion that this contract contained an element of State aid.

Compatibility

- (90) The opening decision assessed whether the marketing agreement could qualify as compatible start-up aid pursuant to Section 5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed doubts as to whether the various conditions for compatible start-up aid were fulfilled.
- (91) In particular, the opening decision observed that the agreement with Air Berlin apparently failed to fulfil the following conditions:
- (a) point (d) of point 79 of the 2005 Aviation Guidelines, since it was unclear whether Air Berlin had demonstrated the long-term profitability of the route;
 - (b) point (e) of point 79 of the 2005 Aviation Guidelines, since the contract did not limit the support to additional start-up costs;

[illegible]

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
Neues Zugangs- kontrollsystem													
Container Tor 1													
Rollwegbeschilderung													
Unterbrechungsfreie Stromvers. (Notstrom)													
Abstellfläche Ost, Bombenbedrohte Flz.													
Erweiterung S/L-Bahnköpfe, RESA													
Flughafennavigation													
Summe p.A.													

⁽¹⁾ Submission of information by Germany of 5 May 2012, Annex II.

(95) Germany argues that any financing of airport security measures pursuant to § 8 *Luftsicherheitsgesetz*, of air traffic control and of air safety measures pursuant to § 27(c)(2) *Luftverkehrsgesetz* and of the fire brigade falls within the public policy remit. According to Germany, fences around the airport and control footpaths, a container gate, runway signs, emergency electricity, parking spaces for airplanes subject to bomb threats and extension of runway-end safety areas (RESAs) fall under § 8 *Luftsicherheitsgesetz* and fall therefore also in the public policy remit.

(96) With regard to air traffic control and air safety measures pursuant to § 27(c)(2) *Luftverkehrsgesetz*, Germany submits that the State does not cover the costs for these measures for all airports, but that the different treatment of different airports is justified and therefore does not involve an advantage. More concretely, § 27(c)(2) distinguishes between certain airports where the financing of these security measures at federal level is regarded as being necessary for reasons of safety and transport policy interests, and other airports where such measures are not regarded as strictly necessary from a federal perspective. The Federal Ministry of Transport has so far recognised the financing of several airports, among those Saarbrücken, as being necessary for reasons of safety and transport policies. This is why financing of regional airports, which would normally have to bear those costs themselves, is not discriminatory. The funding of air traffic control and air safety measures, whether financed directly by the State on the federal level or by the *Länder*, is part of the public policy remit in all cases.

(97) Furthermore, costs for the fire brigade, for example, are not regulated on the federal level, but fall within the competence of the *Länder*, which is why the fire brigade is not financed by the State at all airports. The difference in treatment is rooted in historical as well as objective reasons. Mainly, it lies in the nature of the airport business, that smaller regional airports cannot bear the high fixed costs which a fire brigade creates and that, therefore, these will be borne by the respective *Land*.

- (98) As regards vh Saar, Germany submits that the company cannot be considered an undertaking. First, it is asserted that vh Saar does not itself act on the market, but merely holds shares in other companies (namely the airport and HSG). By referring to a judgment of the Court of Justice⁽¹⁵⁾, Germany recalls that merely holding shares in other companies, even if it is a controlling share, is not in itself an economic activity. It is further submitted that an exception from this principle, according to which a holding company does engage in an economic activity where it exercises influence over the companies it owns shares in, does not apply in the case of vh Saar.

Advantage

- (99) Germany argues, with respect to vh Saar, that the company did not receive any advantage from State resources, as it passed all funds received from the *Saarland* on to FSBesitzG/FSG. In consequence, it denies that vh Saar could be considered a beneficiary.
- (100) As regards the funds received by FSBesitzG/FSG from vh Saar via the P&L agreement, Germany asserts that no advantage was granted as all financing merely compensated the FSBesitzG/FSG for providing a service of general economic interest (SGEI) in accordance with the *Altmark* jurisprudence.

First Altmark criterion: entrustment with a SGEI

- (101) Germany argues that the operation of the airport, including the construction and maintenance of the necessary infrastructure, constitutes a SGEI. The notion of SGEI is defined by Germany as services rendered on a market, in the reliable and stable provision of which the public has a general interest, which the market itself cannot provide, and which are provided by an entity which has been entrusted with a corresponding obligation.
- (102) As regards the operation of Saarbrücken Airport, Germany maintains that it involves offering services on a market. It further argues that, having less than 500 000 passengers per year and being thereby below the threshold in the 2005 Aviation Guidelines from which an airport can be expected to be profitable, the airport offers services that the market would otherwise not provide.
- (103) According to Germany, Saarbrücken Airport has been entrusted with the obligation to provide these services. That obligation, so Germany states, results from the operating licence and the provision of German aviation law. Germany refers specifically to § 45(1) of the Aviation Licensing Regulation (*Luftverkehrszulassungsordnung*), which provides that an airport undertaking has to 'maintain the airport in a safe-to-operate state and to properly operate it'. The obligation to operate involves the duty to make airport services available to aircraft without any discrimination during the regular operating hours, which are themselves laid down in the operating licence and cannot be changed unilaterally by the airport operator. Any violation of the obligation to operate the airport would result in fines of up to EUR 50 000 pursuant to § 108 *Luftverkehrszulassungsordnung* in connection with § 58(1)(10)(2) *Luftverkehrsgesetz*. Germany finally submits that, in addition, the *Land* ensures the proper operation by means of its comprehensive control over the operator.
- (104) Commenting on the opening decision's observation that no formal entrustment act appeared to be in place, Germany asserts that the combination of the factors mentioned in recital 103, and in particular the comprehensive and strict control over the airport exercised by the *Saarland*, ensure that the purposes of entrustment are realised in at least the same way as it would be the case if a formal entrustment act were in place.
- (105) In supporting its claim that the operation of the airport constitutes an SGEI, Germany asserts that the airport forms an essential part of the traffic infrastructure in the *Saarland*, which is necessary in particular to connect the region with the rest of the country and major aviation hubs. The particular importance of this connection is said to stem from the *Saarland*'s geographical position on the margin of Germany, far away from the country's major metropolitan centres.

⁽¹⁵⁾ Case C-222/04, *Ministero dell'Economia e delle Finanze/Cassa di Risparmio di Firenze SpA et al.*, point 111.

- (106) The airport is, first, claimed to serve the region's population by catering to their touristic and private traffic needs. The *Saarland* is said to increasingly develop as a destination for tourism. Germany secondly asserts that it is vital for the connection of the *Saarland*'s scientific, cultural, and social institutions, which are predominantly located in the City of Saarbrücken. Thirdly, the significance of the airport for the local economy and regional development is emphasised, especially in light of the ongoing structural transition away from an economy based on coal-mining and towards an international and innovative economy. Germany points out that companies base their decision to move to the *Saarland* often on the fact that there is an airport. It further refers to a study of 2009 according to which the demand for the provision of air passenger transport is supposed to increase in the future.
- (107) Germany underpins its foregoing submission by asserting that the steady increase of passengers at Saarbrücken over the last decades, the results of a study showing further growth potential, and the fact that other airports in the region cannot satisfy the local demand, all demonstrate the importance of the airport for the local population and economy. Germany invokes the 2005 Aviation Guidelines, which state that 'it is not impossible to consider the overall management of an airport, in exceptional cases, to be considered a service of general economic interest', for example where an airport is located in an 'isolated region', and assert that Saarbrücken is such an exceptional case because of its geographical position and the on-going structural changes of the local economy⁽¹⁶⁾. It finally submits that the financing does not fund activities going beyond the 'basic activities' in point 53(iv) of the 2005 Aviation Guidelines.
- (108) Germany next asserts that the existence of an SGEI cannot be undermined by the allegedly missing necessity of the airport. It argues that other airports in the region cannot satisfy the needs that Saarbrücken Airport caters to. In particular, it is submitted that the other airports in the region are either too distant from Saarbrücken Airport's core catchment area (such as the airports in Luxembourg, Metz–Nancy–Lorraine, and Frankfurt–Hahn) or not comparable to Saarbrücken because of their smaller size and limited services offered (Zweibrücken, above all).

Second Altmark criterion: compensation parameters

- (109) Germany argues that the purpose of the second *Altmark* criterion is to avoid overcompensation and to ensure efficient utilisation of public funding. It asserts that based on the strict control exercised by the local authorities over the airport, ensuring responsible economic behaviour, and the fact that the latter's activities are limited to providing a SGEI, the purpose of the second criterion is fulfilled. It is finally asserted that, in any event, the financing modalities are designed in such a way as to exclude any possibility of abusive reliance on SGEI compensation.

Third Altmark criterion: avoidance of overcompensation

- (110) Germany maintains that the public financing never went beyond the amount necessary to facilitate the provision of the SGEI, taking into account all the relevant revenues. The activities of the airport, it is stressed, are limited to providing the SGEI in question, with the consequence that no other costs that could have been cross-subsidised arose. It is further submitted that the infrastructure and the airport operations are necessary and appropriate to satisfy the air traffic needs in Saarbrücken Airport's catchment area. FSBesitzG and FSG did not and do not generate profits, and FSBG only achieved marginal profits. Germany asserts that the local authorities closely monitored the utilisation of public funds and would have intervened if inefficiencies had existed.

Fourth Altmark criterion: public tender or benchmarking

- (111) As the airport has been in existence for a long time well before the provision of airport services came to be considered as an economic activity, Germany submits that it chose not to tender the SGEI, but rather to continue relying on the existing airport. It is nevertheless submitted that the fourth criterion is fulfilled, as Germany considers that the local authorities have closely monitored the activities of the airport, thereby ensuring that only efficient costs were reimbursed. While the *Saarland* does not have precise data on other regional airports, it assumes that Saarbrücken Airport's efficiency is average, and that the local authorities would have recognised and eliminated any inefficiency. Germany finally submits that due to the various differences existing between regional airports in Germany, a simple comparison is not meaningful. In this situation, the Commission should be content with the fact that there is no indication that Saarbrücken is inefficient.

⁽¹⁶⁾ 2005 Aviation Guidelines, point 34.

Intermediary conclusion on Altmark/SGEI

- (112) As Germany is of the opinion that all four *Altmark* criteria are fulfilled, it submits that the financing of the airport from State resources does not constitute an advantage, but merely a compensation for the provision of a SGEI.

Market economy operator principle

- (113) Germany explains that because of Saarbrücken Airport's great structural and economic significance for the region, the *Saarland* considers the operation as an SGEI, not as a for-profit business activity. Accordingly, a closure of the airport is no option and no analyses of the costs and benefits of a closure exist.

Distortion of competition and effect on trade

- (114) Arguing that the financing of the airport does not distort competition or affect trade between Member States, Germany submits that it does not constitute State aid. In this context, Germany recalls that the 2005 Aviation Guidelines state that funding a small regional airport with less than 1 million pax 'is unlikely to distort competition or affect trade to an extent contrary to the common interest' ⁽¹⁷⁾. Saarbrücken Airport falls within this category of cases, and according to Germany there are no reasons to depart from the general presumption: Saarbrücken Airport is a typical regional airport catering to the needs of the population in the region and the majority of passengers are in fact from the region.
- (115) With a view to other airports in the region, especially those located in other Member States, it is argued that the catchment area of Saarbrücken Airport covers Saarbrücken and the surrounding areas, but hardly extends to other Member States. Indeed, it is said that only [less than 14 %] of passengers stem from either France [...] or Luxembourg [...]. Germany considers that the only foreign airports in potential competition with Saarbrücken are Metz–Nancy–Lorraine Airport and Luxembourg Airport. These two airports are, however, over an hour's drive away from Saarbrücken, so that — assuming an airport's catchment area covers all locations from which that airport can be reached within 60 minutes — their catchment areas only marginally overlap. What is more, the locations in which they do overlap are sparsely populated and said to generate few passengers, while Saarbrücken Airport's core catchment area does not fall within the catchment area of the mentioned foreign airports.
- (116) In addition, it is argued that the profiles of the two mentioned foreign airports and of Saarbrücken Airport are very different: Luxembourg is significantly larger (approximately 1,5 million passengers per annum) and offers more diverse routes, while Metz–Nancy–Lorraine is significantly smaller and offers exclusively scheduled flights within France and charter flights to North Africa. Germany maintains that, as regards Luxembourg Airport in particular, no competition exists as the two airports complement rather than substitute each other.
- (117) As regards the neighbouring airports in Germany, Germany submits that Saarbrücken Airport is not in competition with either Frankfurt–Hahn or Zweibrücken. As far as the former is concerned, it is asserted that the catchment areas overlap only insignificantly due to the distance between the two airports, that Frankfurt–Hahn is much larger (approximately 3,5 million passengers per annum), and offers almost exclusively international routes by low-cost carriers, while these carriers do not serve Saarbrücken. Additionally, air freight is important in Frankfurt–Hahn, but plays no role in Saarbrücken.
- (118) With respect to Zweibrücken, Germany emphasises that while Zweibrücken Airport is, due to its close proximity with Saarbrücken, most likely to be in competition with that airport, the relationship between the two airports is in fact complementary and not competitive. While Zweibrücken does not offer any scheduled flights, but is exclusively used for charter flights, Saarbrücken specialises in scheduled flights for business travellers. These different profiles are reflected in the respective infrastructure, with Saarbrücken's higher-quality facilities being typical for airports focusing on scheduled flights. In addition, air freight plays a role in Zweibrücken, while the same is not true in Saarbrücken due to the latter's short runway and ban on night flights.

⁽¹⁷⁾ 2005 Aviation Guidelines, point 39(2).

- (119) Building on the perceived complementarity between Zweibrücken and Saarbrücken airports, Germany declares that a closer cooperation between the two airports is envisaged. The respective regional governments have already decided to cooperate more closely in the future, envisaging the creation of a joint airport ('Saar-Palatinate-Airport') with two locations (Saarbrücken and Zweibrücken). The cooperation should lead to synergies and save funds. Finally, Germany emphasises the demand for aviation services in the region (both airports taken together already have 750 000 pax), maintaining that only Saarbrücken and Zweibrücken together can properly satisfy this demand, in particular because the other neighbouring airports cannot serve as substitutes.
- (120) Germany stresses that even if the airports in Saarbrücken, Zweibrücken, and Frankfurt-Hahn were found to be in competition with each other, any public support measures would not affect trade between Member States. All three airports are located in Germany, the operating companies are German and the shareholders are German territorial entities.
- (121) Finally, it is asserted that any distortion of competition or effect on trade would be so marginal that a '*de minimis* rationale' should be applied in the case at hand, leading to the conclusion that any such effect is not appreciable.

3.1.2. EXISTING AID AND COMPATIBILITY

- (122) In the alternative and if the Commission should not follow the argument of Germany that the financing measures do not constitute State aid, Germany submits that the measures constitute existing aid, are in any event compatible as well as exempted from notification under the 2005 SGEI Decision, comply with the compatibility criteria set out in Sections 4.1 and 4.2 of the 2005 Aviation Guidelines, and can be justified as compatible pursuant to Article 107(3) (c) of the Treaty.

Existing aid

- (123) Germany points out that if the P&L agreement between *vh Saar* and *FSBesitzG/FSG* were to be found to constitute State aid, it would qualify as existing aid. The relevant agreement, legal basis of the annual deficit cover, was concluded on 7 May 1996 and has, according to Germany, not been changed since. If the Commission were to find that the P&L agreement constitutes incompatible State aid, this finding would only have an effect for the future.

2005 SGEI Decision

- (124) Germany argues that the financing falls under the 2005 SGEI Decision, as the applicability criteria for aid to airports (less than 1 million pax or less than EUR 100 million turnover in the two years prior to entrustment; less than EUR 30 million in compensation per year) are fulfilled. It further asserts that the conditions enshrined in Articles 4 and 5 of the 2005 SGEI Decision (entrustment with an SGEI, no overcompensation) are complied with, for the same reasons as those mentioned with respect to compliance with the *Altmark* criteria.
- (125) Germany also repeats that there is a significant demand for aviation services in the region that cannot be satisfied by neighbouring airports, thereby rejecting the suggestion in the opening decision that the Airport was not necessary to satisfy the local demand for air traffic services. It stresses that relevant studies demonstrate that there are further growth potentials due to a predicted increase in passenger demand which neighbouring airports will not be able to satisfy (Germany refers to their explanations as to the lack of substitutability between the airports of the region and the corresponding lack of competition between them).
- (126) As regards, finally, the suggestions in the opening decision that a formal entrustment act, a limitation to the basic activities of an airport, and a transparent fixing of the compensation parameters were missing, Germany refers back to its submissions regarding the compliance with the *Altmark* criteria, claiming that the reasoning presented there is equally applicable in the present context.

2012 SGEI Decision

- (127) Germany mentions that the 2012 SGEI Decision, which will be applicable to the measures under discussion in this Decision only after the expiration of the transitional period in 2014, will be relevant only for the future, and then especially for the envisaged cooperation between Saarbrücken and Zweibrücken Airports.

2005 Aviation Guidelines

- (128) Germany first asserts that the general financing measures are compatible with the internal market pursuant to Article 106(2) of the Treaty in connection with Section 4.2 of the 2005 Aviation Guidelines (aid for operation of airport infrastructure). In support of this submission it merely refers back to the arguments presented with respect to the compliance with the *Altmark* criteria and the 2005 SGEI Decision.
- (129) With respect to compatibility pursuant to Section 4.1 of the 2005 Aviation Guidelines (financing of airport infrastructure), Germany submits that all conditions set out therein are fulfilled.

Construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.)

- (130) Germany refers to their submissions regarding the existence of an SGEI for the purpose of demonstrating that Saarbrücken Airport meets an objective of general interest. It repeats that the airport satisfies the aviation needs of the local population, that the accessibility of the region cannot be ensured by the neighbouring airports, and that the airport is crucial for the economic development of the region.

The infrastructure is necessary and proportionate to the objective

- (131) According to Germany, the infrastructure, especially the terminal building that has been in use since 2000 and the modernised runway are strictly necessary to achieve the objective and are not disproportionately large or elaborate. The investments into the infrastructure were necessary to maintain or replace the worn-out infrastructure and to adapt to increasing passenger numbers, heightened demands in terms of comfort, as well as stricter safety and security requirements. Without the investments, the Airport would not be operational. Germany also recalls that the existing infrastructure was regularly congested before the construction of a new terminal (starting in 1999) [...]. It finally submits that the necessary investments could not have been financed from the operating company's own capital.

The infrastructure has satisfactory medium-term prospects for use

- (132) Based on the already existing utilisation and the expected further increase in passenger numbers, Germany maintains that the infrastructure has more than satisfactory prospects for use. It refers to a prognosis of the development of aviation in the region, demonstrating that demand will grow.
- (133) Germany submits that, when the construction of the new terminal building started in 1999, it was not foreseeable that the events of 11 September 2001 in the United States, the ash-cloud following a volcano eruption on Iceland in 2010, and the global economic crisis between 2008 and 2011 would negatively affect passenger numbers in Saarbrücken. These events are said to have affected the entire European aviation sector, delaying the otherwise positive development. Nevertheless, the positive trend that was already visible in 1999 is, according to Germany, still detectable, leading to the expectation that Saarbrücken Airport's capacity will be fully utilised in the medium term (taking account also of the envisaged cooperation with Zweibrücken Airport).
- (134) With respect to the financial prospects, Germany stresses that a positive EBITDA is expected for 2020, and that this is sufficient to satisfy the requirement of satisfactory medium-term prospects for use. It recalls that the Commission itself has acknowledged that regional airports do not generally generate profits which could be reinvested into the infrastructure, a fact which cannot preclude compatibility of support measures pursuant to the 2005 Aviation Guidelines.

All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

- (135) As all airlines have access to the airport on a non-discriminatory basis and fall under the generally applicable schedule of charges, including discounts contained therein, Germany is of the opinion that this criterion is fulfilled. It stresses that especially the discounts are not designed in such a way that they would create a *de facto* selective advantage for some airlines. Finally, it asserts that the individual contracts concluded with Cirrus and Air Berlin are not relevant in this context, and that in any event all airlines had the possibility of concluding such contracts.

The development of trade is not affected to an extent contrary to Union interest

- (136) It is not clear to Germany how the ‘moderate’ extension of the infrastructure at Saarbrücken Airport could have or have had effects on trade. It recalls that the Commission has accepted that support to small regional airports usually does not have such an effect. As regards a possible effect on Zweibrücken Airport, Germany repeats that the two airports are not in competition with each other, but must be seen as complementary. It also argues that the infrastructure measures did not have an effect on Metz–Nancy–Lorraine and Luxembourg airports that would be contrary to the Community interest.

Article 107(3)(c) of the Treaty

- (137) Germany asserts that at least for the period between 2000 and 2005, the financial support for the airport can be found to be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty. For the purpose of demonstrating the importance of Saarbrücken Airport for the regional economic development and accessibility of the region, Germany refers to its submissions regarding the existence of an SGEI. The financial support has almost exclusively benefited infrastructure projects, which were in line with regional development goals. By way of example, Germany submits extensive explanations as to the necessity of the three biggest single infrastructure investments.
- (138) As regards the incentive effect, Germany explains that the airport is an important incentive for extra-regional companies to invest in the *Saarland*. Similarly, companies already present are incentivised to expand and invest further. It is submitted that if an incentive effect were missing, the *Saarland* would, taking into account its difficult budgetary situation, reconsider its support for the airport. Finally, Germany stresses again that the operation of Zweibrücken Airport is not affected.

3.2. THE TRANSFER OF VARIOUS PLOTS OF LAND TO FSBESITZG

3.2.1. EXISTENCE OF AID

- (139) Germany is of the opinion that the land transfer served security purposes and came within the public policy remit, thereby falling outside of the scope of application of Article 107(1) of the Treaty. More precisely, it is argued that after the runway had been changed, the transferred land was necessary to surround the runway ends with extended security and safety areas and to adapt the existing security fence. Securing the airport territory is, according to Germany, in the public interest and constitutes a sovereign task, not an economic activity. The background to these security measures were legislative changes taking place after the events of 11 September 2001 in the United States.
- (140) In addition, Germany submits that the post-2000 transfer of land with a total value of [...] did not, in any event, distort competition or affect trade for the same reasons as were mentioned with respect to the general financing measures. Based on the low value, the land transfer would fall under the *de minimis* regulation.

3.3. GUARANTEES ON LOANS TO THE BENEFIT OF VH SAAR AND FSBESITZG

3.3.1. EXISTENCE OF AID

- (141) The opening decision had assumed that of three known guarantees for FSBesitzG, only one had been granted after 2000. However, Germany explains that the guarantee in question was, in fact, granted in the course of 1999, that is to say before the crucial *Aéroports de Paris* judgment. It is therefore submitted that none of the three guarantees could constitute State aid measures. In the event that the Commission should nevertheless find that these guarantees constituted State aid, Germany submits that they would need to be assessed as existing aid, with the consequence that any Commission decision would only have effects *ex nunc*.
- (142) With respect to the letters of comfort, Germany refers to its reasoning regarding the general financing measure for the benefit of the airport (recitals 93–121), claiming it to be equally applicable here.

3.3.2. COMPATIBILITY

- (143) Germany argues that if the measures should be qualified as State aid, they would be compatible with the internal market pursuant to the conditions laid down in the 2005 Aviation Guidelines. In this respect, it refers to the arguments presented as regards the general financing measure, claiming that they are equally applicable here.

3.4. THE LEASE CONTRACT BETWEEN FSBESITZG AND FSBG

3.4.1. EXISTENCE OF AID

- (144) Germany distinguishes between the lease contract concluded in 1997, which was in force until 1 July 2006, and the lease contract which was valid from 1 July 2006 until the merger of FSBesitzG and FSBG.
- (145) As regards the 1997 lease contract, it is asserted that if found to constitute State aid, it would qualify as existing aid. If the Commission found this contract to constitute incompatible State aid, such a decision would only have effect for the future, not the past.
- (146) With respect to the 2006 lease contract, Germany submits that this contract merely amounted to a modification of the existing aid, and did not qualify as new aid. It emphasises that notably the law on the basis of which such a lease contract could be concluded, had not changed. It alleges that a change of the legislative basis would be necessary for the qualification as new aid.
- (147) In addition, Germany asserts that the 2006 lease contract was in line with market conditions at the time. It argues that a variable leasing payment was not uncommon, and that there is no indication that the actual amount charged was uncommonly low. In addition, it is submitted that the variable leasing payment also entailed the possibility of obtaining significantly higher leasing payments than under the previous contract. It is submitted that the 2006 lease contract improved FSBG's ability to act. Finally, Germany argues that it was in FSBesitzG's interest to keep Fraport as a shareholder, since that company's involvement allowed for access to know-how and created synergies.
- (148) In any event, Germany maintains that, despite the fact that no documents demonstrating how the leasing payments were calculated are available, the actual amount of the leasing payment was not important, as the close connection between FSBesitzG and FSBG meant that the overall economic impact was neutral. A higher leasing payment would have led FSBesitzG to receive less money from vh Saar, whereas a lower payment would have been compensated through higher transfers from vh Saar.
- (149) As regards the distortion of competition and effect on trade, Germany refers to the arguments made in this respect in the context of the general financing measures, holding that these arguments are equally applicable here.

3.5. DISCOUNTS FOR AIRLINES

3.5.1. EXISTENCE OF AID

- (150) Germany argues the discounts on airport charges introduced in 2007 were economically sensible, did not grant a selective advantage, and did not distort competition/had no effect on trade.

Market economy operator test

- (151) Following the departure of Hapag Lloyd/TUIFly in 2006, the passenger numbers at Saarbrücken Airport dropped by 30 %. In this situation, according to Germany, actions were necessary to ensure that the existing capacity was appropriately used in the medium to long term and to maintain the airport's competitiveness and attractiveness. The previous schedule of charges had proved to be a disadvantage in competition, as the airport had the highest charges of all airports in Germany. Germany submits that the discounts did indeed lead to a continuous increase in passenger numbers after 2006. Germany illustrates the positive effect of the discounts by referring to the decision of Air Berlin to start serving Saarbrücken Airport, a decision that was made only after the discounts were in place.
- (152) Germany underpins its argument that the discounts made economic sense, with the argument that discounts were only granted to new airlines or new routes. In consequence, so it is asserted, it could be expected that the discounts would have no immediate effect on the status quo, but would lead to an increase of passengers in the future. The economic sense is said to be further underlined by the limitation that the discount could not go beyond 50 % of the investment costs of the new airline or the new route.

- (153) While maintaining that the discounts made economic sense, Germany argues that because the discounts were offered to all airlines, it was impossible to make precise *ex ante* calculations of the costs and benefits of the discounts. The costs of a closure of the airport, on the other hand, were not assessed, as closure was never an option.

Selectivity

- (154) Relying on the fact that the discounts introduced in 2007 were available to all airlines, Germany maintains that the measure was non-selective. The published schedule of charges, of which the discounts were a part, was general and abstract in character, the discounts were automatically applied to all airlines operating from Saarbrücken that supplied the relevant data, and the airport had no discretion in applying the discounts.
- (155) Germany asserts that the purpose of the discounts was to increase the attractiveness of Saarbrücken Airport, not to favour a particular airline. A *de facto* selectivity would also be excluded by the fact that the same charges were applied to all airplanes exceeding 5 700 kg of *Maximum Take-Off Weight* (MTOW), thereby treating all commercial traffic airplanes in an equal manner, and by not discriminating between domestic and international flights. Finally, the discounts did also not discriminate on the basis of the number of landings.

Distortion of competition and effect on trade

- (156) As regards the distortion of competition and effect on trade, Germany refers to the arguments brought forward in this respect for the general financing measures, holding that those arguments are equally applicable here.

3.6. START-UP AID TO CIRRUS AIRLINES

3.6.1. EXISTENCE OF AID

- (157) Germany argues that in concluding the contract with Cirrus, FSBesitzG acted like a private investor could have done, with the consequence that the payments made to Cirrus did not constitute State aid. Additionally, it is submitted that the measure did not distort competition and had no effect on trade.

Market economy operator test

- (158) According to Germany, the purpose of the contract with Cirrus was to achieve an increase in passenger numbers. The increase was supposed to result from a higher frequency on the flights to [...], as well as from the use of modern aircraft. Both the higher frequency and the obligation to use modern aircraft were particularly intended to increase comfort and flexibility for business travellers.
- (159) Germany submits that the frequent amendments to the contract demonstrate that FSBesitzG closely monitored the economic development and was able to react quickly to economic necessity. The short notice period for cancelling the contract (30 days) appears to be a further indication of FSBesitzG's focus on the economic sustainability of the contract, allowing it to cancel the agreement in case that the goals could not be achieved. The long-term profitability was finally supposed to be strengthened by establishing Cirrus as the *home carrier* in Saarbrücken. According to Germany, precise data on expected costs and benefits is, however, not available.

Distortion of competition and effect on trade

- (160) As regards the distortion of competition and the effect on trade, Germany refers to the arguments made for the discounts on airport charges introduced in 2007, holding that these arguments are equally applicable here.

3.6.2. COMPATIBILITY

- (161) Germany argues that even if they were considered to constitute State aid, the payments to Cirrus can be justified as compatible start-up aid pursuant to the conditions laid out in the 2005 Aviation Guidelines as well as in Article 107 (3)(c) of the Treaty.

- (162) Recalling that the contract with Cirrus increased the frequency of that airline's service on the [...] route, that FSBesitzG concluded that contract with a view to it being profitable, and that the effect of the increased frequency on other routes could not be investigated because no other airline served [...] from Saarbrücken, Germany maintains that the relevant conditions are fulfilled. It further explains that there were no other high-speed connections linking Saarbrücken and [...] and that the payments under the contract were not cumulated with discounts on the airport charges (the schedule of charges including the discounts only entered into force after the Cirrus contract had expired). Finally, Germany explains that because it did not see the contract as containing elements of State aid, the existence of the contract was not made public (on a list or otherwise), and no specific appeal mechanism was provided for.

3.7. MARKETING AGREEMENT WITH AIR BERLIN

3.7.1. EXISTENCE OF AID

- (163) Germany submits that the marketing agreement with Air Berlin was concluded in compliance with the MEO test and does not grant Air Berlin an advantage for the purposes of Article 107(1) of the Treaty. Additionally, it is submitted that the measure did not distort competition and had no effect on trade.

Market economy operator test

- (164) Before concluding the contract with Air Berlin, FSG evaluated the costs and expected revenues, concluding that the contract was profitable for the airport. Germany explains that, while the original expectations were not entirely met, an extrapolation of the available real data shows that the contract is still clearly profitable.
- (165) In this context, Germany contests the suggestion made in the opening decision that the marketing agreement had no genuine value for the airport apart from increasing the number of passengers on Air Berlin flights. It submits that the marketing activities agreed upon in the contract raise the Airport's profile and draw attention to the region as a travel destination, which in turn entails the possibility to generate further (non-aviation) revenue. Germany argues that when an airline markets a destination, consumers do not only take notice of the fact that this airline serves this destination, but also become aware of the region as a travel destination in general.
- (166) Germany also challenges the preliminary finding contained in the opening decision that the marketing agreement effectively introduced additional special discounts for Air Berlin. Germany states that rather, the marketing agreement has genuine economic value for the airport, in such a way that a private investor would also have concluded such a contract, expected to be profitable already after three years.

Distortion of competition and effect on trade

- (167) As regards the distortion of competition and effect on trade, Germany refers to the arguments it made concerning the discounts on airport charges introduced in 2007, holding that those arguments are equally applicable here.

4. COMMENTS RECEIVED FROM AIR BERLIN

- (168) Before arguing that the two measures that directly affect Air Berlin — the general discount scheme on airport charges and the market contract concluded between FSG and Air Berlin — are in compliance with State aid rules, the airline first makes the general remark that it considers a genuine demand for aviation service to exist in the region of Saarbrücken. It stresses that Air Berlin's flights to [...] and [...] reach a 'Seat Load Factor' comparable to that reached on Air Berlin's flights to the same destinations from [...]. Additionally, Air Berlin is of the opinion that none of the other existing airports in the region would be a viable alternative to Saarbrücken, which in turn precludes an effect on trade. In particular, Air Berlin stresses that it has never considered the neighbouring airports [...] as an alternative base, given that on those airports the demand for flights to [...], a holiday destination mainly fancied by German tourists, is not comparable to the demand for such destinations at Saarbrücken Airport.

4.1. DISCOUNTS FOR AIRLINES

- (169) With respect to the discounts enshrined in the 2007 schedule of airport charges, Air Berlin, like Germany, argues that due to its abstract and general character, the discounts could not be considered to be selective. Wherever an airline fulfilled the listed conditions, the discounts would be granted without any discretion on the part of the airport.
- (170) Additionally, Air Berlin contests the fact that there is competition between airlines from different Member States. Putting forward that only one airline from another Member States operates from Saarbrücken, it submits that the assumption that the measures has an effect on trade is not sustainable.
- (171) Air Berlin also claims that the discount system fulfils all the conditions set out in the *Charleroi* judgment of the Court, namely that the discounts are time-limited, degressive, and not available for more than 50 % of the actual start-up and marketing costs.
- (172) Finally, Air Berlin asserts that the airport charges at Saarbrücken Airport are, in comparison with other German airports, not particularly low. It is argued that the passenger charges are between [...] and [...] lower in [...].

4.2. MARKETING AGREEMENT WITH AIR BERLIN

- (173) Air Berlin explains that the development of passenger numbers since the conclusion of the contract confirms the expectations held at the time. On this basis, it could be assumed that the increase in aviation and non-aviation revenue that FSG expected to gain from this contract would materialise.
- (174) Further, Air Berlin lists the various connections available via [...], as well as the various marketing activities it has undertaken to promote Saarbrücken Airport. It submits that the combination of the increased frequency, the attractive connections, and the promotion of Saarbrücken Airport as a vacation and business destination have significant value for the airport and the region as a whole. As a consequence, according to Air Berlin, the contract makes economic sense for the airport, and therefore a private investor could also have concluded it.

5. ASSESSMENT

5.1. FINANCING OF VH SAAR, FSG, AND FSBESITZG (CAPITAL INJECTIONS INTO VH SAAR, CAPITAL INJECTIONS INTO FSBESITZG/FSG TO COVER LOSSES)

- (175) The financing of vh Saar, FSG and FSBesitzG under assessment consisted of the following measures: vh Saar injected capital into FSBesitzG/FSG in order to cover their losses. vh Saar financed this with capital injections it received from the Saarland and other revenues.

5.1.1. EXISTENCE OF AID

- (176) By virtue of Article 107(1) of the Treaty ‘...any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market’.
- (177) The criteria in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measure in question constitutes aid within the meaning of Article 107(1) of the Treaty all of the following conditions need to be fulfilled. Namely, the financial support should:
- (a) be granted by the State or through State resources;
 - (b) favour certain undertakings or the production of certain goods;
 - (c) distort or threaten to distort competition; and
 - (d) affect trade between Member States.

Economic activity and notion of undertaking

- (178) According to settled case-law, the Commission must first establish whether the vh Saar, FSG, and FSBesitzG are undertakings within the meaning of Article 107(1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed⁽¹⁸⁾. Any activity consisting in offering goods or services on a given market is an economic activity⁽¹⁹⁾.
- (179) In its '*Leipzig-Halle Airport*' judgment the Court of Justice confirmed that the operation of an airport for commercial purposes and the construction of the airport infrastructure constitute an economic activity⁽²⁰⁾. Once an airport operator engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) of the Treaty, and the Treaty rules on State aid are therefore capable of applying to advantages granted by the State or through State resources to that airport operator⁽²¹⁾.
- (180) Regarding the moment in time from which the construction and operation of an airport became an economic activity, the Commission recalls that the gradual development of market forces in the airport sector does not allow for a precise date to be determined. However, the Court of Justice of the European Union has recognised the evolution in the nature of airport activities, and in its judgment in '*Leipzig/Halle Airport*' the General Court held that from 2000 onward the application of State aid rules to the financing of airport infrastructure could no longer be excluded. Consequently, from the date of the judgment in '*Aéroports de Paris*' (12 December 2000), the operation and construction of airport infrastructure must be considered as a task falling within the ambit of State aid control.
- (181) In this regard the Commission notes that the infrastructure which is subject to the present Decision was operated by the airport operator FSBG since 1997, while FSBesitzG owned and maintained the airport infrastructure.
- (182) Since 2008, FSG is both the owner and the operator of Saarbrücken airport. The airport operator — until 2008 FSBG and since then FSG — charges users for the use of its services and infrastructure, while the infrastructure owner — FSBesitzG until 2008 — leased the infrastructure to the airport operator against a lease payment. In effect, both the infrastructure owner and the infrastructure operator thereby commercially exploit the airport infrastructure in Saarbrücken. It follows that the entities exploiting this infrastructure — FSBesitzG, FSBG, and FSG — constitute undertakings for the purposes of Article 107(1) of the Treaty from the 12 December 2000, the date of the '*Aéroports de Paris*' judgment, onwards.
- (183) As regards vh Saar, Germany submitted that, as a holding company, vh Saar could not be regarded as an undertaking for the purposes of Article 107(1) of the Treaty. The Commission recalls that according to the Court of Justice, 'the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset'⁽²²⁾. At the same time, the Court of Justice observed that 'on the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking'.

⁽¹⁸⁾ Case C-35/96 *Commission v Italy* [1998] ECR I-3851; C-41/90 *Höfner and Elser* [1991] ECR I-1979; Case C-244/94 *Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013; Case C-55/96 *Job Centre* [1997] ECR I-7119.

⁽¹⁹⁾ Case 118/85 *Commission v Italy* [1987] ECR 2599; Case 35/96 *Commission v Italy* [1998] ECR I-3851.

⁽²⁰⁾ Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission*, ('*Leipzig/Halle judgment*'), [2011] ECR II-1311, in particular paragraphs 93 and 94; confirmed by Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, [2012] not yet reported.

⁽²¹⁾ Cases C-159/91 and C-160/91, *Poucet v AGV and Pistre v Cancave* [1993] ECR I-637.

⁽²²⁾ Case C-222/04 *Ministero dell'Economia e delle Finanze/Casse di Risparmio di Firenze SpA et al* [2006] I-289, paragraph 111.

- (184) The Commission recalls that the statutory function of vh Saar is to coordinate the 'activities related to the construction, extension, and operation of public ports and airports in Saarland'. That coordination would typically go beyond the mere exercise of rights attached to the status of shareholder. At the same time, there is no evidence of vh Saar actually exercising control or involving itself directly in the management of FSBesitzG or FSG. Against this background, it is not entirely clear whether vh Saar can be characterised as an undertaking. The Commission finds, however, that it can leave this question open in light of the considerations in recital 203 below, namely that vh Saar has not received an advantage.

Public policy remit

- (185) While FSBesitzG, FSG and FSBG must therefore be considered to constitute undertakings for the purposes of Article 107(1) of the Treaty, it must be recalled that not all the activities of an airport owner and operator are necessarily of an economic nature ⁽²³⁾.
- (186) The Court of Justice ⁽²⁴⁾ has held that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities include for example security, air traffic control, police and customs. The financing has to be strictly limited to the compensation of the costs to which these activities give rise and may not be used instead to fund other economic activities ⁽²⁵⁾.
- (187) Therefore, the financing of activities falling within the public policy remit, or of infrastructure directly related to those activities in general, does not constitute State aid ⁽²⁶⁾. At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform these activities are generally considered to be of a non-economic nature ⁽²⁷⁾.
- (188) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities ⁽²⁸⁾. Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves as non-economic. Therefore, an analysis of the legal framework applicable to the airport operator is necessary in order to assess whether under that legal framework airport managers or airlines are required to bear the cost of the provision of some activities that might be non-economic in themselves but are inherent to the deployment of their economic activities.
- (189) Germany explains that the following activities are to be considered as falling within the public policy remit, with the consequence that their exercise would not constitute an economic activity: airport security measures pursuant to § 8 *Luftsicherheitsgesetz* (Air Security Law) ⁽²⁹⁾ (fences around the airport and control footpaths, a container gate, runway signs, emergency electricity, parking spaces for airplanes subject to bomb threats and extension of runway end safety areas (RESA) which all fall under § 8 *Luftsicherheitsgesetz*); the fire brigade; and air traffic control and air safety measures pursuant to § 27(c)(2) *Luftverkehrsgesetz* (Air Traffic Law).

⁽²³⁾ Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

⁽²⁴⁾ Commission Decision N309/2002 of 19 March 2003 on Aviation security — compensation for costs incurred following the attacks of 11 September 2001.

⁽²⁵⁾ Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova* [1997] ECR I-1547; Commission Decision N309/02 of 19 March 2003; Commission Decision N438/2002 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector.

⁽²⁶⁾ Commission Decision N309/02 of 19 March 2003.

⁽²⁷⁾ See, in particular, Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

⁽²⁸⁾ See i.a. Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-01627, paragraph 36, and case-law cited.

⁽²⁹⁾ Measures pursuant to § 8 *Luftsicherheitsgesetz* include, inter alia, construction of airport infrastructure that enables sufficient security controls; certain measures related to luggage and freight; securing restricted areas; controlling personnel and goods accessing restricted areas; training security personnel; removing and unloading airplanes that constitute security threats.

- (190) The Commission is of the view that measures pursuant to § 8 *Luftsicherheitsgesetz*, measures pursuant to § 27(c)(2) *Luftverkehrsgesetz* and the fire brigade can, in principle, be considered to constitute activities falling within the public policy remit.
- (191) With respect to measures relating purely to operational safety, however, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport⁽³⁰⁾. Subject to a more detailed review with respect to individual activities and costs (see recitals 196 and 197), the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling within the public policy remit. Any undertaking wishing to operate an airport has to ensure the safety of the installations, such as of the runway and aprons.
- (192) As regards the legal framework, Germany has submitted that with regard to the fire brigade there are no legal rules strictly imposing these costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for the fire brigade is subject to regional responsibilities and these costs are usually remunerated by the relevant regional authorities. The remuneration of these costs is limited to the extent necessary to cover these costs.
- (193) As regards air traffic control and air safety measures, § 27(d) *Luftverkehrsgesetz* provides that the costs related to the measures in § 27(c) *Luftverkehrsgesetz* are covered by the State for a number of specific airports. Airports are eligible for cost coverage as 'recognised airports' pursuant to § 27(d) *Luftverkehrsgesetz* if the Federal Ministry of Transport has recognised a necessity of the air traffic control and air safety measures for security reasons and transport policy related interests⁽³¹⁾. German airports which have not been recognised are not eligible for cost coverage pursuant to § 27(d) *Luftverkehrsgesetz* and have therefore in principle to bear the costs related to the measures foreseen in § 27(c) *Luftverkehrsgesetz* themselves. These costs are inherent to the operation of the airports. Since some airports have to bear these costs themselves whereas other airports do not, the latter might be granted an advantage, even if control and air safety measures can be considered to be non-economic. The Commission notes that Saarbrücken Airport has been recognised to be an airport eligible for cost coverage pursuant to § 27(d) *Luftverkehrsgesetz*. Other airports have to bear these costs themselves. Therefore, the coverage of the costs of Saarbrücken Airport related to air traffic control and safety measures pursuant to § 27(d) *Luftverkehrsgesetz* gives an advantage to Saarbrücken Airport, even if control and air safety measures can be considered to be of a non-economic nature.
- (194) With respect to measures pursuant to § 8 *Luftsicherheitsgesetz*, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the public authorities. The Commission notes, however, that pursuant to § 8(3) *Luftsicherheitsgesetz* only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities listed in § 5 *Luftsicherheitsgesetz* may be reimbursed. All other costs must be borne by the airport operator. To the extent that public financing granted to FSBesitzG or FSG relieved those undertakings of costs they had to bear pursuant to § 8(3) *Luftsicherheitsgesetz*, that public financing is not exempted from scrutiny under Union State aid rules.

Conclusion on public policy remit

- (195) In the light of those considerations, the Commission finds it appropriate to draw more specific conclusions regarding investment costs and operating expenses allegedly falling within the public policy remit.

⁽³⁰⁾ Commission decision of 20 February 2014 in State aid case SA.35847 (2012/N) — Czech Republic — Ostrava Airport, not yet published in the Official Journal, recital 16.

⁽³¹⁾ § 27(d)(1) *Luftverkehrsgesetz*: 'Flugsicherungsdienste und die dazu erforderlichen flugsicherungstechnischen Einrichtungen werden an den Flugplätzen vorgehalten, bei denen das Bundesministerium für Verkehr, Bau und Stadtentwicklung einen Bedarf aus Gründen der Sicherheit und aus verkehrspolitischen Interessen anerkennt'.

- (196) As regards operating expenses, the Commission accepts that operating expenses linked to the fire brigade qualify as public policy remit expenses, in so far as the remuneration of these costs is strictly limited to what is necessary to pursue these activities. As regards operating costs linked to measures taken pursuant to § 8 *Luftsicherheitsgesetz*, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to § 8(3) *Luftsicherheitsgesetz* qualify as public policy remit costs. With respect to air traffic control and air safety measures pursuant to § 27c(2) *Luftverkehrsgesetz*, noting that Saarbrücken is one of the airports eligible for cost coverage, whereas other airports are not, the Commission finds that the coverage of operating costs linked to air traffic control and air safety measures pursuant to § 27(d) *Luftverkehrsgesetz* gives an advantage to Saarbrücken Airport, even if air traffic control and air safety measures can be considered to be non-economic. Equally, operating costs related to ensuring the operational safety of the airport do not qualify as public policy remit costs.
- (197) As regards investments made between 2000 and 2012, the Commission accepts that investments directly related to the fire brigade qualify as public policy remit expenses in so far as the remuneration of those costs is strictly limited to what is necessary to pursue these activities. As regards investments linked to measures taken pursuant to § 8 *Luftsicherheitsgesetz*, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to § 8(3) *Luftsicherheitsgesetz* qualify as public policy remit costs. With respect to investments linked to air traffic control and air safety measures pursuant to § 27(c)(2) *Luftverkehrsgesetz*, noting that Saarbrücken is one of the airports eligible for cost coverage, the Commission finds that those investments related to air traffic control and safety measures pursuant to § 27(d) *Luftverkehrsgesetz* give an advantage to Saarbrücken Airport, even if control and air safety measures can be considered to be non-economic. Equally, investments related to ensuring the operational safety of the airport do not qualify as public policy remit costs. In particular, this means that the investments into fences around the airport, runway signs, and the extension of runway end safety areas cannot be qualified as falling within the public policy remit.
- (198) In any case, regardless of the legal classification of those costs as falling within the public remit or not, it has been demonstrated that they must be borne by the airport operator, under the applicable legal framework. Accordingly, were the State to pay for those costs, the airport operator would be relieved from a cost that it should normally have incurred.

State resources and imputability to the State

- (199) In order to constitute State aid, the measure in question has to be financed from State resources and the decision to grant the measure must be imputable to the State.
- (200) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it⁽³²⁾. Resources of local authorities are for the application of Article 107 of the Treaty State resources⁽³³⁾.
- (201) The capital injections provided to *vh Saar* stem directly from the *Land Saarland's* budget and therefore constitute State resources.
- (202) As regards the financing of *FSBesitzG/FSG* by *vh Saar*, it must be noted that *vh Saar* is entirely owned by the *Land Saarland*, and therefore constitutes a public undertaking. The funding provided by *vh Saar* to *FSBesitzG/FSG* thus constitutes a loss of State resources. As regards imputability of the P&L agreement and the transfers made thereunder, the Commission notes that the statutes, by means of which *vh Saar* was established by the *Land Saarland's* Ministry of Economics, are dated 7 May 1996. On that very same day, the P&L agreement between *vh Saar* and *FSBesitzG/FSG*

⁽³²⁾ Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397.

⁽³³⁾ Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais*, not yet published, paragraph 108.

was established. According to Germany, vh Saar acts under the 'comprehensive legal and factual control of the *Land Saarland*' as the sole shareholder of the company. In this regard, the Commission first notes that, according to the annual reports of vh Saar, the company can be considered as controlling FSBesitzG/FSG⁽³⁴⁾. According to the statutes, the *Saarland*'s government appoints vh Saar's supervisory board and the chairman of the supervisory board is a representative of the Ministry of the Land responsible for aviation. The statutes also foresee that the board of directors is appointed by the general assembly, which consists of representatives of the owner, i.e. the *Saarland*. Finally, the statutes provide that vh Saar was to conclude a control agreement⁽³⁵⁾ with FSG. Based on this information, the Commission considers that the P&L agreement between vh Saar and FSBesitzG/FSG and the transfers made thereunder are imputable to the State.

Economic advantage

- (203) Germany has confirmed that all public funds provided to vh Saar are used by the entity to fulfil its obligations under the P&L agreement with FSBesitzG/FSG, that is to say that all funds are passed on by vh Saar to FSBesitzG/FSG. As vh Saar is therefore merely an intermediary via which funding is passed on from the State to FSBesitzG/FSG, vh Saar cannot be considered to receive an economic advantage itself.

FSBesitzG/FSG: MEO

- (204) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention⁽³⁶⁾. Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention⁽³⁷⁾. Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.
- (205) The Commission further recalls that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid'⁽³⁸⁾. In this case, in order to determine whether the public financing of Saarbrücken Airport grants FSBesitzG/FSG an advantage that they would not have received under normal market conditions, the Commission has to compare the conduct of the public shareholders providing the financing to that of a MEO that is guided by prospects of profitability in the long term⁽³⁹⁾.
- (206) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEO principle is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question'⁽⁴⁰⁾.
- (207) In *Stardust Marine* the Court stated that, '[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation'⁽⁴¹⁾.
- (208) Furthermore, the Court declared in the *EDF* case that, '[...] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen'⁽⁴²⁾.

⁽³⁴⁾ vh Saar and FSBesitzG/FSG can be considered as connected companies in the meaning of § 290 HGB.

⁽³⁵⁾ Contract by which one company submits the direction of the company to another enterprise.

⁽³⁶⁾ Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60 and Case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, paragraph 41.

⁽³⁷⁾ Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

⁽³⁸⁾ Case C-482/99 *France v Commission ('Stardust Marine')* [2002] ECR I-4397, point 69.

⁽³⁹⁾ Case C-305/89 *Italy v Commission ('ALFA Romeo')* [1991] ECR I-1603; Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871.

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

⁽⁴¹⁾ Case C-482/99 *France v Commission* [2002] ECR I-04397.

⁽⁴²⁾ Case C-124/10P *European Commission v Électricité de France (EDF)* [2012], not yet published in ECR, ('EDF Judgment'), paragraph 85.

- (209) In order to be able to apply the MEO principle the Commission has to place itself at the time when each decision to finance the measures at stake was taken. The Commission must also base its assessment on the information and assumptions which were at the disposal of the relevant local authorities at the time when the decision regarding the financial arrangements of the measures at stake was taken.
- (210) The Commission takes note of Germany's submission that the *Land Saarland*, which owns and finances Saarbrücken Airport, is not concerned with a return on investment, but rather views the financing as related to the provision of essential infrastructure. It is also for this reason that according to Germany no analysis of the costs of a potential closure of the airport exists. The Commission further observes that the airport has incurred increasing losses since 2000 and that a positive EBIDTA, but not a positive overall result, is only expected for 2020. In the light of these considerations, the public financing of FSBesitzG/FSG cannot be qualified as complying with the MEO principle.

FSBesitzG/FSG: SGEI Compensation

- (211) Germany has submitted that in this case public funding constitutes compensation for a service of general economic interest that does not confer an economic advantage. According to the Court of Justice's *Altmark* ⁽⁴³⁾ jurisprudence, compensation for the provision of a service of general economic interest does not grant an economic advantage where four cumulative conditions are fulfilled:
- (a) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined (*Altmark* criterion 1').
 - (b) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (*Altmark* criterion 2').
 - (c) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit (*Altmark* criterion 3').
 - (d) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with the means for carrying out the service so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (*Altmark* criterion 4').
- (212) Pursuant to *Altmark* criterion 4, the amount of compensation must either be determined following a public procurement procedure or, instead, on the basis of an analysis of the costs which a typical, well run undertaking would have incurred. In the case of Saarbrücken Airport, the operation of the airport was not tendered out, but rather entrusted to the State-owned FSBesitzG/FSG. The amount of compensation was also not determined on the basis of an analysis of the costs that a typical, well run undertaking would have incurred. The financing modalities were and are such that any loss generated by FSBesitzG/FSG is covered from State resources, regardless of whether such losses correspond to costs that a typical, well run undertaking would have occurred.
- (213) In order to fulfil the *Altmark* criterion 4 it is not sufficient that the authorities of the *Land Saarland*, who as sole shareholder has comprehensive supervisory and control powers, claim to have ensured the efficient use of resources. While Germany submits that only costs incurred as a consequence of efficient operations entered into the deficit cover, the P&L agreement does not provide for such a limitation, but rather provides for the cover of any losses that may have been generated.
- (214) It is also not sufficient to compare the costs of Saarbrücken Airport with those of other State-owned undertakings active in other sectors, as no conclusions can be drawn therefrom as to the efficiency of the airport operator. A comparison with other airport operators was, according to Germany, not attempted, as it was considered that regional airports differed too greatly with respect to their costs and revenues to allow for a meaningful comparison.

⁽⁴³⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, paragraphs 87–93.

- (215) In its final analysis, Germany therefore mainly relies on its appreciation that there is no indication that the airport operator in Saarbrücken was inefficient. It has submitted that the Commission has, in the past, accepted the absence of an indication of inefficiency as sufficient for compliance with the *Altmark* criterion 4. The Commission notes, however, that the decision referred to by Germany is by no means solely based on the absence of any indication of inefficiency. In that case, the Commission referred to a variety of reasons for finding that *Altmark* criterion 4 was fulfilled, and stressed that its reasoning was based on the 'specific factual and legal constraints prevailing in this case' ⁽⁴⁴⁾.
- (216) The Commission finds therefore that the *Altmark* criterion 4 is not fulfilled in the present case. As the four *Altmark* criteria are strictly cumulative, it is therefore not necessary to assess compliance with the other criteria.

Selectivity

- (217) Article 107(1) of the Treaty requires that a measure, in order to be defined as State aid, favours 'certain undertakings or the production of certain goods'. In the case at hand, the Commission notes that the public financing only benefits FSBesitzG/FSG. It is thus clearly selective within the meaning of Article 107(1) of the Treaty.

Distortion of competition and effect on trade

- (218) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as affected by that aid ⁽⁴⁵⁾. The economic advantage granted by the measure in this case to the airport operator strengthens its economic position, as the airport operator will be able to set up its business without bearing the inherent investment and operating costs.
- (219) As assessed in recitals 178 et seq., the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, in particular with respect to low-cost carriers and charter operators also airports that are not located in the same catchment areas and even in different Member States can also be in competition with each other to attract those airlines.
- (220) As mentioned in point 40 of the 2005 Aviation Guidelines and reaffirmed in point 45 of the 2014 Aviation Guidelines, it is not possible to exclude even small airports from the scope of application of Article 107(1) of the Treaty.
- (221) Saarbrücken Airport currently serves approximately 425 000 passengers per year, and has served as many as approximately 520 000 per year in the past. The forecasts provided by Germany establish that passenger numbers are expected to rise to as much as [...] passengers per year in 2020. As observed in recital 16 above, it is located in the immediate vicinity of Zweibrücken Airport (39 kilometers) and within two hours' drive from six other airports. According to the data provided by Germany, approximately [less than 14 %] of passengers using Saarbrücken Airport originate from other Member States. In light of these facts, the Commission considers that public funding to FSBesitzG/FSG distorts or threatens to distort competition and has at least a potential effect on trade between Member States.
- (222) Apart from these general considerations, the Commission also considers that Saarbrücken Airport is or at least has been in direct competition with Zweibrücken Airport. First, it must be noted that TUIFly, formerly Saarbrücken Airport's biggest client, left that airport and moved to Zweibrücken in 2007. Secondly, for a substantial period of time (approximately four years) flights to Berlin were offered from both Zweibrücken (Germanwings) and Saarbrücken (Air Berlin and Luxair) in parallel, demonstrating competition both between the airports and the airlines ⁽⁴⁶⁾.

⁽⁴⁴⁾ See OJ L 219, 24.8.2007, p. 9, recitals 111 et seq.

⁽⁴⁵⁾ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

⁽⁴⁶⁾ See Commission decision of 1 October 2014 in State aid case SA.27339 — Germany — Zweibrücken airport, not yet published in OJ.

- (223) In addition to these indicators for competition between Saarbrücken and Zweibrücken Airports, there is also evidence that — despite the official submission by Germany that the two airports never considered themselves as being in direct competition — officials of the *Land* Rhineland–Palatinate have clearly perceived the existence of competition. In two internal notes of the Rhineland–Palatinate government written in 2003, the position defended by the authors is that cooperation between Zweibrücken and Saarbrücken Airports was not possible/advisable at that time. Rather, one note explained that at least as long as Fraport AG was involved with Saarbrücken Airport ⁽⁴⁷⁾, the relationship between the two airports would be one of competition ⁽⁴⁸⁾. The notes further express that ‘from the perspective of Rhineland–Palatinate, it can be expected that Zweibrücken Airport will prevail in this competition in the long term’ ⁽⁴⁹⁾. These statements indicate that at the very least in 2003, the perceived relationship between the two airports was indeed one of competition.
- (224) Germany takes the position that pursuant to point 39 of the 2005 Aviation Guidelines, public funding provided to small regional airports is ‘unlikely to distort competition or affect trade to an extent contrary to the common interest’. It also submits that competition with other airports is limited by a number of factors, such as business model, size, and distance. Any distortion of competition or effect on trade would, in any event, be minimal.
- (225) However, the Commission considers that the indicators described in recitals 221 to 223 demonstrate the existence of at least a potential distortion of competition and effect on trade. The Commission emphasises that the definition of State aid does not require that the distortion of competition or effect on trade be significant or material, even though it considers that, given the close proximity of Saarbrücken and Zweibrücken airports and their direct competitive relationship as indicated above, this was indeed the case.
- (226) There are international flights from Saarbrücken airport to destinations such as Mallorca or Ankara, or other holiday destinations. The runway at Saarbrücken is of a sufficient length (2 000 m) and allows airlines to serve medium–haul international destinations.
- (227) Against this background, the public financing granted to FSBesitzG/FSG must be considered as being liable to distort competition and have an effect on trade.

5.1.2. EXISTING AID AND NEW AID

- (228) The Commission recalls that an aid measure constitutes existing aid pursuant to Article 1(b)(v) of Council Regulation (EC) No 659/1999 ⁽⁵⁰⁾ where it can be established that at the time the aid measure was put into effect, it did not constitute State aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Germany submits that the P&L agreement between FSBesitzG/FSG and *vh Saar*, which constitutes the basis for the annual deficit coverage that was considered to constitute State aid, was put into place when the public funding of airports was not yet considered to constitute State aid and has not been altered since.
- (229) The Commission recalls that the gradual development of market forces in the airport sector does not allow for a precise date to be determined from which the operation of an airport should have undoubtedly been considered as an economic activity. As stated in recital 180, from the date of the judgment in ‘*Aéroports de Paris*’ (12 December 2000), the operation and construction of airport infrastructure must be considered as a task falling within the ambit of State aid control.
- (230) Conversely, due to the uncertainty that existed prior to the judgment in ‘*Aéroports de Paris*’, public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid. It follows that the Commission cannot now call into question, on the basis of State aid rules, financing measures granted before the ‘*Aéroport de Paris*’ judgment.
- (231) In consequence, State aid measures that were granted to airport operators before the date of the ‘*Aéroports de Paris*’ judgment did not constitute State aid at the time when they were put into place, and became existing aid by 12 December 2000.

⁽⁴⁷⁾ Fraport AG held a 51 % share in FSBG until 30 June 2007.

⁽⁴⁸⁾ *Vorlage für den Ministerrat, Gemeinsame Kabinettsitzung der Regierung des Saarlandes und der Landesregierung von Rheinland–Pfalz am 27. Mai 2003, Ministerium für Wirtschaft, Verkehr, Landwirtschaft und Weinbau, 15 May 2003.*

⁽⁴⁹⁾ *Einschätzung der rheinland–pfälzischen Innenministeriums, 15 May 2003.*

⁽⁵⁰⁾ 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).

- (232) In the present case, the P&L agreement between FSBesitzG/FSG and vh Saar (under which individual capital injections were made) was put into place in 1996 and has, according to Germany, not been changed since. It can therefore be considered that, from 2000 onwards, the annual public financing granted pursuant to this agreement constituted existing aid.
- (233) The Commission further considers, however, that the existing aid became new aid by 1 June 2007. In point 83 of the 2005 Aviation Guidelines, and pursuant to what is now Article 108(1) of the Treaty, the Commission proposed appropriate measures to the Member States, asking them to bring all their existing schemes relating to State aid covered by those Guidelines in conformity with those Guidelines by 1 June 2007 at the latest. Member States were asked to confirm their acceptance in writing. Should a Member State fail to act according to its commitment, the existing aid becomes unlawful aid after the date set in the appropriate measures and is subject to recovery.
- (234) Germany accepted the appropriate measures by letter of 30 May 2006. Considering that the P&L agreement established an aid scheme which provided the basis for repeated payments of aid over time, Germany had to ensure that the aid scheme conformed to the 2005 Aviation Guidelines at 1 June 2007 the latest. From that date onwards, the public financing of FSBesitzG/FSG no longer constituted existing aid.

5.1.3. CONCLUSION

- (235) In view of the arguments presented in recitals 176 to 225, the Commission considers that the public funding granted in the form of annual loss coverage to FSBesitzG/FSG between 2000 and 2012 (see financial data detailed in Tables 3 and 4) constitutes State aid within the meaning of Article 107(1) of the Treaty in so far as it was related to activities outside the public policy remit, and therefore constituted new aid from 1 June 2007 onwards.
- (236) The Commission further considers that, in particular in view of the arguments presented in recital 203, the capital injections granted to vh Saar do not constitute State aid within the meaning of Article 107(1) of the Treaty, as vh Saar passed on all the public funds received and therefore did not itself obtain an economic advantage.

5.1.4. LAWFULNESS OF THE AID

- (237) Pursuant to Article 108(3) of the Treaty, Member States must notify any plans to grant or alter aid, and must not put the proposed measures into effect until the notification procedure has resulted in a final decision.
- (238) As the financing has already been put at the disposal of FSBesitzG/FSG the Commission considers that Germany has not respected the prohibition of Article 108(3) of the Treaty⁽⁵¹⁾.

5.1.5. COMPATIBILITY

5.1.5.1. *The applicability of the 2014 and 2005 Aviation Guidelines*

- (239) Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) of the Treaty that State aid is not compatible with the internal market. The aid in question can only be assessed on the basis of Article 107(3)(c) of the Treaty, which stipulates that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market.
- (240) In this regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) of the Treaty.

⁽⁵¹⁾ Case T 109/01 *Fleuren Compost v Commission* [2004] ECR II-127.

- (241) According to the 2014 Aviation Guidelines, the Commission considers that the Commission Notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽⁵²⁾ applies to unlawful investment aid to airports. In this respect, if the unlawful investment aid was granted before 4 April 2014, the Commission will apply the compatibility rules in force at the time when the unlawful investment aid was granted. The Commission has already concluded in recital 238 that the annual coverage of losses by vh Saar constitutes unlawful State aid granted before 4 April 2014. Accordingly, the Commission will apply the principles set out in the 2005 Aviation guidelines in the case of unlawful investment aid to airports granted before 4 April 2014 ⁽⁵³⁾.
- (242) According to the 2014 Aviation Guidelines, the Commission considers that the provisions of the notice on the determination of the applicable rules for the assessment of unlawful State aid should not apply to pending cases of unlawful operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period ⁽⁵⁴⁾.

5.1.5.2. *Distinction between investment and operating aid*

- (243) In view of the provisions of the 2014 Aviation Guidelines referred to in recitals 241 and 242, the Commission has to determine whether the measure in question constitutes unlawful investment or operating aid.
- (244) According to point 25 (18) of the 2014 Aviation Guidelines investment aid is defined as ‘aid to finance fixed capital assets, specifically, to cover the capital costs funding gap’. Moreover, according to point 25 of the 2014 Aviation Guidelines investment aid can relate both to an upfront payment (that is to say cover upfront investment costs) and to aid paid out in the form of periodic instalments (to cover capital costs, in terms of annual depreciation and costs of financing).
- (245) Operating aid, on the other hand, relates to covering all or part of the operating costs of an airport, defined as ‘the underlying costs of the provision of airport services, including categories such as costs of personnel, contracted services, communications, waste, energy, maintenance, rent, administration, etc., but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit’ ⁽⁵⁵⁾.
- (246) In the light of these definitions, it can be considered that the part of the annual capital injections that was used to cover annual operating losses ⁽⁵⁶⁾ of FSBesitzG/FSG net of the costs included in the EBITDA that fall within a public policy remit as established in recitals 186 to 197 constitute operating aid to FSBesitzG/FSG.
- (247) The Commission notes that FSBesitzG/FSG received a total of up to around [...] to cover its losses in the years 2000–2012. In this time period, total cumulated EBITDA of FSBesitzG (FSBG)/FSG amounted to approximately — [...]. From this amount the costs falling within the public policy remit would have to be deducted ⁽⁵⁷⁾. Against this background, the Commission considers that the maximum amount of operating aid granted in implementation of the P&L agreement to FSBesitzG/FSG in the years 2000–2012 is up to around [...].

⁽⁵²⁾ OJ C 119, 22.5.2002, p. 22.

⁽⁵³⁾ Point 173 of the 2014 Aviation Guidelines.

⁽⁵⁴⁾ Point 172 of the 2014 Aviation Guidelines.

⁽⁵⁵⁾ Point 25 (22) of the 2014 Aviation Guidelines.

⁽⁵⁶⁾ Expressed in Earnings Before Interest, Taxes, Depreciation and Amortisation (hereinafter: EBITDA).

⁽⁵⁷⁾ No precise figures on costs related to the public policy remit in the years 2000–2012 are however available.

- (248) Finally, the part of the annual capital injections that covers losses of FSBesitzG/FSG that are not already included in the EBITDA (that is to say the annual depreciation of assets, costs of financing, and others.), minus costs falling within a public policy remit as established in recitals 186 to 197 constitute investment aid in favour of FSBesitzG/FSG.
- (249) In view of the considerations in recitals 247 to–248, it can be concluded that the maximum amount of investment aid is approximately [...] ⁽⁵⁸⁾.

5.1.5.3. *Investment aid*

- (250) According to point 61 of the 2005 Aviation Guidelines the Commission has to examine whether the cumulative conditions set out in points (a) to (e) are met:
- (a) the construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.);
 - (b) the infrastructure is necessary and proportional to the objective which has been set;
 - (c) the infrastructure has satisfactory medium–term prospects for use, in particular as regards the use of existing infrastructure;
 - (d) all potential users of the infrastructure have access to it in an equal and non–discriminatory manner; and
 - (e) the development of trade is not affected to an extent contrary to the Union interest.
- (251) In addition State aid to airports, as any other State aid measure, must have an incentive effect and should be necessary and proportional to the pursued legitimate objective in order to be compatible.

The construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.)

- (252) The investment aid measures under assessment aimed at financing the construction of a new terminal with a capacity of 700 000 passengers because the old terminal (capacity of 390 000 passengers) was congested already a few years before the construction works started. In addition the investment aid was used to finance a number of measures that helped adapting the airport to the current requirements for modern airport infrastructure with a view to keeping it fully operational.
- (253) According to Germany, the main aim of the financing of the infrastructure at Saarbrücken Airport was to improve the air transport accessibility of the region by decongesting the airport and thus to stimulate regional development.
- (254) Saarbrücken Airport is crucial for the development of the region in view of the ongoing structural transition of the region and its switch from the mining and steel producing industry to a technology and service–oriented region, for which a good connection to the main German business centres is indispensable. Saarbrücken Airport further satisfies connectivity needs of the region in particular in view of its developing research and academic facilities. The business profile of Saarbrücken Airport corresponds to these needs of the region, offering a well–developed and comfortable infrastructure for a number of scheduled flights to the main business centres in Germany (Berlin, Hamburg and in the past also Munich).
- (255) The Commission notes that in view of the close proximity between Saarbrücken and Zweibrücken, a possible duplication of airport infrastructure could militate against finding that the construction and operation of infrastructure in Saarbrücken meets a clearly defined objective of common interest. However, the Commission notes that until 2006, Zweibrücken did not offer commercial aviation airport services ⁽⁵⁹⁾, rendering Saarbrücken the only airport providing aviation connectivity in the region. After 2006, when Zweibrücken airport entered the commercial aviation market, it essentially duplicated the infrastructure in Saarbrücken ⁽⁶⁰⁾; at the same time, it cannot be concluded that due to the market entry of Zweibrücken airport the ongoing public financing of the pre–existing Saarbrücken Airport suddenly turned into duplication financing.

⁽⁵⁸⁾ The Commission notes that no precise figures on costs falling within the public policy remit are available. Against this background, the Commission is not in a position to determine the precise amount of investment aid granted to FSBesitzG/FSG.

⁽⁵⁹⁾ See footnote 46.

⁽⁶⁰⁾ See footnote 46.

- (256) The Commission therefore concludes that the construction and operation of the infrastructure at Saarbrücken Airport meets a clearly defined objective of common interest.

The infrastructure is necessary and proportional to the set objective.

- (257) The investment aid for the Saarbrücken Airport has to be necessary and proportionate to the pursued objective. One important aspect in this context is whether the investment does not constitute a duplication of an existing unprofitable infrastructure.

- (258) Firstly the Commission notes that the new terminal increasing the annual capacity of the airport from 390 000 passengers to 700 000 passengers was constructed in 2000. The annual capacity of the old terminal was for the first time exceeded in 1996 and passenger numbers continued growing until 2000 when they reached 484 566 passengers. During the period 1996 and 2000 the old terminal was frequently congested in particular during the summer periods, causing long waiting times, crowded passenger areas or passengers waiting outside the terminal. In addition, the old terminal did not comply anymore with the security requirements. The new terminal is equipped with a new security system. Furthermore, in 2009–2010 additional security measures in the runway and security area were implemented, in particular the location of the runway lights was adjusted to give better signals to the pilots, the runway guard lights were installed and the superstructure of the runway curve was adjusted to the needs of modern aircrafts. Finally, the runway was maintained to avoid damage to the aircrafts operating at the airport. The Commission therefore considers that the investments into the infrastructure were necessary to adapt to increasing passenger numbers as well as to meet the current requirements for modern airport infrastructure. The airport could serve the connectivity and the development of the region only with the constructed infrastructure.

- (259) Secondly, the new investment did not constitute a duplication of existing non-profitable infrastructure since three of the closest airports Luxembourg (121 km from Saarbrücken), Metz–Nancy–Lorraine (96 km from Saarbrücken) and Frankfurt–Hahn (128 km from Saarbrücken) are not located in the same catchment area and pursue business models that are significantly different from that of Saarbrücken Airport. Saarbrücken offers mainly scheduled flights connecting Saarbrücken with main German business centres (Berlin, Hamburg and in the past also Munich) and a number of holiday destinations. Luxembourg offers mainly scheduled flights to European capitals, Metz–Nancy–Lorraine is focused on scheduled flights to French cities and destinations in North Africa and the business model of Frankfurt–Hahn is based on low-cost carriers offering flights to a number of holiday destinations, but none to other German towns, and air freight transport.

- (260) The only duplication of infrastructure that can be observed is between Saarbrücken and Zweibrücken (39 km from Saarbrücken). However, it must be said that Saarbrücken is a well-established airport that decided to conduct an investment into a new terminal to decongest the existing old one when its passenger numbers were steadily growing and Zweibrücken Airport did not yet offer airport services for commercial aviation⁽⁶¹⁾. The investment decision of Saarbrücken Airport was economically justified and necessary to ensure the connectivity of the region. It was therefore Zweibrücken Airport that duplicated available infrastructure when the decision about its conversion from a military into a commercial airport was taken⁽⁶²⁾.

- (261) The necessity and proportionality of the investment aid to Saarbrücken Airport therefore follows from the congestion as well as the need to meet the current requirements for modern airport infrastructure. The constructed infrastructure was necessary for the airport in order to serve the connectivity and the development of the region. The Commission therefore concludes that the infrastructure in question is necessary and proportional to the pursued objectives.

⁽⁶¹⁾ See footnote 46.

⁽⁶²⁾ See footnote 46.

The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

- (262) Following a period of significant growth, air traffic in Germany and Europe in recent years has been negatively affected by the economic and financial crisis in 2009, which resulted in a 4,6 % decrease in passenger air transport in Germany in 2009, and, hence, one of the worst years for flight traffic. However, the general trend of growth in air transport has not been stopped, but only delayed. Since June 2010 the monthly growth rates in passenger air traffic in Germany have been increasing and were 7 % higher than the monthly growth rates of the previous year. It also has to be taken into account that, according to forecasts, since 2009 Germany has enjoyed a strong economic growth of around 3 % per annum. The growth of the air traffic market is normally higher than general economic growth ⁽⁶³⁾.
- (263) The satisfactory mid-term use of the new terminal at the Saarbrücken Airport is confirmed by the fact that annual passenger numbers remain well above the upper limit (that is to say 390 000 pax) of the capacity of the old terminal. The only sharp decrease of passenger numbers occurred in 2007, which coincided with a sharp increase of the passenger numbers at Zweibrücken Airport. This can be explained by the fact that in 2007 the airline Hapag Lloyd/TUIFly left Saarbrücken Airport and started operating from Zweibrücken Airport. The situation changed significantly in 2008 when with 518 288 passengers Saarbrücken noted an absolute peak in its passenger numbers. Due to the financial crisis in Germany, this level could not be maintained in the following years, according to Germany ⁽⁶⁴⁾.
- (264) The total monthly capacity of Saarbrücken Airport amounts to [...] passengers. Since 2005 at the latest this capacity is fully used or even exceeded in the summer months (July to September) ⁽⁶⁵⁾. It can therefore be concluded that Saarbrücken Airport is already now to a large extent using the new capacity and that the mid-term prospects for the use of the capacity are satisfactory.

All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

- (265) According to the information submitted by Germany ⁽⁶⁶⁾ the infrastructure has always been open to all potential users without any commercially unjustified discrimination.

The development of trade is not affected to an extent contrary to the Union interest

- (266) According to point 39 of the 2005 Aviation Guidelines the category of the airport can provide an indication of the extent to which airports are competing with one another and therefore also the extent to which public funding granted to an airport may distort competition. While, according to the 2005 Aviation Guidelines, public funding to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest, this was not based on the assumption, and was neither meant to indicate, that competition distortions and effect on trade are excluded.
- (267) The annual capacity of the old terminal of Saarbrücken Airport was 390 000 passengers. After the construction of the new terminal, the annual capacity of the airport increased to 700 000 passengers. With this capacity the airport falls in airport category D 'small regional airport', as defined by point 15 of the 2005 Aviation Guidelines. Since 2000 the annual passenger traffic at Saarbrücken Airport has remained stable at the level of around 500 000 passengers, which amounts to half of the passenger number established as an upper limit for a small regional airport. In addition, Saarbrücken Airport is a typical regionally oriented airport, which is reflected by the fact that a significant number of the passengers using this airport come from Saarland. The number of passengers who come from the frontier areas of France and Luxembourg is limited and amounted to [less than 14 %] ([...] from France and [...] from Luxembourg) ⁽⁶⁷⁾.
- (268) Taking into account the concept of a catchment area of around 100 km and travelling time of 60 minutes, it can be assumed that three of the airports located closest to Saarbrücken, that is to say the Luxembourg Airport (121 km from Saarbrücken), Metz–Nancy–Lorraine Airport (97 km from Saarbrücken) and Frankfurt–Hahn Airport (128 km from Saarbrücken) are not located in the same catchment area. They also pursue business models that are significantly different from that of Saarbrücken Airport.

⁽⁶³⁾ Aktualisierte Stellungnahme zur Nachfrageprognose für den Flughafen Kassel–Calden, Intraplan Consult GmbH, 12 March 2012, p. 8.

⁽⁶⁴⁾ Submission of information by Germany of 16 April 2012 p. 65.

⁽⁶⁵⁾ Submission of information by Germany of 16 April 2012 p. 9 and attachment 2.

⁽⁶⁶⁾ Submission of information by Germany of 16 April 2012 p. 66.

⁽⁶⁷⁾ Submission of information by Germany of 16 April 2012 p. 33.

- (269) As regards Luxembourg Airport, the business models of Luxembourg and Saarbrücken are different. Luxembourg Airport is with around 1,5 million pax significantly larger than Saarbrücken Airport. It offers a variety of scheduled and charter flights, the latter to the European capitals. This selection of destinations to a large extent meets the needs of the employees of the financial and international institutions located in Luxembourg. In contrast, Saarbrücken Airport mostly offers scheduled flights to a number of German cities that are considered German business centres (Berlin, Hamburg, Munich) and to a number of holiday destinations.
- (270) As regards the Airport Metz–Nancy–Lorraine, it can be observed that there is hardly any overlap as regards flights offered by this airport and Saarbrücken Airport, since Metz–Nancy–Lorraine offers mainly scheduled flights to French cities and charter flights to North Africa.
- (271) Competition distortions between Saarbrücken and Frankfurt–Hahn can also largely be excluded already because of the distance between those two airports, which amounts to 2 hours' travel time. In addition, Frankfurt–Hahn is served mainly by low-cost carriers (Ryanair) and freight constitutes a rather important element in its business model whereas Saarbrücken Airport offers mainly scheduled flights to national destinations and has only limited air freight transport.
- (272) More relevant is the competitive relationship between Saarbrücken Airport and Zweibrücken Airport, which is due to their proximity (39 km or 34 minutes' travel time) and the large overlap of their catchment areas. Germany brings forward that the two airports have different business models: Saarbrücken Airport is a well-established airport (opened more than 80 years ago) and has a more sophisticated infrastructure that offers more comfort to passengers (with a large share of business travellers). It offers mainly scheduled flights to main German business centres and a number of holiday destinations. Zweibrücken Airport has a rather low-comfort infrastructure and its business model is based on low-cost carriers, vacation flights, and air freight transport. The Commission notes, however, that, despite the fact that the business models of the two airports appear to differ to some degree, it is clear that Zweibrücken Airport's core business (vacation flights, in particular to Antalya/Palma de Mallorca) is also catered for by Saarbrücken. It is true that Saarbrücken otherwise concentrates on scheduled flights to major cities such as Luxembourg, Berlin, and Hamburg. This does not, however, change the fact that Zweibrücken appears to have only limited business that is not or could not be served from Saarbrücken.
- (273) In addition, it can be observed that a significant increase of the passenger number at Zweibrücken Airport in 2007 coincided with a rather deep drop of passengers in Saarbrücken in the same year. It thus appears that although the business plans of the airports are to some extent complementary, they also compete with each other.
- (274) At the same time it should be noted that Saarbrücken has been a well-established airport for more than 80 years. After the construction of the new terminal in the year 2000 its annual capacity increased from 390 000 passengers to 700 000 passengers. This capacity could however never be fully used, potentially because in 2006 also Zweibrücken Airport also started operating services for commercial passenger aviation with gradually increasing passenger numbers. In view of the historical development of the two airports (Saarbrücken has been part of the German airport landscape for over 80 years), their geographical location (overlap of the catchment areas) and the free capacity available at Saarbrücken Airport at the time when Zweibrücken Airport entered the commercial aviation market in 2006, the Commission concludes that the opening of Zweibrücken Airport constitutes an unnecessary duplication of infrastructure with distortive effect on competition, rather than the other way around.
- (275) On the basis of the above, the Commission concludes that the investment aid granted to Saarbrücken Airport neither distorts competition nor affects trade to an extent contrary to the common interest.

Aid is necessary and proportional; incentive effect

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

- (277) According to the information submitted by Germany, without the aid the investment could not have been realised. It appears from Table 3 that the airport is still loss-making. Therefore it can be concluded that the aid was necessary to make investments in order to decongest the airport infrastructure as well as the need to meet the current requirements for modern airport infrastructure. Without the aid Saarbrücken Airport would not have met the expected demand of airlines and passengers in the catchment area; the level of the economic activity of the airport would have been reduced. The Commission therefore considers that the aid measure at stake has an incentive effect, that the amount of aid is limited to the minimum necessary for the aided activity to take place, and is thus proportionate.

Conclusion

- (278) Therefore, the Commission concludes that the investment aid granted to Saarbrücken Airport is compatible with Article 107(3)(c) of the Treaty as it complies with the compatibility conditions laid down in point 61 of the 2005 Aviation Guidelines.
- (279) The Commission further considers that since it found the State aid to FSBesitzG/FSG to be compatible under Section 4.1 of the 2005 Aviation Guidelines, it does not have to assess any other grounds of potential compatibility put forward by Germany.

5.1.5.4. Operating aid

- (280) Section 5.1.2 of the 2014 Aviation Guidelines sets out the criteria that the Commission will apply in assessing the compatibility of operating aid with the internal market pursuant to Article 107(3)(c) of the Treaty. Pursuant to point 172 of the 2014 Aviation Guidelines, the Commission will apply these criteria to all cases concerning operating aid to the airport, including pending notifications and unlawful non-notified aid cases.
- (281) Unlawful operating aid granted before the date of application of the 2014 Aviation Guidelines may be declared compatible to the full extent of uncovered operating costs provided that the following conditions ⁽⁶⁸⁾ are met:
- (282) The compatibility criteria for operating aid, which may be granted for a transitional period of 10 years starting from the date of the publication of the 2014 Aviation Guidelines, are:
- (a) contribution to a well-defined objective of common interest: this condition is fulfilled, inter alia, if the aid increases the mobility of citizens of the Union and connectivity of the regions or facilitates regional development ⁽⁶⁹⁾;
 - (b) need for State intervention: the aid must be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver ⁽⁷⁰⁾;
 - (c) existence of incentive effect: this condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of air traffic, the level of economic activity of the airport concerned would be significantly reduced ⁽⁷¹⁾;
 - (d) proportionality of the aid amount (aid limited to the minimum necessary): in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place ⁽⁷²⁾;
 - (e) avoidance of undue negative effects on competition and trade ⁽⁷³⁾.

⁽⁶⁸⁾ According to point 137 of the 2014 Aviation Guidelines, not all of the conditions set out in Section 5.1 of the Guidelines apply to operating aid granted in the past.

⁽⁶⁹⁾ Points 113 and 137 of the 2014 Aviation Guidelines.

⁽⁷⁰⁾ Points 116 and 137 of the 2014 Aviation Guidelines.

⁽⁷¹⁾ Points 124 and 137 of the 2014 Aviation Guidelines.

⁽⁷²⁾ Points 125 and 137 of the 2014 Aviation Guidelines.

⁽⁷³⁾ Points 131 and 137 of the 2014 Aviation Guidelines.

The operating aid contributes to a clearly defined objective of common interest

- (283) The operating aid under assessment that comprises the losses of FSBesitzG/FSG since 2000 and the corresponding capital injections by vh Saar, financed from capital injections received from Saarland as demonstrated in Table 3, had the objective of maintaining the appropriate level of operation of Saarbrücken Airport.
- (284) According to point 113 of the 2014 Aviation Guidelines operating aid to airports will be considered to contribute to the achievement of an objective of common interest if it increases the mobility of Union citizens and the connectivity of the regions, combats air traffic congestion at major Union hub airports or facilitates regional development.
- (285) As explained in recital 235, operating aid to Saarbrücken Airport contributed to the connectivity and development of the region in view of its structural transition from the mining and steel producing industry to a technology and service-oriented region as well as its development to a regional research and academic centre. The development of Saarbrücken Airport was also based on a sound passenger forecast since the extended capacity of the airport is already now to a large extent fully used.
- (286) It could, however, be problematic that the airport infrastructure at Saarbrücken Airport has been duplicated by a similar infrastructure at Zweibrücken Airport. In a duplication scenario the 2014 Aviation Guidelines assume in their point 114 that the State aid does not contribute to an objective of common interest. When looking at the sequence of events regarding the extension of Saarbrücken Airport and the conversion of Zweibrücken Airport from a military to a civil aviation airport, it is clearly visible that the P&L agreement under which the losses of Saarbrücken Airport have been compensated was put in place when Zweibrücken Airport had not yet entered the market for commercial aviation and Saarbrücken Airport had been congested for a few years. Therefore, the duplication argument applies rather to the State aid granted to Zweibrücken Airport ⁽⁷⁴⁾.
- (287) The Commission therefore considers that the operating aid granted to Saarbrücken Airport contributed to the achievement of the objective of common interest of improving the connectivity and regional development of the Saarland region through the operation of safe transport infrastructure to meet the transport needs of the region.

Need for State intervention

- (288) According to point 116 et seq. of the 2014 Aviation Guidelines, operating aid to airports will be considered necessary if it brings about a material improvement that the market itself cannot deliver. The guidelines further recognise that the need for public funding to finance operating costs will normally be proportionately greater for smaller airports due to high fixed costs and that airports with annual passenger traffic between 200 000 and 700 000 passengers may not be able to cover their operating costs to a substantial extent.
- (289) Since the construction of the new terminal the annual passenger numbers of Saarbrücken Airport have stabilised at around 500 000, which is well below 700 000 passengers, the number established by the 2014 Aviation Guidelines as an upper limit for this category of regional airports. Although the capacity of the airport is fully used at least in [...], the airport is not able to generate enough revenues to cover its operating costs, which the 2014 Aviation Guidelines identify as typical for airports of this size.
- (290) Therefore the Commission considers that the operating aid to Saarbrücken Airport is necessary.

⁽⁷⁴⁾ See footnote 46.

Appropriateness of State aid as a policy instrument

- (291) According to point 120 of the 2014 Aviation Guidelines operating aid should be an appropriate policy instrument to achieve the intended objective or resolve the problem to be addressed. Since Saarbrücken Airport is loss-making at operating level the only appropriate instrument is operating aid that enables the airport to continue operations ensuring connectivity of the Saarland region. Other instruments such as investment aid or regulatory measures do not seem appropriate to address the financial problems of Saarbrücken Airport at the operating level. Therefore the Commission considers that the operating aid granted to Saarbrücken Airport is an appropriate instrument.

Existence of incentive effect and proportionality of the aid amount (aid limited to the minimum necessary)

- (292) According to point 124 of the 2014 Aviation Guidelines the operating aid has an incentive effect if it is likely that in the absence of the operating aid and taking into account the possible presence of investment aid and the level of air traffic, the level of the economic activity of the airport would be significantly reduced.
- (293) Saarbrücken Airport received investment aid to construct a new terminal and to implement the current requirements for modern airport infrastructure. This enabled the airport to satisfy the connectivity and transport needs of the Saarland region, which expressed in passenger numbers have stabilised over the last years at the level of 500 000 passengers per annum. Despite rather stable passenger numbers the airport is however not able to cover its operating costs. Without the operating aid the airport could not maintain the current level of traffic and its economic activity would have to be reduced. At the same time the aid did not exceed the amount required to cover operating losses, and therefore the aid amount is limited to the minimum necessary.
- (294) Therefore the Commission considers that the operating aid to Saarbrücken Airport has an incentive effect and is proportionate.

Avoidance of undue negative effects on competition and trade

- (295) According to point 131 of the 2014 Aviation Guidelines when assessing the compatibility of operating aid to the airport, the Commission will take into account the distortions of competition and the effects on trade. An indication of potential competition distortions or effect on trade may be the fact that the airport is located in the same catchment area as another airport with spare capacity.
- (296) As demonstrated in recitals 237 et seq., taking into account the concept of a catchment area of around 100 km and travelling time of 60 minutes, it can be assumed that three of the airports located closest to Saarbrücken, that is to say the Luxembourg Airport (121 km from Saarbrücken), Metz–Nancy–Lorraine Airport (96 km from Saarbrücken) and Frankfurt–Hahn Airport (128 km from Saarbrücken) are not located in the same catchment area and pursue business models that are significantly different from that of Saarbrücken Airport. Saarbrücken offers mainly scheduled flights connecting Saarbrücken with main German business centres (Berlin, Hamburg and in the past also Munich) and a number of holiday destinations. Luxembourg offers mainly scheduled flights to European capitals, Metz–Nancy–Lorraine is focused on scheduled flights to French cities and destinations in Northern Africa and the business model of Frankfurt–Hahn is based on low-cost carriers and air freight transport.
- (297) The problem of duplication of the airport infrastructure in the same catchment area arises only regarding Zweibrücken Airport. However, as explained in recital 252 and taking into account the sequence of events regarding the extension of the infrastructure at Saarbrücken Airport and the transformation of Zweibrücken Airport from a military into a civil aviation airport, which created the spare capacity in the Saarland area, it can be concluded that it is Zweibrücken Airport which unnecessarily duplicated infrastructure with distortive effect on competition.

Conclusion

- (298) On the basis of the above, the Commission concludes that the operating aid granted to Saarbrücken Airport is compatible with Article 107(3)(c) of the Treaty in the light of the compatibility conditions laid down in Section 5.1.2 of the 2014 Aviation Guidelines.

- (299) The Commission further considers that since it found the operating aid to FSBesitzG/FSG to be compatible under the 2014 Aviation Guidelines, it does not have to consider any other grounds of potential compatibility put forward by Germany.

5.2. THE TRANSFER OF VARIOUS PLOTS OF LAND TO FSBESITZG

5.2.1. EXISTENCE OF AID

- (300) For the reasons set out in recitals 179 to 182, FSBesitzG has to be considered an undertaking from the year 2000 onwards.

Therefore, as far as the various transfers of land that were mentioned in the opening decision are concerned, only those that took place after the year 2000 are relevant for the purposes of the present Decision. Transfers that took place before 2000 did not benefit an undertaking and therefore could not amount to State aid. In relation to the transfers that took place after 2000, Germany brings forward that they were necessary for safety reasons and would hence fall within the public policy remit and be exempted from State aid scrutiny. In Germany's view, the transfers fall under § 8 *Luftverkehrsgesetz*. By the same token as in recitals 186 to 194, the Commission is of the view that measures pursuant to § 8 *Luftverkehrsgesetz* can, in principle, be considered to constitute activities falling within the public policy remit. To the extent, however, that the transfer of plots relieved FSBesitzG or FSG of costs they had to bear pursuant to § 8(3) *Luftverkehrsgesetz*, the transfers are not exempted from scrutiny under Union State aid rules.

- (301) After 2000, three transfers of land took place, two of them [...] (2002 and 2003) and one against payment (2004). The plots of land were transferred by the Land Saarland. Accordingly, the Commission can conclude that the land transfers to FSBesitzG involve State resources in the form of direct grants from the State budget and are therefore imputable to the State.
- (302) The two transfers that took place free of charge must be considered to have granted FSBesitzG an advantage that it could not have otherwise obtained on the market. Germany provided an internal evaluation of the value of these two plots of land, according to which the combined market value would amount to approximately [...]. The third plot of land was sold for a price of [...]. Germany has provided an evaluation of the plots of land that were transferred in 2002. According to this evaluation, the transferred plots outside the original fence had a value of [...]; the plots of land on the premises of the airport had a value of [...]. It claims that this evaluation can be used to also determine the value of the plot sold in 2004. On that basis, Germany estimated that the value of the plot sold in 2004 amounted to [...] at the time of the transaction, which equals the sales price that FSBesitzG paid. In this regard, the Commission first notes that the evaluation referred to by Germany has not been done by an independent expert, but in house, by the unit in the Saarland's Ministry of finance responsible for sale of land. Moreover, Germany has not provided any explanation on how it arrived at its conclusion. In particular, it remained unclear which plots of land were located on the premises and which ones outside the premises of the airport. The Commission can therefore not exclude that the price paid was below market value and thus conferred an advantage to FSBesitzG. As only FSBesitzG benefited from the three transfers, it must also be considered that they were selective in nature. Finally, by the same token as in recitals 218 to 225, the transfers are liable to distort competition and have an effect on trade. Accordingly, the transfer of three plots of land amounted to State aid.
- (303) The Commission furthermore considers that since the aid related to the free transfer of fixed capital assets, the aid must be qualified as investment aid.

5.2.2. COMPATIBILITY

- (304) The investment aid was used to allow for the extension of runway end safety areas (RESA). As set out in Section 5.1.5.3, this investment was done with a view to keeping the airport fully operational, thereby enhancing regional development. The Commission considers that the investment aid in the form of a transfer of land also fulfils all the other conditions for establishing compatibility pursuant to point 61 of the 2005 Aviation Guidelines, since the reasons set out in Section 5.1.5.3 equally apply. It is therefore concluded that the investment aid in the form of the transfer of land is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

5.3. GUARANTEES ON LOANS TO THE BENEFIT OF VH SAAR AND FSBESITZG

5.3.1. EXISTENCE OF AID

- (305) The Commission notes that the Land *Saarland* guaranteed loans to FSBesitzG on three occasions without receiving any remuneration. However, it also notes that the guarantees were all granted before the year 2000. As FSBesitzG could only be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty from the year 2000 onwards, the Commission finds that the guarantees did not grant an advantage to an undertaking and therefore do not amount to State aid.
- (306) As regards the comfort letters provided to vh Saar, the Commission recalls its previous conclusion in recital 203 that vh Saar uses the funding it received to fulfil its financing obligations toward Saarbrücken Airport. The loans taken out by vh Saar following the comfort letters were also passed on to Saarbrücken Airport. It can therefore be concluded that the advantage contained in these letters did not benefit vh Saar, but that the advantage therein, if any, was passed on to the Airport.
- (307) As to the advantage to the airport, the loans secured by the comfort letters were passed on to finance investments in infrastructure. If the comfort letters involved aid, it would thus be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty for the reasons set out in Section 5.1.5.3.

5.4. THE LEASE CONTRACT BETWEEN FSBESITZG AND FSBG

5.4.1. EXISTENCE OF AID

- (308) The Commission already determined, in recital 181, that FSBG was an undertaking for the purposes of Article 107(1) of the Treaty. It therefore only needs to be assessed whether the lease contracts granted an advantage to FSBG, whether such an advantage was granted from State resources, and whether it distorted competition and affected trade between Member States.

Distinction between existing and new aid

- (309) The Commission first observes that a distinction needs to be drawn between the lease contract that was concluded on 7 July 1997 and effective until 1 July 2006 ('the 1997 contract'), and the contract that was effective as from 1 July 2006 onwards ('the 2006 contract'). As was stressed above, the construction and operation of an airport was not considered to constitute an economic activity until the year 2000, with the consequence that any aid scheme put into place before that date would, if considered to amount to State aid, constitute *existing aid* after that date (see Section 5.1.2). Hence, it is not necessary to investigate further whether the 1997 contract (which foresaw fixed annual lease payments) did in fact amount to aid, given it would in any event have to be qualified as existing aid.
- (310) On the other hand, the conclusion of a new lease contract by FSBG in 2006 with changed conditions for determining the annual lease to be paid (in particular, the introduction of a new price element, namely the transfer of a certain percentage of the annual profit of FSBG) cannot be considered as merely a 'modification of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market' ⁽⁷⁵⁾. The 2006 contract can therefore not, if amounting to State aid, be considered as existing aid, but would rather constitute new aid.

State resources and imputability to the State

- (311) In order to constitute State aid, the measure in question has to be financed from State resources and the decision to grant the measure must be imputable to the State.

⁽⁷⁵⁾ Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140/1, 30.4.2004, p. 1).

- (312) The 2006 contract was concluded between FSBesitzG and FSBG. FSBesitzG was (indirectly) 100 % owned by the State, which was hence in a position to exercise control over the company. Agreeing to a lease contract with a lease lower than the market price would entail foregone revenues for that company and its owner, that is to say ultimately the Saarland and would hence be financed from State resources. As to the imputability, the Commission notes that according to the statute of FSBesitzG the members of the supervisory board of FSBesitzG are appointed by the government of Saarland and that the president is appointed by the Ministry responsible for aviation. The conclusion of the 2006 contract needed the consent of the supervisory board ⁽⁷⁶⁾, which represents the government of the Saarland. The Commission can therefore conclude that the measure is imputable to the State.

Economic Advantage

- (313) To determine whether the 2006 contract granted an economic advantage to FSBG, it is necessary to either compare the terms of that contract to those that were common on the market at the relevant time for the same type of contract, or, if that is not possible, to consider whether a profit-oriented market economy operator would have engaged in this transaction.
- (314) Germany has not provided any evidence demonstrating that the 2006 contract conformed to normal market conditions at the time. It is therefore necessary to analyse whether a prudent MEO, interested in making a reasonable profit, would have concluded the 2006 contract.
- (315) The Commission observes that FSBesitzG consistently incurred losses at least since the year 2000 (see Table 3). Considering that the lease contract with FSBG was virtually its only source of income (apart from the yearly loss cover received from *vh Saar*), it would appear that a reasonable MEO being in the place of FSBesitzG would have attempted to cover its own costs from the income generated from this lease contract. The costs incurred by FSBesitzG were higher than the income it generated by leasing the airport to FSBG. It also does not appear that FSBesitzG was, in concluding the 2006 contract, pursuing a specific long-term profitability strategy.
- (316) In light of these considerations, the conclusion of the 2006 contract cannot be considered as being in line with the MEO principle and it therefore conferred an advantage to FSBG.

Selectivity

- (317) Article 107(1) of the Treaty requires that a measure, in order to be defined as State aid, favours 'certain undertakings or the production of certain goods'. As the 2006 contract only benefitted FSBG, it can be considered selective within the meaning of Article 107(1) of the Treaty.

Distortion of competition and effect on trade

- (318) Finally, the measure was liable to distort competition and have an effect on trade for the reasons explained in Section 5.1.1.

Conclusion

- (319) The Commission therefore considers that the 2006 contract involved State aid for FSBG. It must be assessed as operating aid.

5.4.2. COMPATIBILITY

- (320) As described in Section 5.1.5.4, operating aid granted before the date of application of the 2014 Aviation Guidelines may be declared compatible to the full extent of uncovered operating costs provided that the following conditions ⁽⁷⁷⁾ are met:

- contribution to a well-defined objective of common interest,
- need for State intervention,
- existence of incentive effect,

⁽⁷⁶⁾ See § 10 letter (i) of the Statute of FSBesitzG, according to which any change in the lease contract between FSBesitzG and FSBG had to be approved by the supervisory board of FSBesitzG.

⁽⁷⁷⁾ According to point 137 of the 2014 Aviation Guidelines, not all of the conditions set out in Section 5.1 of the Guidelines apply to operating aid granted in the past.

- proportionality of the aid amount (aid limited to the minimum necessary),
 - avoidance of undue negative effects on competition and trade.
- (321) The operating aid under assessment, which concerned the leasing of airport infrastructure below market price, had the objective of maintaining the appropriate level of operation at Saarbrücken Airport.
- (322) According to point 113 of the 2014 Aviation Guidelines, operating aid to airports will be considered to contribute to the achievement of an objective of common interest if it increases the mobility of Union citizens and the connectivity of the regions, combats air traffic congestion at major Union hub airports or facilitates regional development.
- (323) As explained in recital 254, operating aid to Saarbrücken Airport contributed to the connectivity and development of the region. For the reasons set out in recital 284, the duplication argument applies rather to the State aid granted to Zweibrücken Airport.
- (324) Therefore, the Commission considers that the operating aid granted to FSBG contributed to the achievement of the objective of common interest of improving the connectivity and regional development of the Saarland region through the operation of transport infrastructure to meet the transport needs of the region.
- (325) According to the 2014 Aviation Guidelines, smaller airports may have difficulties in ensuring the financing of their operation without public funding. According to point 118 of the 2014 Aviation Guidelines, airports with an annual passenger traffic below 700 000 passengers per annum may not be able to cover their operating costs to a substantial extent. Traffic at Saarbrücken Airport was constantly below 700 000 passengers. Therefore, the Commission considers that the aid was necessary as it allowed an improvement in the connectivity of the region that the market would not deliver by itself.
- (326) As pointed out above, Saarbrücken Airport received investment aid which enabled the airport to satisfy the connectivity and transport needs of the Saarland region (see recital 285). Despite rather stable passenger numbers, the airport is not able to cover its operating costs. In this context, the Commission notes that also FSBG was loss making in the years 2006 and 2007, when the 2006 contract was applicable (the losses recorded amounted to EUR – 214 709 in 2006 and EUR – 2 737 773 in 2007). The losses were incurred despite the fact that the lease paid by FSBG in those years was lower than the lease paid under the 1997 contract (see Table 7). It can hence be assumed that the aid involved in the 2006 contract had an incentive effect and did not exceed the amount required to cover operating losses and thus was limited to the minimum necessary for the aided activity to take place.
- (327) On this basis, the Commission concludes that the compatibility conditions laid down in the 2014 Aviation Guidelines are met.

5.5. DISCOUNTS FOR AIRLINES/MARKETING AGREEMENTS

5.5.1. EXISTENCE OF AID

- (328) By providing air transportation services, airlines are performing an economic activity and therefore constitute undertakings within the meaning of Article 107(1) of the Treaty. It must be analysed whether the arrangements between the airlines and the airport in question granted the former an economic advantage.

Economic advantage

- (329) Where an airport has public resources at its disposal, aid to an airline can, in principle, be excluded where the relationship between the airport and the airline satisfies the MEO test. The existence of an advantage can normally be excluded if: (a) the price charged for the services corresponds to the market price; or (b) it can be demonstrated through an *ex ante* analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport and is part of an overall strategy leading to profitability in the long term.

- (330) In order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non-aeronautical revenues stemming from the airline's activity should be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes. Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport must be taken into account. Such incremental costs may encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs. In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test.
- (331) In addition, the airport infrastructure must be open to all airlines and not dedicated to a specific airline in order to exclude that the advantage resulting from compatible aid to the airport operator is not passed on to a specific airline.
- (332) Against this background, the Commission will assess the overall scheme of airport charges applicable at Saarbrücken Airport as well as the individual contracts between airlines and Saarbrücken Airport which deviate from or are outside the scope of the scheme of airport charges.

Discounts for airlines

- (333) On 1 April 2007, a new schedule of charges was introduced at Saarbrücken Airport (2007 schedule of charges). This schedule envisaged discounts for airlines fulfilling certain conditions. The 2007 schedule of charges in particular offered discounts for new airlines, new destinations and increased passenger numbers. Until then, no discounts had been foreseen in the schedule of charges. Saarbrücken Airport adopted a new schedule of charges which entered into force on 1 September 2013, replacing the 2007 schedule of charges. The 2013 schedule of charges is not subject to the present decision.
- (334) When applying the MEO test to the measure at stake, the Commission first has to determine whether the price charged corresponds to a market price. For this, the Commission has doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. In the absence of an identifiable market benchmark, the Commission has to assess the *ex ante* incremental profitability of the 2007 schedule of charges.
- (335) The 2007 schedule of charge was introduced to enhance the competitiveness of Saarbrücken Airport. When drawing up the 2007 schedule of charges, the operator of Saarbrücken Airport analysed passenger numbers, airport movements as well as the financial results of the years 1997–2006. According to Germany, a market analysis undertaken at that time showed that Saarbrücken was one of the most expensive airports in Germany. The Commission observes that TUIFly left Saarbrücken as from late 2006. In addition, Saarbrücken Airport faced new competition from Zweibrücken after 2006. All these factors together led Saarbrücken Airport to reconsider its pricing policy and to introduce a revised schedule of charges offering incentives in form of discounts in order to ensure its future viability and profitability.
- (336) While, according to the available information, no *ex ante* profitability studies have been prepared for the 2007 schedule of charges, Germany has submitted that Saarbrücken Airport expected that virtually no additional investments would be required to provide additional airport services to airlines and that no additional operating costs would arise. Therefore, in Germany's view no *ex ante* profitability study was necessary. Hence, the incremental costs were limited to the incentives offered. In this context, the Commission observes that the 2007 schedule of charges indeed offered discounts only for new airlines, new connections, or increased passenger numbers with the consequence that it did not impact negatively on the status quo at the airport. The Commission observes that before the introduction of the 2007 schedule of charges, Saarbrücken airport's capacity was utilised only at 50 %. Indeed, passenger numbers decreased from 487 000 in 2005 to 350 000 in 2007, whereas the airport's potential annual capacity would have been 700 000 passengers per annum. The Commission notes that after the departure of TUIFly Saarbrücken Airport had spare capacities, with the consequence that additional traffic could be handled without the need to upgrade infrastructure or acquire additional equipment or hire new staff. Germany confirmed that there was no need to hire new staff or to expand existing infrastructure or other equipment in order to serve new airlines or connections (for instance the existing baggage belts and personnel were sufficient).

- (337) With any new airline or connection, aeronautical as well as non-aeronautical revenues would be generated. Given that the level of costs remained stable, any new airline or connection would, according to Germany, provide a positive contribution to the airport's profitability. The fact that Saarbrücken indeed managed to attract a number of new airlines (such as Air Berlin, which started operating from Saarbrücken in late 2007) and to establish new connections after the introduction of the 2007 schedule of charges also indicates that the discount-based strategy to increase its business was successful. The available data finally demonstrates that the 2007 schedule of charges resulted in a gradual increase of revenue for the airport (from [...] in 2007 to [...] in 2010).
- (338) The Commission further notes that when assessing airport/airline arrangements, it should also assess the extent to which the arrangements can be considered part of the implementation of an overall strategy of the airport to lead to profitability at least in the long term. In this respect, the Commission has to take into account the factual evidence that was available, and the developments that could reasonably be expected, at the time when the 2007 schedule of charges was made, in particular the prevailing market conditions, notably the market changes induced by the liberalisation in the air transport market, the market entry and development of low cost carriers and other point-to-point carriers, changes in the organisational and economic structure of the airport industry as well as the degree of diversification and complexity of the functions undertaken by airports, the enhancement of the competition between airlines and airports, the uncertain economic environment due to the changes in the prevailing market conditions or any other uncertainty in the economic environment have to be taken into account. The Commission notes that, as described in 335, several reasons (such as new competition from Zweibrücken after 2006 and the departure of TUIFly from the end of 2006) led Saarbrücken Airport to consider a revised schedule of charges with discounts being a necessary step in ensuring its future viability and profitability.
- (339) Finally, the Commission notes that the airport infrastructure is open to all airlines and not dedicated to a specific airline.
- (340) In the light of these considerations, accepting that an increase in activity resulted in virtually no incremental costs but could be expected to create incremental revenue, the Commission accepts that in adopting the 2007 schedule of charges and the discounts contained therein, Saarbrücken Airport acted like a MEO. Therefore, the measure did not grant the affected airlines any economic advantage.

Marketing agreement with Air Berlin

- (341) In the contract concluded between Air Berlin and Saarbrücken Airport on 6 April 2011, the two parties agreed that Air Berlin would increase the frequency of its flights to and from Berlin by an additional five return-flights per week, and the frequency of its flights to and from [...] by an additional three return-flights per week until the end of April 2014. In return for this frequency increase and the commitment from Air Berlin that it would advertise the new frequency, Saarbrücken Airport committed to paying a total of [EUR 800 000–EUR 1 700 000] to Air Berlin in 2011 and 2012.
- (342) Germany provided an analysis of the profitability of the contract that could be expected at the time of the conclusion of the contract, undertaken by FSG. It was submitted that apart from the direct marketing payments, the increased frequency would not cause any additional costs⁽⁷⁸⁾ for the airport, which according to Germany could handle the additional traffic on the basis of the existing infrastructure and personnel. The analysis was based on the following expectations:

Table 10

Ex ante profitability of marketing agreement with Air Berlin (figures in EUR)

	2011	2012	2013	2014	2011–2014
Incremental Revenues	[...]	[...]	[...]	[...]	[...]
Incremental Costs	[...]	[...]	[...]	[...]	[...]

⁽⁷⁸⁾ The incremental costs presented in Table 10 concern the marketing payments.

	2011	2012	2013	2014	2011–2014
Result	[...]	[...]	[...]	[...]	[...]

- (343) While the *ex ante* analysis undertaken by FSG and submitted by Germany did not discount the future payments to the date on which the contract was concluded, it is clear that the contract was expected to be profitable. Germany confirmed that to date, the increased frequency as foreseen by the marketing agreement has not required to hire new staff or to make specific investments: Overall, the Airport's expectations were to a large extent met and the contract has been profitable. In this context, Germany provided a projection for the duration of the contract, based on the profits made in the first 8 months of the contract period (from April 2011–January 2012), according to which the contract appears to be profitable.
- (344) Having analysed the contract and the expectations of FSG at the time of the conclusion of the contract, the Commission is satisfied that the contract contributed to the profitability of Saarbrücken Airport, in that the expected incremental revenues were higher than the expected incremental costs. As the contract thus complied with the MEO principle, it did not grant Air Berlin an advantage.

Conclusion

- (345) Having found that the 2007 schedule of charges and the discounts contained therein as well as the 2011 marketing agreement between Air Berlin and Saarbrücken Airport did not grant the respective airlines an advantage, the other criteria for the existence of aid do not need to be assessed. It can be concluded that no State aid was granted to the airlines in question.

5.6. START-UP AID TO CIRRUS AIRLINES

- (346) The Commission observes that Cirrus Airlines, which received direct payments from FSBesitzG in 2005 and 2006, filed for insolvency in January 2012; the insolvency procedure was opened in April 2012. As a consequence, Cirrus Airline has ceased its economic activity. As the outcome of the insolvency proceedings is not clear, the Commission is for the moment not in a position to take a view as to whether the investigation concerning the payments to Cirrus Airlines might have become devoid of purpose. The payments to Cirrus Airline are therefore not subject to this Decision.

6. CONCLUSION

- (347) Therefore, the Commission concludes that the financing of FSBesitzG/FSG by way of capital injection to cover the losses in the years 2000–2012 constitutes State aid in so far as it was related to activities outside the public policy remit. The aid constitutes new aid from 1 June 2007 onwards. Part of the aid is compatible investment aid pursuant to the 2005 Aviation Guidelines and part of the aid is compatible operating aid pursuant to the 2014 Aviation Guidelines. The Commission further concludes that the capital injections granted to vh Saar do not constitute State aid as vh Saar passed on all the public funds received and therefore did not itself obtain an economic advantage.
- (348) The transfer of plots of land without a remuneration or at a price below the market price in the years 2002, 2003 and 2004 constitutes State aid in so far as it was related to activities outside the public policy remit. The aid is compatible as investment aid pursuant to the 2005 Aviation Guidelines.
- (349) The guarantees on loans were all granted before the year 2000 and therefore do not constitute State aid. The advantage contained in the comfort letters, if any, was passed on from vh Saar to FSBesitzG/FSG.
- (350) The 2006 lease contract involved State aid for FSBG, which is compatible operating aid pursuant to the 2014 Aviation Guidelines.
- (351) No State aid was granted to airlines through the 2007 schedule of charges and the marketing agreement with Air Berlin. The start-up aid in favour of Cirrus Airline is not subject to the present Decision.

- (352) Finally, the Commission notes that on 17 June 2014, Germany informed the Commission that it exceptionally accepts that this decision is adopted in the English language,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Saarbrücken Airport is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty of the Functioning of the European Union.

The measures which Germany has implemented for airlines (2007 schedule of charges, marketing agreement with Air Berlin) do not constitute State 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

COMMISSION DECISION (EU) 2015/1072**of 1 October 2014****on the measures implemented by Germany in favour of Propapier PM2 GmbH — State aid SA.23827 (2013/C) (ex NN 46/12, ex N 582/07)***(notified under document C(2014) 6837)***(Only the German text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision cited above and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 8 October 2007, registered at the Commission on the same day, the German authorities, pursuant to Article 108(3) of the TFEU, notified under the Guidelines on national regional aid for 2007-2013 ⁽¹⁾ (hereinafter: RAG) their intention to grant aid in favour of Propapier PM2 GmbH (see below point 2.2, The beneficiary) for a large investment project in Eisenhüttenstadt, Brandenburg-Nordost, Germany. The proposed aid was registered with the reference N 582/07.
- (2) After the submission of additional information, the receipt of several complaints ⁽²⁾, and a meeting with the German authorities and representatives of the beneficiary, the Commission adopted, on 2 April 2008, a decision ⁽³⁾ not to raise objections to the notified aid measure.
- (3) After the adoption of the Commission decision on 2 April 2008, the Commission received further submissions from complainants contesting the assessment of the Commission and the adoption of a decision not to raise objections to the aid measure. Smurfit Kappa Group plc (hereinafter: 'Smurfit Kappa') also submitted information on 24 June 2008, alleging that additional aid had been granted to Propapier PM2 GmbH & Co. KG in the form of infrastructure aid, and asked the Commission to revoke its decision. The Commission opened a separate investigation registered as State aid case SA.36147 (C 30/10) ⁽⁴⁾, in order to assess the latter allegations.
- (4) On 5 August 2008, Smurfit Kappa brought an action for annulment of the Commission decision of 2 April 2008 before the General Court.
- (5) By letter dated 7 November 2008, Germany informed the Commission of the implementation of the aided investment. By letters dated 22 December 2008 and 13 January 2010, it informed the Commission of certain changes to the notified project.
- (6) By its judgment of 10 July 2012, T-304/08, *Smurfit Kappa Group plc v Commission*, the General Court annulled the abovementioned Commission decision of 2 April 2008 (hereinafter: 'the annulled decision'). Therefore, the Commission was required to re-assess the aid measure and take a new decision placing itself in the situation which existed on 2 April 2008 ⁽⁵⁾.

⁽¹⁾ OJ C 54, 4.3.2006, p. 13.

⁽²⁾ These included formal complaints lodged by the Swedish and Finnish Forest Industry Federations, on 20 December 2007 (registered under reference CP 365/07); by the Koninklijke Vereniging van Nederlandse Papier- en Kartonfabrieken, on 3 January 2008 (registered under reference CP 3/08); and by Procelpac — Groupement français des fabricants de papiers et cartons d'emballage à base de cellulose, on 22 February 2008 (registered under reference CP 47/08).

⁽³⁾ OJ C 131, 29.5.2008, p. 6.

⁽⁴⁾ OJ C 7, 12.1.2011, p. 10.

⁽⁵⁾ Cf. Commission decision of 23 March 2011 on State aid case C 28/05 Glunz AG (OJ L 228, 3.9.2011, p. 22), and Commission decision of 11 May 2012 on State aid case SA.28855 (N 373/09) (ex C 10/09, ex N 528/08) ING restructuring aid (OJ C 260, 29.8.2012, p. 1).

- (7) On 14 August 2012, a meeting took place between the Commission services, the German authorities and representatives of the beneficiary company. By letters of 24 August 2012 and 5 February 2013, the German authorities submitted comments.
- (8) It has to be noted that the granting of the aid by Germany was subject to the approval of the Commission. Germany started to pay out the aid only after the adoption by the Commission, on 2 April 2008, of the annulled decision. Following the annulment by the Court, however, it must be considered that the annulled Commission decision has never existed and that Germany has not been duly authorised to grant the proposed aid. The Commission has accordingly transferred the case to the register of non-notified aid under the reference SA.23827 (2012/NN-46).
- (9) By letter dated 15 May 2013, the Commission informed Germany of its decision to initiate the procedure laid down in Article 108(2) of the TFEU (hereinafter 'the opening decision') in respect of the regional aid granted to Propapier PM2 GmbH. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁶⁾ on 8 August 2013. Third parties were invited to submit their comments.
- (10) Germany submitted comments by letter dated 15 July 2013 (2013/073407).
- (11) By email dated 20 September 2013 (2013/092832) and letter dated 20 November 2013 (2013/113552), the Commission requested further information, which was provided by Germany by letters dated 16 October 2013 (2013/102801), 9 December 2013 (2013/123872), and 21 January 2014 (2014/007118).
- (12) Smurfit Kappa submitted, as interested third party, comments by letter dated 6 September 2013 (2013/090228) (these comments were forwarded to Germany by letter dated 13 September 2013 (2013/091012)), announcing potential further comments. By letter dated 30 September 2013 (2013/095929) the Commission invited Smurfit Kappa to submit its further comments by 30 October 2013. By email dated 30 October 2013 (2013/107610) Smurfit Kappa declared not to have additional comments, but asked for information about the procedure. The Commission reacted to this by letter dated 29 November 2013 (2013/119741). Germany reacted on the comments of Smurfit Kappa by letter dated 14 October 2013 (2013/101451).
- (13) By letters dated 30 September 2013 (2013/095932, 2013/095939, 2013/095941, 2013/095942), the Commission informed the former complainants the Swedish and Finnish Forest Industry Federations, the Koninklijke Vereniging van Nederlandse Papier- en Kartonfabrieken and Procelpac — Groupement français des fabricants de papiers et cartons d'emballage à base de cellulose, which had intervened in the preliminary examination before the adoption of the annulled decision (see recital 2), about the opening of the formal investigation and invited them to submit their comments. None of these complainants submitted comments.

2. DETAILED DESCRIPTION

2.1. OBJECTIVE

- (14) Germany intended to promote regional development by providing regional investment aid to Propapier PM2 GmbH & Co. KG for the setting up of a paper production plant in Eisenhüttenstadt, Brandenburg-Nordost, an assisted area pursuant to Article 107(3)(a) TFEU with a regional aid ceiling of 30 % gross grant equivalent (GGE) under the regional aid map of Germany for the applicable period 1 January 2007—31 December 2013 ⁽⁷⁾.

2.2. THE BENEFICIARY

- (15) The beneficiary of the aid identified in the annulled decision was Propapier PM2 GmbH & Co. KG, a large enterprise belonging to the group headed by Progroup AG (hereinafter: Progroup).

⁽⁶⁾ OJ C 230, 8.8.2013, p. 39.

⁽⁷⁾ State aid N 459/06 (OJ C 295, 5.12.2006, p. 6).

- (16) The corporate relationship between the aid recipient and the group was described as follows: [...] (*) % of the capital of Propapier PM2 GmbH & Co. KG is held by Propapier PM2 Beteiligungs GmbH in its capacity as a member of the commercial partnership with unlimited liability. Propapier PM2 Beteiligungs GmbH is owned [...] % by Propapier Papiererzeugung GmbH and [...] % by Mr Jürgen Heindl. The sole owner of Propapier Papiererzeugung GmbH was Progroup, in which Mr Jürgen Heindl held [...] % of the shares through JH-Holding GmbH. The remaining [...] % of the shares in Progroup AG were distributed as follows: two shareholders each had a holding of [...] % and a further shareholder had a share of [...] %. None of these shareholders had any special voting rights.
- (17) Progroup produces and sells corrugated case material and corrugated board through its subsidiaries. In 2007, at the time of the notification, corrugated board was produced in plants in Europe by Prowell GmbH & Co. KG and its subsidiaries, i.e. Prowell SA in France, Prowell s.r.o. in the Czech Republic; at the end of 2008, Prowell Sp. z o.o. started production in Poland. Corrugated case material was being produced by Propapier Papiererzeugung GmbH. The other companies belonging to Progroup offer services in connection with the sale of corrugated board.
- (18) As originally notified in 2007, the investment project included the setting up of a power plant supplying the new paper mill. The core part of the investment project, i.e. the setting up of the paper mill, was to be carried out and operated by Propapier PM2 GmbH & Co. KG. The power plant providing steam and energy for the production process of the paper mill, on the other hand, was to be set up and financed by Propower GmbH (hereinafter: Propower), a company belonging to the same group and holding the remaining [...] % stake in Propapier PM2 GmbH & Co. KG. A leasing agreement between the parties was to convey the right to use the power plant to Propapier PM2 GmbH & Co. KG.
- (19) Germany explained that, under German tax law, business assets ('Wirtschaftsgüter') forming part of the special business assets (the so-called 'Sonderbetriebsvermögen') of a partner (in this case, Propower) of a commercial partnership (in this case, Propapier PM2 GmbH & Co. KG) are allocated for tax purposes to the assets of the commercial partnership and not to those of the member, even if that member is the civil law owner of the asset. This is a consequence of the tax transparency of commercial partnerships. Consequently, Propapier PM2 GmbH & Co. KG would be able to claim the aid for the whole investment project, including for the construction of the power plant to be operated by Propower.
- (20) After the adoption of the annulled decision, Germany informed the Commission that the power plant was excluded from the scope of the aided investment project, and that no aid was requested or would be granted for the realisation of the power plant. Propower was to be sold to EnBW Energy Solutions GmbH (ESG), a daughter company of EnBW Energie Baden-Württemberg AG.
- (21) Because under German corporate law a commercial partnership ('Kommanditgesellschaft') must consist of at least two members, one of which with limited liability, Propapier PM2 GmbH & Co. KG was dissolved following the stepping out of Propower. Its other member, Propapier PM2 Beteiligungs GmbH, was transformed from an investment company into an operational company and renamed as Propapier PM2 GmbH (hereinafter: Propapier), and became the beneficiary of the aid measure.
- (22) Germany informed that Propapier Papiererzeugung GmbH now operates under the name Propapier PM1 GmbH and holds all the shares of Propapier PM2 GmbH.

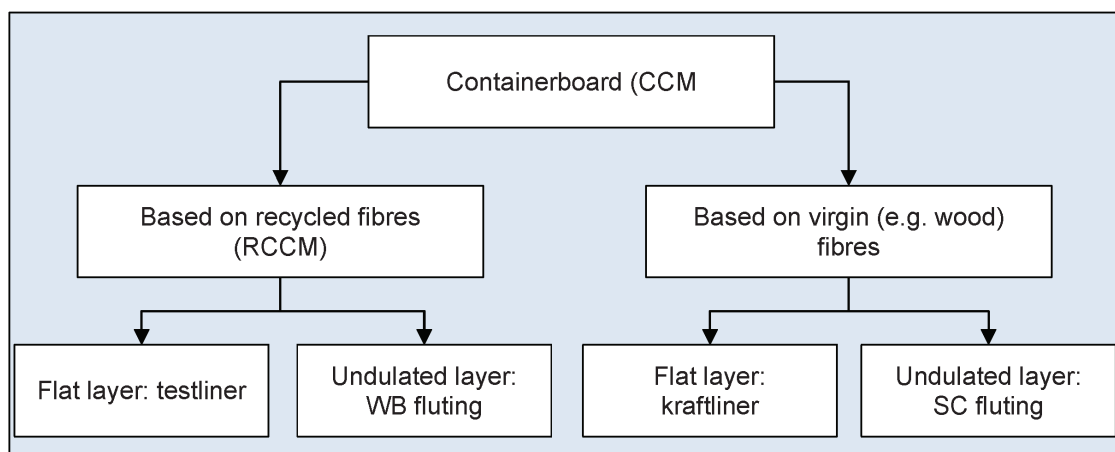
2.3. THE INVESTMENT PROJECT

2.3.1. PRODUCTS AND TECHNOLOGY

- (23) Corrugated case material (hereinafter: CCM), also called containerboard, is paper manufactured for the production of corrugated board. The term encompasses both linerboard and fluting. The liner constitutes a flat inner or outer layer whereas the fluting is the undulated layer. CCM is made out of natural wood or recycled fibres. Liners made out of wood (also called virgin) fibres are called kraftliners, whereas liners made out of recycled fibres are called testliners. Flutings made out of virgin fibres are called SC flutings and those made out of recycled fibres are called WB flutings. Recycled CCM (RCCM) encompasses all CCM made of recycled fibres, i.e. testliners and WB flutings. Figure 1 below schematically represents the different types of CCM.

(*) Covered by the obligation of professional secrecy.

Figure 1



- (24) CCM is the base paper to manufacture corrugated board, which is made by combining layers of liner board with layers of fluting. Corrugated board is then further processed into corrugated boxes used for packaging.
- (25) The paper mill was intended to produce two types of CCM, namely testliner up to 150 g/m² and fluting made from recycled fibres (WB fluting).
- (26) According to the business planning at the time of the notification, a large part (approx. 75 %) of the CCM produced in the aided plant was to be used within Progroup for the production of the downstream product, i.e. corrugated board. Progroup sells corrugated board as a final product on the market. The part of CCM not used internally was to be sold to third parties. Progroup was not involved in the production of corrugated boxes for final customers.
- (27) The paper plant was to include waste paper recycling equipment, a paper machine for producing CCM, an operational building, a spare parts store, workshop buildings and a paper roll warehouse.
- (28) The power plant was to generate the steam needed for the production process. In order to make efficient use of heat energy, the power plant was expected to also generate electricity covering [< 60] % of Propapier's electricity needs.

2.3.2. PROJECT IMPLEMENTATION

- (29) The investment project started in December 2007 and was expected to be implemented by mid-2010. Full capacity of 615 000 t/a of CCM was scheduled to be reached gradually by 2015.

2.4. ELIGIBLE EXPENDITURE

- (30) The eligible investment costs are calculated on the basis of the costs relating to initial investment. In the initial notification, the eligible expenditure calculated in accordance with the RAG amounted to EUR 643 862 500 in nominal value (EUR 586 722 900 in discounted value⁽⁸⁾), distributed over buildings, installations and equipment, and other costs.
- (31) The category "other costs" included, among others, interior design, informatics costs, and software licences. Germany confirmed that software licences worth EUR [...] would only be used in the establishment receiving the aid; they constitute amortisable assets, would be purchased from third parties, and would remain in the establishment receiving the aid for five years.

⁽⁸⁾ For the purpose of this decision, eligible costs and aid amounts are discounted to the year of initial notification, using the discount rate applicable at the moment of the notification, i.e. 5,42 % (cf. point 41 of the RAG).

- (32) After the adoption of the annulled decision, Germany informed the Commission that, since the power plant was excluded from the subsidised project, the eligible costs were reduced accordingly. The total incurred eligible costs of the modified project amount to EUR 385 944 683 in nominal value, corresponding to EUR 352 974 825 in discounted value.

2.5. FINANCING OF THE INVESTMENT

- (33) In the initial notification, Germany informed that some 73 % of the total project costs would be financed through bank loans free of any aid (in particular, the loans would not be covered by a public guarantee). Another 14 % was to be funded from own resources, while the balance was to be financed through the aid.
- (34) Germany confirmed that even after the exclusion of the power plant investment, the condition that the beneficiary makes an own contribution of more than 25 % of the total eligible expenditure, free of any public support, was respected.

2.6. LEGAL BASIS

- (35) In the initial notification, the indicated legal basis for the aid was the following:
- (a) Investitionszulagengesetz 2007 vom 15. Juli 2006 in der Fassung der Bekanntmachung vom 23. Februar 2007 (BGBl. 2007 I S. 282) (block-exempted scheme XR 6/2007⁽⁹⁾);
 - (b) Gesetz über die Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur" vom 6. Oktober 1969 (BGBl. I S. 1861), zuletzt geändert durch Article 102 der Verordnung vom 25. November 2003 (BGBl. I S. 2304), in Verbindung mit dem 36. Rahmenplan der Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur" (GA) für den Zeitraum 2007 bis 2010 (BT-Drs. 16/5215 vom 27. April 2007) (block-exempted scheme XR 31/2007⁽¹⁰⁾);
 - (c) Richtlinie des Ministeriums für Wirtschaft zur Förderung der gewerblichen Wirtschaft im Rahmen der Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur" — GA — (GA-G) vom 7. Dezember 2006 (ABl. für Brandenburg Nr. 51 vom 27. Dezember 2006, S. 798);
 - (d) Landeshaushaltsordnung (LHO) vom 21. April 1999 (GVBl. I/99, S. 106) mit den dazugehörigen Verwaltungsvorschriften (VV-LHO).
- (36) Germany informed, after the adoption of the annulled decision, that the aid was granted exclusively under the "Investitionszulagengesetz 2007", i.e. the block-exempted scheme XR 6/2007.

2.7. THE AID MEASURE

- (37) Before works on the project started in December 2007, the beneficiary had applied for the aid on 15 May 2007 and Germany had confirmed by letter of the Investitionsbank des Landes Brandenburg of 24 May 2007 that, subject to the final outcome of a detailed verification, the project meets the conditions of eligibility.
- (38) Germany notified a total aid amount of EUR 82 509 500 in nominal value, corresponding to EUR 72 145 700 in discounted value. Germany confirmed that this aid would not be cumulated with other aid for the same eligible costs.
- (39) Germany later informed that aid amounting to EUR 50 559 153 in nominal value, corresponding to EUR 44 172 973 in discounted value, had been paid out to Propapier for the reduced investment project. Germany further specified that the aid paid out exceeded the aid intensity of 12,30 % GGE approved in the annulled decision, corresponding to EUR 43 415 903 in discounted value calculated on the basis of the reduced eligible costs.

⁽⁹⁾ Published in OJ C 41, 24.2.2007, p. 9. Scheme implemented under Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (Regional block exemption regulation) (OJ L 302, 1.11.2006, p. 29).

⁽¹⁰⁾ Published in OJ C 102, 5.5.2007, p. 11. Scheme implemented under the Regional block exemption regulation (see footnote 9 above).

- (40) In the context of the initial notification, Germany had undertaken to respect the maximum aid intensity of 12,30 % GGE. Accordingly, Germany confirmed by letter dated 21 January 2014 that it obtained from Propapier the reimbursement of a total amount of EUR 1 099 539, corresponding to the excessive amount of aid granted, including interest.
- (41) The responsible granting authority is the Finanzamt Frankfurt (Oder).

2.8. CONTRIBUTION TO REGIONAL DEVELOPMENT

- (42) Brandenburg-Nordost was a region with significant socioeconomic handicaps where in 2004 GDP per capita was 76,3 % of EU-27 average ⁽¹¹⁾ and the unemployment rate stood in 2005 at 19,8 %, equivalent to 220 % of the EU-27 average and 178 % of the German average.
- (43) To further the regional development of the region, Germany considered it necessary to support and develop the paper production and processing sector, which had emerged as a potential new economic activity for the Brandenburg-Nordost region. It was expected that the paper production plant, which brought a key technology to the region, would lead to the settlement of a new primary industry and to the extension of the value-added chain (corrugating machines, packaging, etc.). The investment into an advanced paper mill also reflected the intention of Eisenhüttenstadt to diversify its economic profile beyond that of a mono-structure focused on the metal industry. The production of CCM from recycled fibre is consistent with Eisenhüttenstadt's plan to establish a recycling industry in the city.
- (44) The investment project as initially notified was expected to create 150 direct jobs (including 36 in the power plant) and some 450 indirect jobs ⁽¹²⁾.

3. DOUBTS AND GROUNDS FOR OPENING

- (45) In the annulled decision, the Commission concluded that the thresholds laid down in § 68(a) and (b) of the RAG were not exceeded. The Commission also stated that, according to § 68 of the RAG, the Commission had limited its discretionary power to undertake a detailed verification that the benefits of the aid outweigh the distortions of competition only to those situations where one of the thresholds in § 68(a) or (b) of the RAG is exceeded. Moreover, the Commission expressed the view that if the thresholds for market share and capacity increase are not exceeded and the scaling down mechanism of § 67 of the RAG is applied to adjust the maximum aid intensity, this ensures that the potential distortion of competition through the aid remains proportionate to the objective of regional development. It also argued that the requirements of the RAG secure the contribution of the aid to regional development. On this basis, the Commission declared the measure compatible with Article 87(3)(a) of the EC Treaty.
- (46) In its judgment in Case T-304/08, the General Court held that the fact that a measure complies with all standard compatibility criteria of the RAG is not sufficient to demonstrate that it will have a positive effect on regional development and that it is not apparent from § 68 of the RAG that the initiation of the formal investigation procedure is precluded where the market share and capacity thresholds have not been exceeded ⁽¹³⁾. The General Court further stated that the assessments made in the annulled decision could not alone enable the Commission to eliminate all doubts as to the compatibility of the aid measure with the common market in the light of the derogation provided for in Article 107(3)(a) TFEU, since the application of that derogation presupposes that the benefits of the measure outweigh its disadvantages, however limited these may be. The General Court thus underlined that it is the Commission's duty to open the formal investigation in accordance with Article 108(2) TFEU — even if the thresholds laid down in § 68 of the RAG are not exceeded — in cases where it has doubts on the positive balance of the aid.
- (47) In recitals 118 and 127 of its opening decision, the Commission referred to the claims from complainants that the capacity created by the Propapier project would exceed 5 % on the relevant market defined for the assessment of

⁽¹¹⁾ Measured in purchasing power standards.

⁽¹²⁾ After the adoption of the annulled decision, Germany informed that the project had led to a total of 675 (of which 36 in the power plant) jobs created in the region. Propapier itself employs 123 workers and 23 employees. Besides, Propapier has created 11 apprenticeships.

⁽¹³⁾ See § 88 of the judgment in Case T-304/08.

§ 68 of the RAG, and that the aid to Propapier would seriously distort competition in a sector that suffers from structural overcapacity. According to the complainants, the industry reacted by capacity reductions, but the capacity to be created by Propapier would exacerbate the existing sectorial problems by creating new capacity that would replace the capacity of the production mills that were decommissioned to restore a competitive balance on the CCM market.

- (48) In its opening decision, the Commission expressed doubts on the question whether indeed a situation of overcapacity existed in the sector, and whether the aid to Propapier would have maintained or reinforced this situation. The Commission also left open for comments by third parties the issue of whether the capacity increase effect to be taken into account exceeds 5 % of the apparent consumption on the relevant market or not. The Commission stated that, on the basis of the information available to it before the adoption of the annulled decision, it could not affirm without doubt that the positive effects of the aid outweigh its negative effects (the resulting distortion of competition and effect on trade between Member States), or that the capacity creation threshold laid down in § 68 of the RAG is not exceeded.
- (49) The Commission therefore invited the Member State and third parties to submit comments on the correct application of the test laid down in § 68(b) of the RAG. In particular, the Commission invited interested parties to submit information allowing it to conclude whether or not the relevant market was in structural overcapacity over the relevant period 2001-2006, whether the notified aid would have maintained or reinforced such a situation, and whether the positive effects of the aid to Propapier could have outweighed its negative effects in terms of distortion of competition or effect on trade between Member States.

4. COMMENTS FROM THE COMPLAINANT SMURFIT KAPPA

4.1. PRELIMINARY REMARKS

- (50) Smurfit Kappa stresses that it is the primary responsibility of Germany, rather than Smurfit Kappa, to show that the Propapier project does not lead to unacceptable distortions of competition.
- (51) Smurfit Kappa insists that the General Court's judgment in Case T-304/08 requires the Commission to assess whether the expected benefits of the aid outweigh the distortions of competition and the impact on trade between Member States, and remarks that since the formal investigation was opened, the thresholds of § 68 of the RAG are no longer relevant.

4.2. MARKET DEFINITION

- (52) Smurfit Kappa comments on the provisional definitions of the relevant product market as set out by the Commission in the opening decision — which are the same as in the annulled decision — and refers to Smurfit Kappa's application to the Court of 5 August 2008 for the annulment of the initial State aid decision N 582/07 (hereinafter: the Application), where it argued that these definitions are not correct.
- (53) Smurfit Kappa claims that a market for testliner of up to 150 g/m² and fluting made from recycled paper does not exist, and that in any case, with its new PM2 paper machine, Propapier never intended to produce testliner up to 150 g/m² but "corrugating medium and testliner III of 70/110 g/m² as well as fluting of 70/130 g/m²" (information from press releases), suggesting implicitly that an even narrower market should be considered. Therefore Smurfit Kappa asks the Commission to delineate the relevant product markets more accurately.

4.3. CAPACITY INCREASE CALCULATION

- (54) Smurfit Kappa points to information mentioned in interviews and press releases, stating that the new paper mill will be able to produce 650 000 t per annum, and even up to 750 000 t per year, which is much more than the capacity notified by Germany. Smurfit Kappa concludes that the Commission should not rely on figures provided by Germany but should conduct its own investigation.

- (55) Smurfit Kappa bases most of its argumentation on the 2007 London Economics study (Economic analysis of State aid given to Progroup AG ⁽¹⁴⁾), commissioned by itself, which states that Progroup's production expansion will turn it from a net CCM buyer to a net seller, to the tune of 250 000 t/a. Based on the 650 000 t/a total capacity of the new PM2 mill (figure advanced by Smurfit Kappa), this would reduce the company's need for third party delivered CCM by 400 000 t/a. Smurfit Kappa concludes that thus the full 650 000 t/a would have to be allocated to the open market (i.e. the market for sales to third parties only, excluding in-house deliveries) data.
- (56) Smurfit Kappa argues that the so-called "displacement effect" (concept as explained in the London Economics study) should be taken into account: according to Smurfit Kappa, the CCM production to be used intra-group will ultimately displace sales from other producers in the open market, i.e. Progroup will no longer buy that CCM production on the open market. Therefore, the real capacity increase amounts to the new sales by Propapier on the open market plus the "freed" sales by other producers on the open market. This constitutes in fact the total new production capacity according to Smurfit Kappa.
- (57) Smurfit Kappa provides an xls sheet dated 30 June 2008 which constitutes Annex A.10 of the Application and uses a few figures issuing from a 2007 report by Henry Poole Consulting ⁽¹⁵⁾. This table indicates a Progroup demand of 240 000 t/a on the recycled CCM market in 2008, and a post-investment forecast for 2010 of 285 000 t/a recycled CCM production to be sold on the market by Propapier. Smurfit Kappa argues that the sum of these two (525 000 t/a), i.e. 285 000 t/a that will not be used intra-group plus 240 000 t/a that Progroup will no longer buy on the open market) is the total impact of the subsidised investment on the open market for CCM and should be used for the calculation of the capacity increase in accordance with § 68(b) of the RAG.
- (58) Smurfit Kappa also rejects the Propapier figure of 150 000 t/a for CCM capacity increase on the open market. Smurfit Kappa alleges that the new corrugated board plant to be built by Progroup in Stryków (Poland) would only use approximately 100 000 t/a of recycled paper. Even deducting this additional demand (from 650 000 t/a) would still leave a total capacity of 550 000 t/a.
- (59) On this basis, Smurfit Kappa concludes that the capacity increase created by the subsidised Propapier investment would exceed the 5 % threshold of § 68(b) of the RAG (measured on the basis of 2006 figures for the CCM open market).

4.4. OVERCAPACITY

- (60) Smurfit Kappa argues that the CCM market was in structural overcapacity over the relevant period 2001-2006. According to Smurfit Kappa, the market was characterised by an absence of adequate demand growth, while new capacity was largely driven by State aid, which even further exacerbated the overcapacity. As a result, other paper producers were forced to close down production facilities (Smurfit Kappa closed 14 paper machines in the period 2001-2008) to remain competitive. Smurfit Kappa refers to the London Economics study, which states that new capacity, especially if supported by State aid, will have serious detrimental consequences for competition. The study denotes serious difficulties on the European CCM market for the period 2002-2006 and points to serious overcapacity problems in the sector. The figures are based on data provided by Groupement Ondulé and Smurfit Kappa, and show capacity utilisation rates below 90 % for the years 2003-2005. The rates for 2006 and 2007 are above 90 %, but the study also mentions for these years alternative rates below 90 % which "would have prevailed in the absence of capacity reduction".

⁽¹⁴⁾ Economic analysis of State aid given to Progroup AG, London Economics, 9 November 2007.

⁽¹⁵⁾ Henry Poole Consulting: Strategic Planning Aid for Corrugated Europe (03/07).

4.5. CONTRIBUTION TO REGIONAL DEVELOPMENT AND BALANCING EXERCISE

- (61) As to the balancing of the positive effects of the aid against the distortion in a market characterised by structural overcapacity, Smurfit Kappa observes that the installation of the paper machine built elsewhere and transported to the region concerned does not, in itself, contribute to the technological development of the region. Smurfit Kappa adds that, apart from the power plant and the waste water treatment plant which are both part of the Propapier project, the project does not attract additional investment to the region, and that no increased efficiencies from clustering of paper mills were to be expected. No extension of the value-added chain was to be expected, e.g. there was no reason to add a corrugator plant since there were no customers for corrugated board in the region.
- (62) Smurfit Kappa adds that it could be foreseen in 2007 that whatever the number and quality of jobs created by the Propapier investment, the number of jobs lost elsewhere would be higher.
- (63) Based on the figures given in the opening decision, Smurfit Kappa calculates that the aid amounts to approximately EUR 350 000 per direct job created. Smurfit Kappa questions whether these jobs are created in the region on a permanent basis and whether they can be characterised as high quality jobs. Smurfit Kappa also questions whether the region really benefits from these jobs, since part of the Propapier staff commute from and to other regions. Smurfit Kappa wonders whether the fact that part of the key production team came from the Propapier mill in Burg (Sachsen-Anhalt) is the kind of benefit that justifies subsidies.
- (64) As for the 529 indirect jobs, Smurfit Kappa quotes a 2010 Propapier board member, mentioning only 329 indirect jobs and that (only) over 60 % of the workers are from the region. Smurfit Kappa is of the opinion that more detailed information (e.g. whether maintenance jobs or jobs in infrastructural projects are included, whether the indirect jobs are permanent positions) is needed to properly assess the regional effect, and it urges the Commission to carefully look into this.

4.6. INFRASTRUCTURE AID TO PROPAPIER

- (65) Last but not least, Smurfit Kappa refers to the separate Commission decision to open the formal investigation on infrastructure aid to Propapier (State aid case SA.36147). Smurfit Kappa takes the view that the funding of the waste water treatment plant constitutes investment aid that cannot be seen separate from the aid covered by the SA.23827 opening decision and that the Commission should assess both measures under the same procedure or otherwise should explain why they cannot be considered to be part of the same project.

5. COMMENTS FROM GERMANY

5.1. PRELIMINARY REMARKS

- (66) Germany is of the opinion that after the annulment of its decision N 582/07, the Commission should not have initiated the formal investigation procedure in accordance with Article 108(2) of the TFEU, but should have adopted a decision within the preliminary investigation in accordance with Article 4(3) of Council Regulation No (EC) 659/1999⁽¹⁶⁾. Germany stresses that the General Court judgment in case T-304/08 did not require the Commission to initiate the formal investigation procedure. Germany finds it incomprehensible that, without new facts, the Commission now expresses doubts on the question whether a situation of overcapacity existed in the market for CCM before 2008, while it has clearly concluded in the annulled decision that the market was not in overcapacity and that the 5 % threshold of § 68(b) of the RAG was not exceeded, and has defended this position before the General Court.
- (67) Germany observes that the mere fact that an applicant has come forward does not substantiate “serious difficulties” for the Commission to determine if the aid is compatible with the internal market, and that the choice of procedure should not be dictated by a third party. Germany argues that the fact that after the investment the beneficiary has no

⁽¹⁶⁾ 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), as amended.

more influence on competition (since it does not have a higher market share) than before the investment supports this conclusion. Germany adds that, in fact, the paper factory was intended primarily to satisfy Progroup's additional internal demand for CCM.

- (68) Germany adds that should the Commission decide to make an in-depth assessment, it should consider the fact that the thresholds of § 68 of the RAG are not exceeded as an important indicator that the aid has limited impact on competition.
- (69) Germany submitted different studies:
 - (a) a 2013 economic analysis of investment aid to Progroup⁽¹⁷⁾ (hereinafter: ECA report), commissioned by Progroup for use in the State aid case SA.23827. The report is based on information provided by Pöyry Management Consulting Oy (Pöyry);
 - (b) a 2013 report established by Roland Berger Strategy Consultants⁽¹⁸⁾ (hereinafter: Roland Berger report) at the request of Progroup. The report compiles an *ex post* comparison between the decided investment site Eisenhüttenstadt and an alternative location, namely [...].
 - (c) a 2007 analytical report from Deutsche Bank Research on Smurfit Kappa⁽¹⁹⁾ (hereinafter: Deutsche Bank study).
- (70) Germany also submitted copies of the pleadings and annexes in case T-304/08.

5.2. MARKET DEFINITION

5.2.1. RELEVANT MARKET FOR CCM — OPEN MARKET V OVERALL MARKET

- (71) Germany contests Smurfit Kappa's comments that the PM2 machine is indeed optimised for producing gram weights between 70 g/m² and 130 g/m² but can easily be adjusted to heavier or lighter weights. The PM2 machine can technically produce grammages until 150 g/m². Propapier also has a commercial interest in producing higher grammages when their market price increases. Germany adds that the argumentation of Smurfit Kappa is in contradiction with constant Commission decision practice (the Smurfit Kappa specifications go below the smallest market segmentation that the Commission has used for market definition purposes in similar cases).
- (72) In its comments, Germany also argues that it is not relevant to distinguish between the open and the overall market. The open market is not the relevant product market, but part of a total market for CCM. Germany claims that there are no independent statistical data for the open market, and that the impact of the subsidised investment on competition and trade can only be assessed on the basis of the overall market.
- (73) Germany further claims that the distinction between CCM used in vertically integrated groups and CCM supplied to the open market is artificial and arbitrary. Paper produced in vertically integrated groups and paper supplied on the open market is highly interchangeable (same base material and same product characteristics). Vertically integrated producers trade on both sides of the market (which causes market effects in price and demand/supply on the overall market and in the value-added chain), thus there is no independent open market. CCM used in-house and CCM supplied on the open market depend on each other: vertically integrated producers also supply competitor's corrugated board producers and buy CCM from other competitors, among others to optimise their own production and logistics. According to Germany, quantities involved in such optimisation transactions would have to be allocated to the CCM open market, if at all a distinction is made.

⁽¹⁷⁾ Economic analysis of investment aid to Progroup, Report for Federal Republic of Germany, 11 July 2013.

⁽¹⁸⁾ Propapier PM2 Investitionszulage, Diskussionsunterlage, Roland Berger Strategy Consultants, 15 July 2013.

⁽¹⁹⁾ Deutsche Bank AG Global Markets Research Division, Smurfit Kappa analysis report, 24 April 2007.

- (74) Germany also claims that there is a single market for CCM which includes recycled fibre and virgin fibre based CCM, regardless of its weight. Recycled paper based testliners and flutings, on the one hand, and kraftliners and virgin fibre based CCM are interchangeable on both supply and demand sides. Most paper factories are technically able to produce CCM from both recycled and virgin fibre with the same machines. To enable the Eisenhüttenstadt plant to use virgin fibre, a one-off investment of EUR [...] million, which is less than [...] % of the overall investment, would be sufficient.
- (75) Manufacturers also shift production to lower or heavier grammages when prices drop for certain gram weights; chains of substitution then result in price and quantity adjustments. On the demand side, in case of significant price differences between heavier and lighter weight CCM, customers (packaging manufacturers) can substitute heavier weight paper by more layers of cheaper lighter weight paper.
- (76) In addition, liners and flutings are perfectly substitutable from the supply side: machines can produce both and readily switch.
- (77) As for the geographic market, Germany claims that numerous characteristics suggest that it extends beyond the EEA. Large quantities of CCM are imported into the EEA, e.g. from China, and exported from the EEA, e.g. 585 000 t/a to Africa, Middle East, Asia and Turkey in 2005. In 2007, approximately [...] % of CCM bought by Progroup was imported from outside the EEA ([...] t/a from [...]).
- (78) Germany concludes that there is only one relevant market for CCM, which is at least EEA-wide, includes intragroup sales, liners and flutings, all grammages, and CCM based on recycled and virgin fibre. According to Germany, this conclusion is corroborated by the high correlation between the prices of testliners of all grammages and the prices of testliner and kraftliner, even after controlling for raw material input cost ⁽²⁰⁾.

5.2.2. RELEVANT MARKET FOR CORRUGATED BOARD

- (79) Germany agrees with the Commission's view expressed in its opening decision that corrugated board constitutes a separate relevant product market (both from the supply and the demand side).
- (80) In its comments, Germany claims that the relevant geographic market for corrugated board is EEA-wide (as set by default in § 70 of the RAG): there are no trade barriers, no technical differences, no national preferences, it is produced according to uniform standards, and average prices in the EEA vary little. Germany claims that the largest Progroup factory (Burg) ships over [...] % of its corrugated board output in volume terms beyond 400 km and over [...] % beyond 500 km and some [...] % even between 700 km and 1 100 km. Considering all Progroup factories, in 2007, Progroup supplied [...] % of its output to buyers located over 400 km of its factories, as a rule crossing at least one national border. Most areas supplied by Progroup overlap and cover a large part of the EEA. Between [...] % and [...] % of corrugated board shipments from the Progroup plants cross at least one country border, so even if markets were defined by plant, geographic markets would be supra-national.
- (81) The average prices of corrugated board in the supplied EEA countries vary by less than 10 %. This should be considered as small, given that within Germany price fluctuations for given types of corrugated board of up to 20 % around the average can be observed.
- (82) For Progroup as a whole, the percentage of transport costs of corrugated board remains on average below [...] % of overall turnover up to a shipping distance of 600 km. This percentage however heavily depends on the quality type of corrugated board.

⁽²⁰⁾ ECA report, p. 19.

- (83) Germany argues that given that local markets overlap, there exists a chain of substitution effect which affects prices and competitive conditions throughout an area much larger than the selling radius of a given site: a decrease in price of one factory results in an expansion of its shipment area into one of its neighbouring competitors, which in turn reacts to decreasing demand for its product and the decline in capacity utilisation by a more aggressive price policy which will affect areas not reached by the initial expansion. The price effects are stronger the more pronounced the overlap between shipment areas is. In the corrugated board market the overlaps are substantial.
- (84) Therefore Germany argues that it is not relevant to also consider a narrower market (as considered by the Commission in its opening decision) which covers only the Propapier PM2 core delivery countries.

5.2.3. MARKET SHARE

- (85) On the basis of the market definitions proposed by Germany, the market shares of Progroup on the relevant markets are well below 25 %, before and after the investment. Germany presents the same market share figures as in the Commission opening decision (for CCM and corrugated board), and adds additional figures for CCM assuming that the relevant geographic market covers the EEA and neighbouring countries. These additional figures show market shares for 2011 which are slightly below those in the Commission opening decision.

5.3. CAPACITY INCREASE CALCULATION

- (86) Germany contests the capacity figures advanced by Smurfit Kappa, which alleges a capacity created of 650 000 t/a or even up to 750 000 t/a. Germany explains that Smurfit Kappa's figure on Propapier's capacity of 650 000 t/a corresponds to the technically possible maximum capacity and does not reflect the actual production capacity of Propapier PM2, which is lower because the Propapier PM2 machine is expected to produce mainly CCM of lighter grammage ranges (causing lower output due to higher production complexity). Germany informs that in 2012 the Propapier PM2 production amounted to [$< 615\,000$] t.
- (87) Germany adds that even if 650 000 t/a was taken into account, this would not lead to a capacity increase of more than 5 % on the CCM market. Germany further informs that the capacity of 750 000 t/a referred to by Smurfit Kappa is the theoretical capacity established in the framework of environmental protection licences (the "Immissionsschutzrichtlinien" authorisation).
- (88) Germany is of the view that the overall capacity of 615 000 t/a must not be taken into account for the calculation of the capacity increase on the open market, because [$> 365\,000$] t/a of this total capacity will be used internally, and only [$< 250\,000$] t/a will be sold on the open market. Germany states that in its opening decision the Commission rightly calculated the capacity increase as a proportion of the overall market ⁽²¹⁾, and that measuring the capacity increase in terms of the size of open market is not appropriate.
- (89) Germany rejects the correctness of the capacity figures advanced by Smurfit Kappa, in particular the 285 000 t/a mentioned by Smurfit Kappa as being excess recycled CCM production, to be sold on the open market by Propapier in 2010. Germany states that this figure is based on an unknown source.
- (90) Germany rejects the method to calculate the capacity increase on the open market suggested by the complainant, which takes account of a so-called "displacement effect". Germany argues that it would result in the same capacity increase on the open and on the overall market, independently of what proportion Propapier actually sells on the open market, and the capacity increase thus calculated for the open market would not change even if Propapier would not offer any CCM on the open market, i.e. use all its new production in-house. Germany clarifies that the Propapier PM2 capacity which will be used internally does not increase the supply that is available on the open market, but has the only effect of reducing the demand that has to be satisfied. Germany therefore maintains that

⁽²¹⁾ As it also did in State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co, and SA.32063 (2011/NN) Poland — LIP — Mondi Świecie.

only the [$< 250\,000$] t/a to be sold on the open market must be taken into account in the numerator when calculating the capacity increase in the open market, whilst the displaced demand of 240 000 t/a needs to be taken into account in the denominator, to reduce the overall size of the open market.

- (91) Germany argues that the figure of [$< 250\,000$] t/a to be sold externally is realistic and was accepted by the Commission at the time of the approval of the initial decision and in the opening decision. The new Progroup corrugator plant in Stryków was expected to use about [100 000-200 000] t/a of CCM. In addition, Progroup planned the construction of other facilities in eastern Europe, which would have tied an additional part of the capacity of Propapier PM2 to internal use.

5.4. MARKET GROWTH AND OVERCAPACITY

- (92) For the purpose of the § 68(b) RAG test, the average annual growth rate of the apparent consumption of the product concerned over the last five years has to be compared with the average annual growth rate of the EEA's GDP.
- (93) Germany rejects the Commission conclusion in the opening decision that based on volume figures and growth of real EEA GDP, the CCM market was growing in the relevant period 2001-2006 (CCM 2,15 % compared to GDP growth of 1,97 %) while it was decreasing in value terms (nominal growth rate of CCM market of 0,02 % compared to nominal EEA GDP growth rate of 3,98 %).
- (94) Germany argues that only the growth in volume terms of the market reflects actual growth in demand on that market. Germany assumes that, on a market in which demand increases faster than GDP, additional capacity can be quickly absorbed and thus only has a negligible impact on competition.
- (95) Germany claims that the Commission statement in recital 106 and sequitur of its opening decision that GDP grew faster than the overall CCM market gives a distorting picture, because it compares market growth in value terms with GDP growth at current prices, i.e. figures which have not been corrected for inflation. Germany considers that value figures reflect factors which play a part in pricing, but have nothing to do with real demand (e.g. an increase in input costs would result in growth even though actual demand remains unchanged). Footnote 62 of the RAG, which states that apparent consumption must be calculated on the basis of "production", suggests that calculations for the test of § 68 (b) of the RAG should be in terms of output as a result of the investment project in volume terms.
- (96) Germany quotes the 2007 Deutsche Bank study, which — taking the capacity of the planned Propapier PM2 into account — states that "New capacity is not a threat, but a need to satisfy demand" ⁽²²⁾. Germany claims that such an explicit statement by industry experts in 2007 is sufficient evidence against concerns of structural overcapacity.
- (97) Germany argues that the capacity shut-downs in the CCM industry referred to by Smurfit Kappa were not driven by the will to restore the supply-demand balance on the market but were mostly due to old and inefficient machines. This results among others: (1) from an increasing trend towards lighter CCM by customers, which older machines are unable to produce; (2) from low economies of scale of older machines due to lower production capacities; and (3) the increased standardisation of trim width to 2,5/2,8 m of corrugated board machines, which leads for non-standardised machines to significant waste of paper if CCM of different width is supplied ⁽²³⁾. Furthermore, whilst Smurfit Kappa closed down own plants, it also invested in new capacity in the EEA. In this context, Germany quotes

⁽²²⁾ Deutsche Bank study, p. 21.

⁽²³⁾ ECA report, p. 9.

the Deutsche Bank study which qualifies the consolidation of Smurfit Kappa (after the 2005 merger with Jefferson Smurfit Group) as an attempt to improve the quality of its assets ⁽²⁴⁾. Germany adds that in 8 of the 10 years before 2007, as well as over the whole period, Smurfit Kappa actually exhibited a net increase in its CCM capacity in the EEA rather than a decrease ⁽²⁵⁾.

- (98) The Deutsche Bank study also states that the three planned capacity expansions in Europe (Progroup, Mondi, and SAICA) known in 2007 are needed in order to cater for the expected demand in 2009-2012, and that operating rates will remain high despite this capacity increase. Germany observes that the Deutsche Bank study, as well as Pöyry data, refer to operating rates above 90 % in the sector for the period 2006-2008. The study further identifies GDP growth as key demand driver for the corrugated and CCM industry, and notes that the estimated GDP growth rate of 2,2 % and 2 % respectively for 2007-2008 supports their estimated demand CAGR ⁽²⁶⁾ of 2,9 % for 2006-2009. Pöyry volume data as estimated in 2007 refer to CCM annual growth of 1,5 % in western Europe for the period 2005-2015, and 6,2 % in eastern Europe for the period 2005-2010, dropping to 3,8 % for the period 2010-2015. In Germany's view, periods of declining prices, long capacity building times, and volatile demand are typical for this cyclical industry, and must not be taken for indicators of structural overcapacity.
- (99) Germany concludes that all evidence available at the time of the annulled decision depicts a positive development for the CCM market at the time of the investment decision and after 2007, and that there was no indication for imbalances in the CCM market.

5.5. INCENTIVE EFFECT

- (100) Germany is of the opinion that, since based on its figures the market share and capacity thresholds of § 68 of the RAG are not exceeded, there is no need for a detailed verification of whether the aid has an incentive effect. Germany observes that at the time of the initial approval decision this incentive effect was only assessed based on formal criteria, and that these formal criteria were all fulfilled. At that time, it was not necessary to submit a full business plan to prove that the aid was indeed critical for the decision to locate the investment in an assisted area and no such detailed plan was established by Progroup at the time. Germany however points out that the CEO and owner of Progroup confirmed that the aid was instrumental for Progroup in the choice of the Eisenhüttenstadt site for the location of its Propapier PM2 investment project, and that he would have otherwise invested in [...]. Progroup therefore asked Roland Berger Strategy Consultants to compare the economics of choosing a location in [...] with the location in Eisenhüttenstadt.
- (101) The 2013 Roland Berger report states that the objective of the investment was to enhance [...] of Progroup. [...] is considered a better location since [...]. Other advantages of the [...] location are: cheaper [...], cheaper [...], lower [...] and [...] ⁽²⁷⁾. According to the report, the choice of Eisenhüttenstadt resulted in additional annual costs of EUR [...] million to [...] million compared with [...]. Total discounted cost advantages amount to between EUR [...] million and EUR [...] million. Part of these additional costs was offset by the grant and by expected [...]. Eisenhüttenstadt also offered an opportunity to expand in the future, the cost of land was lower, fresh water supply was guaranteed and the planned power plant would supply steam.
- (102) Germany claims that the investment aid was just high enough to cover the cost disadvantages — of a location in the disadvantaged region of North-East Brandenburg — in case of a successful overall strategy of [...]. Germany claims that on this basis Progroup took the entrepreneurial decision to invest in Eisenhüttenstadt and therefore the investment aid provided the necessary incentive for Progroup to choose Eisenhüttenstadt as location for Propapier PM2, rather than a location in [...].

⁽²⁴⁾ Deutsche Bank study, p. 12.

⁽²⁵⁾ ECA report, p. 10.

⁽²⁶⁾ Compound Annual Growth Rate.

⁽²⁷⁾ Wage differential due to training costs and additional fees, e.g. for rental charges and commuting expenses, based on a comparison between Prowell existing sites in [...].

5.6. CONTRIBUTION TO REGIONAL DEVELOPMENT

- (103) Germany explains that the Propapier PM2 investment project fits into the strategy to support the development of an expert paper industry sector in the Land Brandenburg. The paper industry is one of the expertise fields identified in the coalition agreement for the fourth election period 2004-2009 for the Land Brandenburg ⁽²⁸⁾.
- (104) A 2007 document established by Pöyry at the request of the Ministry of Economy of the Land Brandenburg ⁽²⁹⁾ states that overall the expected development of the paper industry expertise was positive at the time of adoption of the annulled decision. While no specific new paper industry investment plans (other than the Propapier PM2) were identified, there was a clear possibility of capacity expansions or diversification or enlargement of the product portfolio of established companies.
- (105) Germany emphasises that the investment took place in a heavily disadvantaged region: in 2004 GDP per capita in Brandenburg-Nordost was 76,3 % of the EU-27 average and the unemployment rate in 2005 stood at 19,8 %, equivalent to 220 % of the EU-27 average and 178 % of the German average. Eisenhüttenstadt is part of the regional growth area (regionale Wachstumskern — RWK) Frankfurt Oder/Eisenhüttenstadt, which showed for 2006, compared with 1998, a fall of 15 % of employees paying social security contributions or, in absolute terms, a reduction of 7 573 employees.
- (106) Germany argues that the Propapier investment was expected to form an important contribution to the diversification of the region's mono-structure economy highly dependent on the steel industry (Arcelor) threatened by rationalisation initiatives. Germany refers to the loss of hundreds of jobs in the steel industry since 2003 in Eisenhüttenstadt.
- (107) Germany also points to the potential benefits of the Propapier PM2 investment in terms of extension of the value-added chain (e.g. investments in corrugator plants, packaging industry etc.).
- (108) Germany is of the view that the creation of 150 high-quality direct jobs (of which, in 2012, 82 % were from the region) and of some 450 indirect jobs highly contributes to the development of the heavily disadvantaged Brandenburg region. Germany also points to substantial training activities ⁽³⁰⁾ for local workers as well as cooperation with the Technical University in Cottbus. The training activities contribute to the overall qualification level of workers in a region characterised by a lack of technically qualified staff, and thus potentially attract other investors. Germany adds that the demand for trained staff also leads to the creation of specific training programmes by regional education institutions.
- (109) Germany stresses the highly innovative character of the Propapier PM2 machine, which is the first in the world to produce CCM of very light weight, allowing it to put Eisenhüttenstadt on the map as a know-how centre for the sector.
- (110) Contesting Smurfit Kappa's allegations, Germany claims that Progroup did not reduce its personnel when the Propapier PM2 paper mill was set up. It also asserts that the paper machine was assembled in Eisenhüttenstadt and only a few components were produced outside Germany.
- (111) Germany also stresses the importance of the long duration of the investment for a sustainable development of the region. According to Germany, the commitment of Progroup was conceived as a long-term project since the initial planning, in the framework of its vertical integration and its eastern Europe strategy, and therefore the Propapier PM2 investment will also ensure positive effects in the longer term.
- (112) Germany adds that the Propapier PM2 investment also contributes to a higher standard of living in the region: wages paid by Propapier in Brandenburg were regularly higher than the average gross wages and salaries in Brandenburg, which amounted in 2008 to EUR 22 932. This contributes to an increase of the GDP per capita and thus to a

⁽²⁸⁾ SPD Landesverband Brandenburg und CDU Landesverband Brandenburg, Vereinbarung zur Zusammenarbeit in einer Regierungskoalition für die 4. Wahlperiode des Brandenburger Landtages 2004 bis 2009, Potsdam, October 2004.

⁽²⁹⁾ Pöyry, Branchenstrategie Papier Brandenburg (Zusammenfassung) im Auftrag des Ministeriums für Wirtschaft des Landes Brandenburg vom November 2007.

⁽³⁰⁾ E.g. seminars and practical training in Germany and abroad, technical training in hydraulics and pneumatics, specific training for operators of the Propapier PM2 machine.

positive development of the region. Germany also adds that the expected turnover of the Propapier investment and the job creation lead to higher tax income for the region, allowing further public investments which also contribute to the socioeconomic development of the region.

5.7. NEGATIVE EFFECTS

- (113) Germany emphasises that the aid did not lead to overcapacity in the sector. After the adoption of the annulled decision, the Commission approved a series of other State aid measures in the paper sector⁽³¹⁾, for which it had to take account of the capacity created by the Propapier investment when calculating the capacity increase on the relevant market. Germany claims that the Commission would not have approved these measures if the sector had been characterised by significant overcapacity.
- (114) Germany states that, without State aid, the new plant would have been built anyway, but elsewhere. Given that in the relevant market (EEA), with or without aid, the installed CCM capacity would not differ, Germany concludes that there cannot be any negative effects of the aid on competition. Therefore, the aid cannot be seen as a cause for jobs losses at the site of competitors, as is alleged by Smurfit Kappa, but rather as the cause for the creation of employment in Brandenburg.
- (115) Germany adds that the European market for CCM is characterised by a dominant competitor, Smurfit Kappa, which a large number of smaller vendors, including Progroup, have to face. Smurfit Kappa is by far the largest market participant expressing an aggressive strategy through the acquisition of a large number of competitors. In contrast, Progroup is a small market player and is focused on organic growth and not on acquisitions of competitors. Germany therefore claims that as the products of the Propapier PM2 plant are in direct competition with the offers of Smurfit Kappa, the Propapier PM2 investment will help to reducing the outstanding position of this dominant market participant and to increase competition in the market for CCM as a whole.

6. ASSESSMENT OF THE MEASURE

6.1. EXISTENCE OF STATE AID IN THE MEANING OF ARTICLE 107(1) TFEU

- (116) The financial support under the measure was given by Germany in the form of an investment premium and was financed from public resources. The support can thus be considered as given by the Member State and through State resources within the meaning of Article 107(1) TFEU.
- (117) As the aid was granted to a single company, Propapier, the measure is selective.
- (118) The financial support given to Propapier relieved the company from costs which it normally would have had to bear itself and therefore the company benefited from an economic advantage over its competitors.
- (119) The financial support from the German authorities was given for an investment resulting in the production of different types of CCM. Since these products are subject to trade between Member States, the support given is liable to affect trade between Member States and to distort competition.
- (120) Consequently, within this preliminary assessment, the Commission considers that **the measure constitutes State aid** to Propapier within the meaning of Article 107(1) TFEU.

6.2. LEGALITY OF THE AID MEASURE

- (121) According to article 108(3) TFEU, Member States have to notify all aid measures before putting them into effect, unless they are covered by a block exemption. Although the aid was granted in the context of the regional block-exempted aid scheme XR 6/07 (see recitals 35 and 36 above), it is excluded from the scope of the relevant block exemption regulation, i.e. Regulation (EC) No 1628/2006⁽³²⁾, as it exceeded the applicable individual notification threshold (in this case EUR 22,5 million).

⁽³¹⁾ State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co, N 865/06 LIP — DE — Aid to Projektgesellschaft Papierfabrik Adolf Jass Schwarza GmbH, and SA.32063 (2011/NN) Poland — LIP — Mondi Świecie.

⁽³²⁾ Regional block exemption regulation (see footnote 9).

- (122) By notifying the aid measure in 2007, Germany complied with the applicable individual notification requirement expressed in Article 7(e) of Regulation (EC) No 1628/2006. However, following the annulment of the initial Commission decision, and since the aid was paid out before the General Court reached its decision on the annulment action brought by Smurfit Kappa, the aid must be regarded as illegally granted.
- (123) Since the proposed aid exceeds the individual notification threshold of Article 7(e) of Regulation (EC) No 1628/2006, the Commission will assess the measure on the basis of the RAG.

6.3. RELEVANT PERIOD FOR PURPOSES OF THE ASSESSMENT AND APPLICABLE PROCEDURE

- (124) As the Commission explained in recitals 47 to 50 of its opening decision, in order to give effect to the General Court's judgment in Case T-304/08, the Commission's preliminary re-assessment of the aid measure must in principle be based on the situation that existed at the time of the adoption of the annulled decision. As its task is to readopt a decision that is not vitiated by the error identified by the General Court in its above mentioned judgment, the Commission may only take into account facts, reports and other data that could have been available to it before adopting its initial decision on the compatibility of the measure⁽³³⁾.
- (125) In the present case, the scope of the investment project was reduced after the adoption on 2 April 2008 of the annulled decision, leading to lower eligible costs, and the aid amount eventually granted was reduced accordingly. Even though the Commission will adopt a decision on the aid measure as implemented, taking account of the fact that the value of the eligible costs as well as of the aid granted by Germany to Propapier were reduced, the Commission will base its assessment on the information that could have been available at the time of the adoption of the annulled decision, applying the legal State aid framework applicable at that time. In general, in cases of regional aid to large investment projects, the Commission has to take a decision before the investment is actually completed, on the basis of estimates of market figures and future perspectives. The authorised aid intensities are not adapted afterwards if, some years later, the market has developed differently than anticipated at the time of adoption of the Commission decision.
- (126) The procedure for adopting a new decision may be resumed at the very point at which the illegality occurred⁽³⁴⁾. In the context of the State aid discipline, the Court of Justice has held that, if the analysis carried out by the Commission in a previous decision has been defective, thus entailing the illegality of that decision, the procedure for replacing that decision can be resumed at that point by means of a fresh analysis of the examination already undertaken⁽³⁵⁾.

6.4. COMPATIBILITY WITH THE GENERAL PROVISIONS OF THE RAG

- (127) At the time of the adoption of the annulled decision in 2008, the Brandenburg-Nordost region was eligible for regional aid under Article 107(3)(a) TFEU.
- (128) The notified aid was to be granted for initial investment, as defined in point 4.1 of the RAG, and the eligible costs involve the costs of buildings and plant/machinery, in line with point 4.2 of the RAG (see recital 30 above). Germany confirmed that the intangible assets will fulfil the conditions of § 56 of the RAG (see recital 31 above).
- (129) The beneficiary's own contribution, free of any aid, to the eligible costs is above the 25 % threshold required in accordance with point 4.1 of the RAG (see recital 34 above).
- (130) The formal incentive effect rules of § 38 of the RAG were respected: as regards the direct grant initially envisaged, the beneficiary applied for the aid on 15 May 2007 and the German authorities confirmed in writing on 24 May 2007,

⁽³³⁾ Cf. State aid cases C 28/2005 Glunz AG; C 54/1996 Alitalia (Commission Decision 2001/723/EC (OJ L 271, 12.10.2001, p. 28)), SA.23839 (C 44/2007) FagorBrandt (Commission Decision 2013/283/EU (OJ L 166, 18.6.2013, p. 1)) and SA.28855(2012/C) ING restructuring aid.

⁽³⁴⁾ Case 34/86 *Council v Parliament* [1986] ECR 2155, paragraph 47; Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 31; and Case C-458/98 P *Industrie des poudres sphériques v Council* [2000] ECR I-8147, paragraph 82.

⁽³⁵⁾ Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 34.

before the start of work on the project in December 2007 that, subject to the final outcome of a detailed verification, the project met the conditions of eligibility laid down by the relevant scheme.

- (131) In fact, the total aid was finally granted in the form of an investment premium which is paid automatically if the objective criteria established by the relevant legal basis are fulfilled (block-exempted aid scheme XR 6/2007). For this investment premium, no previous aid application and written confirmation that the project in principle meets the conditions of eligibility is required, as set out in footnote 41 of the RAG: in the case of aid granted in accordance with approved tax aid schemes, where a tax exemption or reduction is granted automatically to qualifying expenditure without any discretion on the part of the authorities, Member States do not have to confirm in writing that, subject to detailed verification, the project in principle meets the conditions of eligibility laid down by the scheme before start of work on the project.
- (132) Germany confirmed that the investment was to be maintained in the assisted region for at least 5 years after its completion (point 4.1 of the RAG).
- (133) Germany also confirmed that the rules on cumulation of aid were to be respected (point 4.4 of the RAG).
- (134) The Commission therefore considers that, on the basis of the information that was available to it before the adoption of the annulled decision, **the aid measure complies with the standard compatibility criteria laid down in the RAG.**

6.5. COMPATIBILITY WITH THE RAG PROVISIONS FOR AID TO LARGE INVESTMENT PROJECTS

- (135) Since the regional aid was granted for a large investment project, the Commission also has to assess its compliance with the specific requirements for regional aid to large investment projects set out in point 4.3 of the RAG.

6.5.1. AID INTENSITY (§ 67 OF THE RAG)

- (136) With a notified eligible expenditure of EUR 586 722 900 in discounted value and a standard regional aid ceiling of 30 % GGE applicable in the Brandenburg-Nordost region, the adjusted maximum aid intensity permitted in accordance with § 67 of the RAG is 12,30 % GGE.
- (137) After the adoption of the annulled decision, Germany informed the Commission that the eligible costs have been reduced, because the power plant investment had been excluded from the subsidised project. If the scaling down mechanism foreseen in § 67 of the RAG had been applied to the reduced eligible costs, this would have resulted in a higher maximum aid intensity. However, the beneficiary started works on the project in a scenario where an aid intensity of 12,30 % GGE was notified to and later approved by the Commission. Therefore, it can be concluded that the initially approved aid intensity was sufficient to trigger the investment decision, and that an increase in the aid intensity would have no further incentive effect ⁽³⁶⁾.
- (138) Aid in the amount of EUR 50 559 153 in nominal value, corresponding to EUR 44 172 973 in present value, was paid out to Propapier for the reduced investment project. This corresponds to an aid intensity of 12,51 % GGE, and thus exceeds the maximum allowable of 12,30 %. Germany however confirmed that the excessive aid, including interest, in a total amount of EUR 1 099 539, has been reimbursed by Propapier. Hence the aid remaining with the beneficiary does not exceed EUR 43 415 903, i.e. 12,30 % GGE of the reduced eligible costs of the investment project. On this basis, it can be concluded that the amount of aid granted is in line with § 67 of the RAG.
- (139) In its opening decision on State aid case SA.36147 (C 30/10) ⁽³⁷⁾, the Commission expressed doubts on the potential existence of a single investment project, within the meaning of § 60 of the RAG, between the Propapier paper plant investment and several infrastructure measures undertaken by the public authorities in the industrial area hosting the

⁽³⁶⁾ Cf. Commission Decision 2006/262/EC of 21 September 2005 on State aid No C 5/2004 (ex N 609/03) which Germany is planning to implement for Kronoply (OJ L 94, 1.4.2006, p. 50).

⁽³⁷⁾ See footnote 4.

Propapier investment. The Commission therefore stated in its opening decision on the regional investment aid case SA.23827 (2013/C) — Germany — LIP — Propapier PM 2 GmbH that, if after its formal investigation on State aid case SA.36147 (C 30/10) — Germany — Alleged infrastructure aid for Propapier PM2 the Commission would conclude that other aided investments constitute a single investment project with the Propapier paper plant investment, or that additional aid was granted to Propapier in the form of infrastructure measures, the compliance of the regional investment aid to Propapier with § 67 of the RAG would have to be assessed taking account of the combined aid package.

- (140) The Commission will take account of the regional aid granted to Propapier in its compatibility assessment of the infrastructure aid measures when adopting its final decision on State aid case SA.36147 (C 30/10) ⁽³⁸⁾.

6.5.2. APPLICATION OF THE TESTS PROVIDED IN § 68(A) AND (B) OF THE RAG

- (141) Since the total amount of aid from all sources exceeds the applicable individual notification threshold, the Commission has to carry out the tests laid down in § 68(a) and (b) of the RAG.

- (142) Aid to large investment projects falling under § 68 of the RAG and where:

— the beneficiary accounts for more than 25 % of the sales of the product concerned before or on completion of the investment, or

— the capacity created by the project is more than 5 % of the size of the market using apparent consumption data of the product concerned, unless the average annual growth rate of its apparent consumption over the past five years is above the annual growth rate of the EEA's GDP,

can be approved only after a detailed verification, following the opening of the formal investigation provided for in Article 108(2) TFEU, that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition.

- (143) To carry out the relevant tests provided in § 68(a) and (b) of the RAG, the Commission has first to establish the relevant product and geographic markets.

6.5.2.1. Products concerned

- (144) The Commission considers that, even though the Propapier PM2 machine may have been intended by Progroup to mainly produce testliner of 70/110 g/m² and fluting of 70/130 g/m² (as claimed by Smurfit Kappa), the market delineation should be based on the actual potential output of the machine. Therefore, the Commission confirms that, as submitted by Germany and described in recital 25 above, the investment project directly concerns two types of CCM, namely **testliner up to 150 g/m² and fluting made from recycled fibre**.

- (145) Since an estimated 75 % of the CCM produced in the aided facility was to be used internally within Progroup for the production of the downstream product, the Commission considers, in line with § 69 of the RAG, that the downstream product, i.e. **corrugated board**, is also a product concerned by the investment project.

6.5.2.2. Relevant product market

- (146) According to § 69 of the RAG, the relevant product market includes the product concerned and its substitutes considered to be such either by the consumer (by reason of the product's characteristics, prices and intended use) or by the producer (through flexibility of the production installations).

⁽³⁸⁾ See recital 3.

Relevant product market for CCM

- (147) Germany submitted that the two types of CCM to be produced in the aided facility, i.e. testliner up to 150 g/m² and fluting made from recycled fibre, belong to one and the same overall CCM market, which includes also kraftliner and fluting made from virgin fibre, independently of their weight. Germany substantiated this by referring to the relations of substitutability between the different products.
- (148) The Commission indeed considers that flutings made from recycled fibre and from virgin fibre are substitutes from the supply side point of view. Fluting made from virgin fibre can be produced on the same production line as fluting made from recycled fibre, only an adjustment concerning the preparation of the raw material is necessary (one-off investment of EUR [...] million, which is less than [...] % of the overall investment costs). Moreover, fluting based on virgin fibre is in practice made from a mixture containing up to 40-50 % of recycled fibre.
- (149) Fluting based on virgin fibre is approximately 15 % more expensive than fluting made from recycled fibre only. However, for the consumer, both products have the same basic characteristics and the same use. Consumers can substitute a heavier (e.g. 140 g/m²) recycled fibre based fluting with a lighter (e.g. 127 g/m²) fluting made from virgin fibre. The possibility to use lighter fluting based on virgin fibres compared to recycled fibres outweighs the price difference. Therefore the Commission considers that both products are also substitutes from a demand side point of view.
- (150) As regards demand side substitutability between recycled fibre based testliner and virgin fibre based kraftliner the same applies: they have the same use, and the higher price for kraftliner is offset by the possibility to substitute a heavier testliner with a lighter kraftliner.
- (151) Fluting (both from virgin and recycled fibre), testliner and kraftliner are full substitutes from the supply side viewpoint, since every modern paper machine, including the beneficiary's, can produce both.
- (152) Finally, CCM of different weights (e.g. below 150 g/m² and above) belong to the same relevant market, since they are substitutable for the consumer: the consumer can replace a single layer of heavier CCM by more layers of cheaper and lighter CCM.
- (153) Based on the above, it could be concluded that the relevant product market for CCM is the overall CCM market. In earlier merger decisions⁽³⁹⁾ however, the Commission left the question of the relevant market open, especially as regards the subdivision into virgin fibre based products and recycled fibre based products. The Commission notes that Germany provided market data also for the narrowest possible relevant market of testliner up to 150 g/m² and fluting made from recycled paper.
- (154) Progroup is a vertically integrated paper producer, competing on the overall market for CCM, where any integrated producer may decide, due to better conditions, to buy a certain product from Progroup rather than producing it in-house. Detailed analysis provided by Germany showed that even those vertically integrated manufacturers, which produce in-house as much CCM (measured in tons) as they need for their production of corrugated board, are buying and selling CCM from competitors depending on concrete needs of subtypes of CCM and logistic requirements. Because of the dominant presence of vertically integrated manufacturers, high market shares in the open market (i.e. for third party deliveries only) do not necessarily mean market power. On this basis, Germany concluded that the relevant product market is the overall CCM market covering both in-house deliveries of CCM and sales to third parties (= total market). Nevertheless, Germany also provided data for the open market only.

⁽³⁹⁾ Inter alia, COMP/M.3935 — Jefferson Smurfit/Kappa (10 November 2005); COMP/M.2391 — CVC/Cinven/Assidomän (10 May 2001); COMP/M.2243 — Stora Enso/Assidomän/JV (22 December 2000); COMP/M.2020 — Metsä-Serla/MODO (4 August 2000).

- (155) The Commission sees no reason to deviate from its practice in previous State aid ⁽⁴⁰⁾ and merger decisions ⁽⁴¹⁾ in the paper sector (where the Commission either distinguished between the markets for all CCM and for recycled CCM only, or left the definition open, and either distinguished between overall/open market, or left the definition open, or defined the market to be the overall CCM market but calculated both scenarios). Therefore, on the basis of the information available to it before the adoption of the annulled decision, as well as of comments received after the opening decision that relate to the factual situation before the adoption of the annulled decision, the Commission decided to carry out the tests provided in § 68 of the RAG at the level of the market for all CCM and the market for testliner up to 150 g/m² and fluting made from recycled paper, both on the overall and on the open market.

Relevant product market for corrugated board

- (156) Corrugated board will not be produced in the aided facility, but it is a downstream product concerned by the investment project.
- (157) Germany submitted that corrugated board forms a standalone market from the supply side point of view, since machinery for the production of corrugated board cannot be converted, even with substantial additional costs, to manufacture other products.
- (158) On the demand side, corrugated board packaging is closest to cardboard boxes, however, corrugated board packaging is lighter, more stable and cheaper. Therefore, consumers of corrugated board, i.e. the producers of corrugated boxes, cannot substitute it either with other products for the majority of packaging needs.
- (159) Since no comments were received on this point, the Commission does not deviate from its previous practice in the merger decisions referred to above and confirms its view, also taken in the annulled and in the opening decision, that **corrugated board** constitutes a separate relevant product market.

6.5.2.3. Relevant geographic market

- (160) § 70 of the RAG establishes that for the purpose of applying the tests provided in § 68(a) and (b) of the RAG, “sales and apparent consumption will be defined at the appropriate level of the Prodcom classification, normally in the EEA or, if such information is not available or relevant, on the basis of any other generally accepted market segmentation for which statistical data are readily available”.

Relevant geographic market for CCM

- (161) Germany claims that the relevant geographic market for CCM is at least EEA-wide and that it even extends beyond the EEA (i.e. including EEA neighbouring areas). The Commission sees however no reason to deviate from its practice in earlier State aid and merger decisions to consider the EEA as the relevant geographic market for CCM, and will therefore apply the market test provided in § 68 of the RAG at the generally accepted geographic market segmentation for CCM and recycled CCM for which data is readily available, which is EEA-wide.

Relevant geographic market for corrugated board

- (162) Corrugated board will be manufactured by Progroup in other locations by using the CCM produced at the Eisenhüttenstadt facility. At the time of the notification, it was planned that Propapier would deliver CCM to Progroup plants located in Germany, as well as in France, the Czech Republic and in the future also to the plant in Stryków (Poland) after its set up in 2008. These plants would then in turn produce the downstream product, i.e. corrugated board.
- (163) Germany claims that the relevant geographic market for corrugated board is not narrower than the EEA, but nonetheless also provided data for the area covering the core delivery countries of Progroup (i.e. Czech Republic,

⁽⁴⁰⁾ State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co, N 865/06 LIP — DE — Aid to Projektgesellschaft Papierfabrik Adolf Jass Schwarza GmbH, and SA.32063 (2011/NN) Poland — LIP — Mondi Świecie.

⁽⁴¹⁾ See footnote 38.

France, Germany, the United Kingdom, the Netherlands and Poland). Taking into consideration the worst case scenario, and on the basis of its findings in earlier merger decisions ⁽⁴²⁾ which indicated that corrugated board sheets may economically be transported for a distance of up to 400 km around the corrugator plant, the Commission leaves open the question of defining the relevant geographic market for corrugated board and will calculate market shares both at the EEA-level and in the area covering only the core delivery countries of Progroup.

6.5.2.4. Market shares

- (164) To examine whether the threshold laid down in § 68(a) of the RAG is not exceeded, the Commission has to analyse the market share of the aid beneficiary at group level before and after the investment. The investment project started in 2007 and was completed by mid-2010, while full capacity was foreseen to be reached only by 2015. Germany indicated at the time of the notification that independent data concerning apparent consumption on the relevant markets was not available for the year after full capacity is reached, i.e. 2016. Therefore, the Commission decided to examine the market shares for the year after completion of the investment, i.e. 2011 for which independent forecasts were already available. This is an acceptable approximation since 92 % of the total capacity to be created by the project was expected to be available by then.
- (165) To establish the market share of Progroup at group level the Commission compared its total deliveries (including sales to third parties as well as captive sales within the group) in volume and in value terms in the given year to apparent consumption on the relevant markets. Market shares were also calculated separately for the open market of CCM, i.e. taking into account only non-captive sales of Progroup ⁽⁴³⁾ and the total size of the market of third party deliveries.
- (166) The figures on overall EEA-wide apparent consumption in volume and in value terms on the markets for CCM, for testliner up to 150 g/m² and fluting made from recycled paper as well as for corrugated board were compiled for the purpose of the notification at the request of the beneficiary by Pöyry, a global consulting and engineering firm focusing on the energy, forest industry and infrastructure & environment sectors. Pöyry established data using its own database as well as data available in the public domain, e.g. in trade journals and provided by industry associations.
- (167) Because of a lack of independent figures concerning the size of the open market, this market volume was estimated by Germany on the basis of Pöyry capacity data for 2006. The method consisted in comparing for each integrated producer its production capacity of CCM and of corrugated board. If the capacity for corrugated board production is higher, this results in theory in a corresponding demand for the raw material, i.e. CCM, on the open market. To this extra demand of CCM by integrated producers is added the demand for CCM on the open market originating from non-integrated corrugated board producers. Calculated this way, the size of the open market of CCM is approximately 37 % of the total CCM market. This ratio was also used to estimate the size of the open market in 2011 ⁽⁴⁴⁾.
- (168) This method does not allow to estimate the size of the open market for testliner and fluting made from recycled paper since, due to the supply side flexibility, no separate data are available distinguishing between recycled paper and virgin fibres based CCM production capacities. However, since recycled paper based CCM makes up some 70-80 % of the total CCM market, this high proportion is very likely to apply also to the open market, which means that market shares of Progroup on the open market of recycled fibre based CCM are only slightly higher than on the open market for all types of CCM.
- (169) Data concerning the size of the corrugated board market in the geographic area covering the core delivery countries of Progroup (i.e. Czech Republic, France, Germany, the United Kingdom, the Netherlands and Poland) was established on the basis of FEFCO ⁽⁴⁵⁾ statistics submitted before the adoption of the annulled decision which indicate that this area represents 58 % of the total EEA market.

⁽⁴²⁾ E.g. COMP/M.3935 — Jefferson Smurfit/Kappa; COMP/M.2391 — CVC/Cinven/Assidomän.

⁽⁴³⁾ It should be noted in this respect that Progroup sells on the open market only recycled paper based CCM, i.e. testliner up to 150 g/m² and fluting made from recycled paper.

⁽⁴⁴⁾ Since, as noted above, integrated producers are active in open market transactions not only because of their insufficient capacities but also for logistic needs and depending on their concrete demand for different subtypes of CCM, this method actually underestimates the size of the open market and thus represents a worst case scenario approach.

⁽⁴⁵⁾ FEFCO is the umbrella organisation of European associations of corrugated board manufacturers.

- (170) The market shares of Progroup in the relevant markets in the year before and after the investment, calculated on the basis of the market data provided by Germany (based on Pöyry and FEFECO data), are presented in Table 1 below.

Table 1

Market shares of Progroup at group level on the relevant markets

Market shares (in %)	2006		2011	
	volume	value	volume	value
CCM (overall market — EEA)	[0-10]	[0-10]	[0-10]	[0-10]
Recycled CCM only (testliner up to 150 g/m ² and fluting made from recycled paper) (overall market — EEA)	[0-10]	[0-10]	[0-10]	[0-10]
CCM (open market — EEA)	[0-10]	[0-10]	[0-10]	[0-10]
Corrugated board (EEA)	[0-10]	[0-10]	[0-10]	[0-10]
Corrugated board (core delivery countries)	[0-10]	[0-10]	[0-10]	[0-10]

- (171) For all market definitions taken into account, Progroup's market share remains significantly below the 25 % threshold laid down in § 68(a) of the RAG. A further segmentation based on grammage up to 130 g/m² will not increase the relevant market share above the critical threshold of 25 %.
- (172) Therefore, the Commission considers that the aid measure under scrutiny does not exceed the threshold laid down in § 68(a) of the RAG.

6.5.2.5. Capacity increase and market performance

- (173) The Commission also has to carry out the test provided in § 68(b) of the RAG. It needs to verify whether the capacity created by the project is less than 5 % of the size of the market measured using apparent consumption data of the product concerned, unless the average annual growth rate of its apparent consumption over the last five years is above the average annual growth rate of the EEA's GDP.
- (174) The Commission should first assess if the CCM market is underperforming in the EEA based on the average annual growth rate of its apparent consumption ⁽⁴⁶⁾.
- (175) The latest available data at the time of the notification were those for the years 2001 to 2006. Based on these data, the compound annual growth rate (CAGR) of apparent consumption of the overall CCM market in the EEA was 2,15 % in volume terms and 0,02 % in value terms in the period 2001 to 2006. The CAGR of apparent consumption in the EEA of testliner up to 150 g/m² and fluting made from recycled paper was 3,25 % in volume terms and 1,22 % in value terms in the same period.
- (176) As the CAGR of the European Economic Area's GDP ⁽⁴⁷⁾ in the years 2001 to 2006 was 1,97 % in constant prices (i. e. volume terms) and 3,98 % in current prices (i.e. value terms), the CAGR of the consumption of CCM as well as of testliner up to 150 g/m² and fluting made from recycled paper exceeded the benchmark when calculated in volume terms, but was below the benchmark in value terms.

⁽⁴⁶⁾ Footnote 62 of the RAG defines "apparent consumption of the product concerned" as "production minus export plus imports". Apparent consumption data was compiled by Pöyry for the purpose of the notification.

⁽⁴⁷⁾ EU-27 data were used as a proxy.

Volume and/or value

- (177) The Commission does not follow Germany's observation that the CAGR should only be calculated in volume terms and not in value (see recitals 93 and 94 above). It is true that in the present case only the value calculation triggers the need to calculate if the 5 % threshold of § 68(b) of the RAG is exceeded, but rejecting value calculations as a general rule would be in contradiction with previous Commission practice and would weaken the ability of the test to identify situations of overcapacity, e.g. where growth of supply strongly exceeds already high demand growth, and where average variable costs are relatively low. Consequently the Commission will verify whether the capacity created by the investment project exceeds 5 % of the size of the relevant market.

Capacity test and capacity increase calculation

- (178) In accordance with § 68(b) of the RAG, the capacity increase is calculated as a proportion of apparent consumption of the product concerned, which by definition includes deliveries to third parties as well as in-house deliveries of CCM.
- (179) The capacity test of § 68(b) of the RAG aims to prevent that a substantial capacity increase (i.e. above 5 %) which is not underpinned by an appropriate growth of demand (i.e. the growth of demand is below EEA's GDP growth), has damaging effects on competitors, notably through its effects on prices. What is considered a substantial capacity increase is determined in terms of its proportion to the size of the market. For CCM, the size of the market is ultimately derived from the size of the downstream product market, independently of whether or not the downstream product is manufactured in-house or by third parties. Therefore, measuring capacity created solely in terms of the size of the open CCM market is not appropriate. In addition, as shown above, due to the interdependence between the overall and the open market, a price decrease in the open market would influence the "make-or-buy" decision of integrated producers and would immediately increase demand in the open market. On this basis, the Commission normally measures the capacity increase on the overall market ⁽⁴⁸⁾.
- (180) Germany indicated that the total capacity to be created by the project is 615 000 t/a of CCM (testliner and fluting made from recycled paper), which corresponds to EUR [...] million in value terms. At the same time, Germany indicated that apparent consumption of CCM in the EEA amounted to 23,363 million t in 2006 (in value terms EUR 9 409,76 million). Apparent consumption in the EEA of testliner up to 150 g/m² and fluting made from recycled paper is indicated to have been 18,281 million t in 2006 (in value terms EUR 6 752,698 million).
- (181) Based on the above figures, the capacity created by the Propapier project in Eisenhüttenstadt is 2,6 % of the total CCM market ([< 3] % in value terms), whereas it amounts to 3,4 % of the combined market for testliner up to 150 g/m² and fluting made from recycled paper ([< 5] % in value terms). It follows that the capacity created by the project is below 5 % of the apparent consumption (at EEA level) concerned.
- (182) Even applying as a worst case scenario the higher capacity creation figures advanced by Smurfit Kappa (650 000 t/a and 750 000 t/a), **the 5 % threshold would not be exceeded on the overall CCM market** (see Table 2 below).

Table 2

Capacity increase on the overall CCM market (EEA)

	Relevant market (EEA)	Overall market for CCM	Overall market for recycled CCM (testliner up to 150 g/m ² and fluting made from recycled paper)
Volume in 2006 (in 1000 t)		23 363	18 281

⁽⁴⁸⁾ The same reasoning leading to the same conclusion was followed by the Commission in its decisions on aid to other investments in the paper sector which took place over the same period: State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co, and SA.32063 (2011/NN) Poland — LIP — Mondi Świecie.

Relevant market (EEA)	Overall market for CCM	Overall market for recycled CCM (testliner up to 150 g/m ² and fluting made from recycled paper)
Value in 2006 (in 1000 EUR)	9 409 760	6 752 698
Capacity increase in volume (applying 615 000 t/a)	2,6 %	3,4 %
Capacity increase in value (applying 615 000 t/a)	[< 3] %	[< 5] %
Capacity increase in volume (applying 650 000 t/a)	2,8 %	3,6 %
Capacity increase in value (applying 650 000 t/a)	[< 3] %	[< 5] %
Capacity increase in volume (applying 750 000 t/a)	3,2 %	4,1 %
Capacity increase in value (applying 750 000 t/a)	[< 3] %	[< 5] %

- (183) In order to take account of a worst case approach, the Commission also calculated the capacity increase as a proportion of open market sales of CCM. In this case, only that part of total capacity created by the investment which is aimed at production for open market sales should be taken into account. According to Germany, this amounted to [< 250 000] t/a. The remaining part of capacities to be created, i.e. [> 365 000] t/a (which, without the investment, would have to be purchased by Progroup from third parties and would thus constitute effective demand on the open market), would now be used internally within the group for further processing into corrugated board and therefore would have to be deducted from the size of the open market.
- (184) Since the size of the open market for CCM in the EEA was estimated to be 8,644 million t in 2006 ⁽⁴⁹⁾, the capacity created by the project as a proportion of the size of the open market for CCM would amount to only [< 3] % in volume terms ⁽⁵⁰⁾ (see Table 3 below).
- (185) At the time of the initial notification, Germany could not provide an estimation of the open market for recycled CCM (i.e. testliner and fluting made from recycled paper) only. In its comments to the opening decision, Germany informed that on the basis of further analysis of the historic data of Pöyry, this market could be estimated to be 6,5 million t in 2006. On this basis, capacity increase on the open market for recycled based CCM would be [< 3] % in volume terms (see Table 3 below).
- (186) The Commission also carried out the calculations in value terms, notably assuming that the additional capacity created by the Propapier PM2 project on the open market would be 285 000 t/a (figure advanced by Smurfit Kappa), as a worst case scenario. In all scenarios, **the 5 % threshold would not be exceeded on the open CCM market** (see Table 3 below).

⁽⁴⁹⁾ On the basis of the worst case scenario approach presented in recital 167 of this decision.

⁽⁵⁰⁾ Calculated as [< 250 000] t/a/(8 600 000 t/a — [> 365 000] t/a).

Table 3

Capacity increase on the open CCM market (EEA)

Relevant market (EEA)	Open market for CCM	Open market for recycled CCM (testliner up to 150 g/m ² and fluting made from recycled paper)
Volume in 2006 (in 1000 t)	8 644	6 500
Value in 2006 (in 1000 EUR)	3 481 611	2 400 990
Capacity increase in volume (applying 150 000 t/a)	[< 3] %	[< 3] %
Capacity increase in value (applying 150 000 t/a)	[< 3] %	[< 3] %
Capacity increase in volume (applying 285 000 t/a)	[< 5] %	[< 5] %
Capacity increase in value (applying 285 000 t/a)	[< 3] %	[< 5] %

- (187) The Commission rejects the “displacement effect” theory invoked by the complainant (see recitals 56 and 57 above) which suggests that “freed capacity”, i.e. capacity not bought anymore on the open market by Progroup, should be added up to Progroup’s CCM production sold on the open market in order to calculate the capacity created by the Propapier investment on the open market. Such scenario (applying a capacity increase of 525 000 t/a) would lead to a capacity increase exceeding 5 %, but, as argued also by Germany, such approach would lead to the conclusion that the capacity increase is the same on the open or on the overall market. It would even be the same if Propapier would not offer any CCM on the open market and would use all its new production in-house. In the latter case, since no CCM production is sold on the market, but only the downstream product, i.e. corrugated board, the CCM market would not even need to be considered for the purpose of the tests of § 68 of the RAG.
- (188) Furthermore, the xls sheet provided by Smurfit Kappa dates from June 2008, while the Commission may only take into account facts, reports and other data that could have been available to it before the approval date of the annulled decision, i.e. 2 April 2008. Even if the document uses some data resulting from a 2007 study (Henry Poole Consulting, see footnote 15), the calculations are based on assumptions and other data which do not seem to directly originate from this study.
- (189) As regards the downstream product, i.e. corrugated board, no production capacity is created by the project which aims to produce solely CCM (capacity increase for corrugated board is 0 %). This means that **the 5 % threshold of § 68(b) of the RAG is not exceeded for corrugated board.**
- (190) As a general conclusion, the Commission considers on the basis of the above that the capacity created by the Propapier PM2 project is below 5 % of the relevant markets concerned and thus **the aid measure under scrutiny does not lead to a situation where the threshold laid down in § 68(b) of the RAG is exceeded for the products concerned.**

Structural overcapacity

- (191) As set out in recital 60 above, Smurfit Kappa argued that the CCM market was in structural overcapacity in the period 2001-2006, and that State aid for new investments in the sector exacerbated this overcapacity. The Commission will examine those arguments, even though the results of the test laid down in § 68(b) of the RAG indicate that no substantial capacity increase is brought on a market in structural overcapacity.
- (192) Smurfit Kappa based its argumentation on the 2007 London Economics study, which points to capacity utilisation rates below 90 % from 2003 to 2005 and indicates that these would also have remained below 90 % in 2006-2007 if the sector had not closed down capacity. Germany however claims that the capacity shut downs mainly concerned old and inefficient machines ⁽⁵¹⁾. The ECA report states that the closures were largely driven by natural change in demand and technical standards and the pursuit of economies of scale, and that the need for machine replacement can be attributed to: (1) change in production technologies; (2) evolving standardisation process within the industry; and (3) the potential costs savings afforded by the economies of scale of larger machinery. Germany therefore rejected that the closures were a deliberate choice by the sector in view of restoring supply-demand balance on the market, as argued by Smurfit Kappa.
- (193) The Commission notes that an independent 2007 study (Deutsche Bank study) indeed presents the closures of Smurfit Kappa CCM plants as an attempt to improve the quality of its asset base. This study furthermore indicates that new capacity is needed to satisfy demand over the period 2009-2012 (hereby referring to new investments by Mondi, Progroup and SAICA), and that operating rates would remain at healthy levels, regardless of the introduction of new capacity in 2009 ⁽⁵²⁾.
- (194) The Commission is therefore of the view that there is no convincing evidence that the aid granted to Propapier would reinforce existing structural overcapacity in the CCM market. The figures presented by Smurfit Kappa about overcapacity mainly relate to the period before the investment, while the available forecasts at the time of the annulled decision, including an independent study (Deutsche Bank) point to demand growth as from 2007. In any case, the Commission has taken account of the relative decline of demand over the period 2001-2006 — in value terms — by calculating the proportion of the new capacity created on the relevant market, as required by § 68(b) of the RAG.

6.5.3. CONCLUSION ON WHETHER A DETAILED VERIFICATION IN APPLICATION OF IDAC IS NECESSARY

- (195) The RAG state that in cases where the thresholds of § 68(a) and (b) of the RAG are exceeded, the Commission will approve regional investment aid only after a detailed verification, following the opening of the procedure provided for in Article 88(2) of the Treaty, that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition and effect on trade between Member States. The Commission notes that, in the present case, the thresholds of § 68 of the RAG are not exceeded, i.e. the detailed verification in application of the Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment project ⁽⁵³⁾ (hereinafter: IDAC) is not required. Nonetheless, the Commission has to establish that the contribution of the aid to regional investment outweighs its possible negative effects on trade and competition.

6.5.4. BALANCING OF THE POSITIVE AND NEGATIVE EFFECTS OF THE AID

- (196) The Commission notes that the incentive effect requirements laid down in § 38 of the RAG are met. The Commission notes also that the Court confirmed that the Commission can base its assessment of the incentive effect

⁽⁵¹⁾ The ECA report states that the average age of shut-down paper machines in Europe between 2000 and 2007 is 51 years (p. 55 and Appendix 2).

⁽⁵²⁾ “The industry’s operating rates are an important measure of how healthy the market conditions are and give an indication for the direction of the product prices. The European operating rate was 92 % last year and is expected to increase in the next two years (...). The healthy demand growth in combination with limited new supply will tighten the market further.” (Deutsche Bank study, p. 19).

⁽⁵³⁾ OJ C 223, 16.9.2009, p. 3.

by reference to a circumstance of a chronological nature⁽⁵⁴⁾. The Commission therefore considers that the aid has had an incentive effect on the investment and has triggered its positive contribution to the development of the assisted region concerned.

- (197) The RAG state that regional aid can only play an effective role if it is used sparingly and proportionately and is concentrated on the most disadvantaged regions of the European Union. In particular, the permissible aid ceilings should reflect the relative seriousness of the problems affecting the development of the regions concerned. Furthermore, the advantages of the aid in terms of the development of a less favoured region must outweigh the resulting distortions of competition.
- (198) The Treaty allows the Commission to accept distortions of competition and trade in order to favour the regional development of regions eligible for regional aid pursuant to Article 107(3)(a) of the TFEU. The weight given to the positive effects resulting from the aided investment is greater in the case of the most disadvantaged regions covered by Article 107(3)(a) of the TFEU than in those covered by Article 107(3)(c) of the TFEU.
- (199) The maximum aid intensity of 12,30 % GGE applicable to the investment project was subject to the scaling down of standard regional aid ceilings pursuant to § 67 of the RAG and does not exceed the applicable regional aid ceiling. It can therefore be considered to be proportionate to the handicaps to be addressed in the Brandenburg area, which was at the relevant time considered eligible for regional aid pursuant to Article 107(3)(a) of the TFEU.
- (200) Having established that the aid provides an incentive for carrying out the investment in the region concerned and is proportionate, it is necessary to balance the positive effects of the aid with its negative effects.
- (201) By creating 150 direct and 450 indirect jobs and widening the industrial base of the region concerned, the aided investment contributes to the regional development of a region declared eligible for regional aid pursuant to Article 107(3)(a) of the TFEU. The Commission notes that the aid per job created (amounting to ca. EUR 300 000 per direct job created, but only EUR 75 000 per direct and indirect job created), is not excessive when compared with similar cases of regional aid to capital-intensive investments in the paper sector, where the same standard regional aid ceiling of 30 % was applicable⁽⁵⁵⁾.
- (202) The aid does not lead to the creation or the strengthening of a dominant market position of the aid beneficiary and the effects of the capacity created by the investment on the relevant product markets are limited. At the point in time when the investment and aid granting decisions were taken, those markets could not be considered or expected to be in structural overcapacity at the date of completion of the investment.
- (203) Since the aid respects the maximum scaled down aid intensity ceiling applicable to large investment projects, in accordance with the RAG and with the regional aid map approved for Germany for the period 2007-2013, the Commission considers that the aid has no excessive negative effect on trade which would be incompatible with the internal market. The Commission notes, in particular, that there is no indication resulting from the comments received in the context of the formal investigation procedure that the investment project would have been implemented, in the absence of the aid, in another region in the European Union where a higher or equal aid intensity ceiling would apply. There is also no indication that the aid led Propapier to relocate its activities and resulted in subsequent job losses in other regions with a comparable or worse socioeconomic situation than that of the assisted region where Propapier implemented its investment.
- (204) The Commission concludes that Germany demonstrated that the Propapier PM2 project contributes towards the achievement of the cohesion objective, which is an objective of common interest, and was implemented as part of a coherent regional development strategy. The aided investment contributes significantly to the improvement of the socioeconomic situation and to the development of the region concerned, in particular in view of its effect on employment, revenue generation and widening of its industrial base. Having regard to the nature and size of the project, the Commission considers that the aid does not result in unacceptable distortions of competition and effects on trade.
- (205) In light of the above, the Commission concludes that the benefits of the aid measure outweigh the resulting

⁽⁵⁴⁾ Judgement of the Court of First Instance of 14 January 2009, Case T-162/06, *Kronoply v Commission*, point 80.

⁽⁵⁵⁾ Cf. State aid cases N 203/08 LIP — DE — Aid to Papierfabrik Hamburger Spremberg GmbH&Co (aid of ca. EUR 183 000 per direct job, 200 direct jobs and number of indirect jobs not specified), and N 865/06 LIP — DE — Aid to Projektgesellschaft Papierfabrik Adolf Jass Schwarza GmbH (aid of ca. EUR 367 000 per direct job, 100 direct jobs and 100 indirect jobs).

distortion of competition and negative effects on trade between Member States.

7. CONCLUSION

The Commission finds that Germany has unlawfully implemented the aid in favour of Propapier PM2 GmbH in breach of Article 108(3) of the TFEU. However, the Commission finds that the aid measure fulfils the standard criteria of the RAG, does not lead to a situation where the thresholds laid down in § 68(a) and (b) of the RAG are exceeded for the products concerned, has an incentive effect and is proportionate to the regional handicaps it seeks to alleviate. The Commission further finds that the benefits of the aid measure outweigh the resulting distortion of competition and negative effects on trade between Member States. Therefore, the Commission considers that the aid is compatible with the internal market within the meaning of Article 107(3)(a) of the TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented in favour of Propapier PM2 GmbH, amounting to EUR 43 415 903 in discounted value, is compatible with the internal market in accordance with Article 107(3)(a) 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

COMMISSION DECISION (EU) 2015/1073**of 9 January 2015****on the State aid SA.35888 (2013/C) (ex 2013/NN) SA.37220 (2014/C) (ex 2013/NN) SA.38225 (2014/C) (ex 2013/NN) implemented by Cyprus for Cyprus Airways (Public) Ltd***(notified under document C(2014) 9362)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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 ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE**1.1. THE FIRST FORMAL INVESTIGATION PROCEDURE (SA.35888)**

- (1) In February 2012 the Commission departments were informed through the press that the Cypriot government was contemplating an intervention in favour of Cyprus Airways (Public) Ltd ('Cyprus Airways' or 'the Company'). In order to clarify whether any State aid issues could arise, the Commission opened a case *ex officio*.
- (2) By letters dated 20 February 2012, 15 June 2012 and 23 August 2012 the Commission requested information. The Cypriot authorities replied on 6 April 2012 and on 30 August 2012. On 4 October 2012, a meeting between the Commission and the representatives of the Cypriot authorities and Cyprus Airways took place in Brussels.
- (3) On 13 December 2012 the Cypriot authorities notified to the Commission the State aid for the rescue of Cyprus Airways (SA.35888). The Commission requested further information by letter of 19 December 2012. The Cypriot authorities replied on 4 January 2013.
- (4) By letter dated 6 March 2013 ('the decision of 6 March 2013'), the Commission informed Cyprus that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('the Treaty') in respect of certain State measures described in Section 3.2.1 below ('the first formal investigation procedure').
- (5) The Commission decision of 6 March 2013 to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited the Cypriot authorities and interested parties to submit their comments on the alleged aid measures.
- (6) The Commission received comments from the Cypriot authorities on 31 May 2013. The Commission received comments from five interested parties during the period from 4 April to 3 July 2013. The Commission received the comments of the Cypriot authorities on those submitted by interested parties on 10 September 2013.

1.2. THE SECOND FORMAL INVESTIGATION PROCEDURE (SA.37220 AND SA.38225)

- (7) By pre-notification of 22 July 2013 the Cypriot authorities communicated to the Commission a draft restructuring plan and on 23 October 2013 they notified an updated version of that plan ('the 2013 restructuring plan') (SA.37220). The Commission requested further information by letter of 15 November 2013. The Cypriot authorities replied on 10 January 2014.

⁽¹⁾ SA.35888: OJ C 152, 30.5.2013, p. 12; SA.37220 and SA.38225: OJ C 117, 16.4.2014, p. 125.

⁽²⁾ Cf. footnote 1.

- (8) In the context of the regular monitoring of approved or exempted schemes, the Commission services assessed the implementation of a Cypriot training aid scheme ⁽³⁾. The Commission asked information amongst others on training aid to Cyprus Airways (SA.38225), with letters of 3 December 2012, 15 February 2013 and 6 May 2013. The Cypriot authorities replied on 19 December 2012, 14 March 2013 and 30 May 2013.
- (9) By letter dated 4 February 2014 ('the decision of 4 February 2013'), the Commission informed Cyprus that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the State measures described in Section 3.2.2 ('the second formal investigation procedure').
- (10) The Commission decision of 4 February 2013 was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited the Cypriot authorities and interested parties to submit their comments on the alleged aid measures.
- (11) The Commission received comments from the Cypriot authorities on 31 March 2014. On 16 March 2014, the Commission received comments from three interested parties. On 26 June 2014, the Commission received the comments of the Cypriot authorities on those submitted by interested parties.
- (12) The Commission requested further information by letters of 11 April 2014 and 2 July 2014. The Cypriot authorities replied on 11 May 2014 and 8 August 2014.
- (13) By letter dated 14 November 2014, Cyprus agreed to waive its rights deriving from Article 342 of the Treaty in conjunction with Article 3 of the EC Regulation (EC) No 1/1958 and to have the present decision adopted and notified in English.

2. THE CYPRIOT AIR TRANSPORT MARKET

- (14) Cyprus has two international airports, Larnaca (LCA — close to the capital Nicosia) and Paphos (PFO). Because of the small size of the island, most travellers from/to Cyprus can easily reach either airport.
- (15) The main origin of incoming passengers is the UK and Russia, with significantly fewer passengers coming from Germany, Sweden and Greece. The inflow of passengers fluctuates depending on the season: during the summer months (July-August) there are more than three times more passengers than during the winter months (December-February). However, traffic from Greece does not have significant seasonal fluctuation.
- (16) Cyprus Airways has an average market share of approximately 15 % of traffic to/from the island (2012 data), but its market share fluctuates depending on the season. The most important markets for the Company are the routes between Cyprus and Greece and between Cyprus and the UK. Cyprus Airways was also active in domestic flights in the Greek market until mid-2013. Certain routes to the Middle East have also been traditional markets for Cyprus Airways.
- (17) Major European airlines have been traditionally active in the same markets as Cyprus Airways. However, some routes to Cyprus are only served on a seasonal basis. More recently, Cyprus Airways has been facing competition also by low cost airlines, sometimes operating from a base in Cyprus.
- (18) The Cypriot economy has been facing difficulties, demonstrated by a GDP contraction since 2009, an increase of the budgetary deficit and an increase in unemployment. Due to the deterioration of its financing conditions, Cyprus has been receiving financial support by the euro area Member States and the International Monetary Fund (IMF).

⁽³⁾ SA.27573 (2012/MX) — *Scheme for constant training programmes for individual enterprises* — Cyprus, approved in Cyprus by the Decision of the Commissioner for State Aid Control, published in the Cypriot Official Gazette nr. 8025 of 21 November 2008.

⁽⁴⁾ Cf. footnote 1.

- (19) As a result of the recession in Cyprus, but also in other European countries, the number of passengers travelling to and from Cyprus has decreased. The average fare price has also dropped significantly. The future performance of the Cypriot market will depend on the recovery in Europe but also the situation of the local economy.

3. DESCRIPTION OF THE AID MEASURES

3.1. THE BENEFICIARY

- (20) Cyprus Airways was established in 1947 and its principal activities are the transportation of passengers and cargo by air and other airline-related services. The Company is listed on the Cypriot Stock Exchange. Since the beginning of 2013, following a share capital increase (covered by both formal investigation procedures), the main shareholder of the Company is the Cypriot State with a shareholding of 93,67 % whereas private investors hold the remaining shares.
- (21) At the end of 2013, Cyprus Airways operated scheduled air services to approximately 15 destinations and had a fleet of 6 aircraft (Airbus A320) and approximately 600 employees. It therefore qualified as a large enterprise ⁽⁵⁾.
- (22) In 2005, Cyprus Airways benefitted from CYP 30 million (approximately EUR 51 million) of rescue aid and in 2007 from a number of restructuring measures consisting mainly of (i) loans of CYP 55 million (approx. EUR 96 million), of which a loan of CYP 45 million (approx. EUR 78 million) was backed by a State guarantee, and (ii) a capital increase of CYP 14 million (approx. EUR 24 million), which involved public and private shareholders on equal terms. Those measures, which included a restructuring plan ('the 2007 restructuring plan'), were approved by the Commission as compatible restructuring State aid ⁽⁶⁾.
- (23) Cyprus Airways receives an annual compensation for losses incurred as a result of the Turkey overflight ban on Cypriot aircraft. The compensation is based on an aid scheme authorised by the Commission pursuant to Article 107(2)(b) of the Treaty. The beneficiaries of the scheme are airline companies established in Cyprus ⁽⁷⁾.

3.2. DESCRIPTION OF THE MEASURES

3.2.1. The first formal investigation procedure

- (24) The Commission initiated the formal investigation procedure on 6 March 2013 in relation to the following measures:

3.2.1.1. Measure 1: Contribution by the State to the 2012 share capital increase

- (25) During the period from September 2012 until December 2012, the State disbursed EUR 31,33 million to Cyprus Airways in the form of 'in advance' payments to a planned share capital increase of a total of EUR 45 million. The amount was paid in tranches.
- (26) In November 2012, a new business plan ('turnaround plan') was communicated to the Commission. The plan envisaged the turnaround of the Company in 5 years, based on a capital increase, improved cost and productivity factors, new investments and the reorganisation of the Company into a 'single-class value airline of option-based services'. The plan projected marginal profitability already as of the second year of its implementation. The plan was subject to approval by the existing shareholders, who would be participating in the capital increase necessary for its implementation. Finally, it has not been implemented.
- (27) At the time of granting of measure 1, the Cypriot authorities argued that the State acted like a market economy investor, in order to safeguard its asset until the finalisation of the turnaround plan and the conclusion of the capital increase by all shareholders.

⁽⁵⁾ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

⁽⁶⁾ Commission decision of 3 May 2005 in case N69/2005 (OJ C 191, 5.8.2005, p. 4) and Commission Decision 2008/137/EC of 7 March 2007 — State aid C 10/06 (ex N555/05) — Cyprus Airways Public Ltd — Restructuring plan (OJ L 49, 22.2.2008, p. 25).

⁽⁷⁾ Commission decision of 27 June 2012 in case SA.32523 (11/N) (OJ C 230, 1.8.2012, p. 1).

- (28) Furthermore, the Cypriot authorities anticipated that the capital increase would be concluded with a *pro rata* participation of the private shareholders of an additional EUR 13,67 million. However, private shareholders contributed only EUR 106 000, thus the share capital of the Company was only increased by EUR 31,4 million. The shareholding of the State in Cyprus Airways was raised accordingly from 69,62 % to 93,67 %.

3.2.1.2. *Measure 2: Rescue aid*

- (29) On 13 December 2012, the Cypriot authorities notified a rescue aid of EUR 73 million to Cyprus Airways. According to the Cypriot authorities' claim in the notification, that amount reflected the net cash flow needs of Cyprus Airways until 30 June 2013, that is to say, for six months. The rescue aid would be provided as a government loan with an interest of 1,76 % and should be repaid by 30 June 2013.
- (30) The Cypriot authorities claimed that out of the EUR 73 million of the rescue aid, EUR 16,3 million had already been granted to Cyprus Airways in the context of measure 1. The Commission noted in the decision of 6 March 2013 that the Cypriot authorities notified a rescue aid in the form of a loan, whereas the EUR 16,3 million payment was part of a capital increase.
- (31) The Cypriot authorities argued that the rescue aid was necessary, in order to support Cyprus Airways for a short period. They acknowledged the provision of restructuring aid in 2007, but explained that there were exceptional circumstances, which reversed the initial implementation of the 2007 restructuring plan and which impaired the long-term viability of the Company. The circumstances were linked to the financial situation in Cyprus and Greece, two of the main markets where Cyprus Airways is active, as well as the unstable political situation in the Middle East, the effect of the Turkey overflight ban on Cypriot aircraft, the entrance of a new low-fare competitor in the market, allegedly subsidised by a State scheme, and the undercapitalised position of Cyprus Airways.

3.2.1.3. *Measure 3: Ex gratia compensation*

- (32) According to the notification of 13 December 2012, the Cypriot Council of Ministers decided on 4 December 2012 to grant *ex gratia* compensation to the Cyprus Airways personnel, which would be considered redundant in the context of the Company's restructuring. According to that decision, the conditions for any *ex gratia* compensation were that (i) it would comply with State aid rules; (ii) the trade unions of the Company would accept the new business plan (that is to say the turnaround plan) and (iii) it would not exceed 50 % of the normal compensation to be paid to redundant personnel by the Cypriot Redundant Personnel Fund ('RPF').

3.2.2. **The second formal investigation procedure**

- (33) The Commission initiated the formal investigation procedure on 4 February 2014 in relation to the following measures:

3.2.2.1. *Measure 4: Restructuring aid*

- (34) On 23 October 2013, the Cypriot authorities notified restructuring aid to Cyprus Airways of EUR 102,9 million, accompanied by a new restructuring plan (that is to say the 2013 restructuring plan), unrelated to the turnaround plan mentioned in recital 26 above. The amount of restructuring aid consisted of:
- (a) The State participation of EUR 31,33 million to the capital increase, already granted in 2012 (measure 1);
- (b) The tranches of the rescue aid loan already granted to Cyprus Airways (measure 2) in total of EUR 34,5 million. The granted amount would not be repaid by Cyprus Airways and the corresponding debt would be converted into equity;
- (c) In 2007 and as part of the approved restructuring package, the Cypriot State had provided a guarantee for a loan of CYP 45 million (approx. EUR 78 million), which Cyprus Airways took from Hellenic Bank (see recital 22 above). This loan had been serviced regularly by Cyprus Airways through instalments twice per year and in August 2013 the outstanding amount to be repaid was EUR 28,5 million. Under the notified restructuring aid, the Company would not repay the outstanding amount to Hellenic Bank. As a result, the State guarantee would be called, which would create a new debt of Cyprus Airways towards the State, since the latter would have to repay the loan. That debt of EUR 28,5 million would subsequently be converted by the State into equity of Cyprus Airways;

- (d) Cyprus Airways' Provident Fund for the Cyprus-based employees (excluding pilots) is a defined benefit scheme, paid through contributions by the employees and Cyprus Airways. The entire amount allocated to the Provident Fund based on the contractual entitlements of the personnel ('purchasing power') is ultimately at the disposal of the Company. The Provident Fund's purchasing power is also guaranteed by the Company. As a result of poor investment performance, the Provident Fund has been facing a significant deficit, calculated on 1 January 2013 as EUR 12 million on a going concern basis (that is to say assuming that Cyprus Airways would continue to operate) or EUR 14,9 million on a discontinued basis. In the context of the restructuring aid, the Cypriot State will cover EUR 8,6 million of the Provident Fund's deficit on a going concern basis, whereas the remaining amount will be covered through real estate transactions (proceeds from the sale of the Company's property in Nicosia and transfer of the Company's property in Athens to the Provident Fund).
- (35) The elements (a) and (b) of the restructuring aid correspond to measures 1 and 2, which were subsequently notified in the context of restructuring aid to Cyprus Airways.
- (36) In addition, the 2013 restructuring plan also envisaged a possible EUR 10 million short-term loan by the State, which, according to the Cypriot authorities, would be granted on market terms. However, the envisaged granting date or conditions of this loan were not clear and it is not included in the total amount of EUR 102,9 million.
- (37) The Cypriot authorities explained that the 2007 restructuring plan had initially been implemented according to schedule. However, the revenues of the Company started declining in 2009, as a result of the financial crisis in the Union, in particular Greece and Cyprus. Other factors for the new difficulties of the Company were the Turkey overflight ban, which does not allow Cyprus Airways to reach prospective markets, such as Russia, Armenia and Ukraine in competitive flight times, the unrest in the Middle East and the operation of low-cost competitors with a base in Cyprus.

3.2.2.2. The 2013 Restructuring Plan

- (38) The 2013 restructuring plan envisaged a restructuring period from April 2012 (first sale of an asset in the context of the own contribution of the Company to its restructuring costs) until the end of 2017. The aim is to restore the profitability of Cyprus Airways as of the financial year 2014. However, the Cypriot authorities clarified that the 2013 restructuring plan did not address the fundamental business model of the Company. The Company has already undertaken some of the measures envisaged under the 2013 restructuring plan.

Restructuring of fleet and operations

- (39) The 2013 restructuring plan envisaged a reduction of the fleet to six aircraft (from 13 in the beginning of April 2012). This reduction was achieved by 10 December 2013, through the sale of two owned aircraft in April 2012 and the expiry of the lease contracts for another five aircraft. Out of the remaining fleet of six aircraft, five aircraft, which have been leased by Cyprus Airways, would be kept in operations, whereas one aircraft, which was owned by the Company, would be held as spare.
- (40) The reduction in the fleet would be reflected in a reduced number of routes to 13. The following routes had already been closed since April 2012: LCA-ATH-SKG-LCA; LCA-ATH-HER-LCA; LCA-ATH-RHO-LCA; LCA-LED⁽⁸⁾. The following routes were also planned to be closed: LCA-HER-RHO-LCA; LCA-SKG-HER-LCA; LCA-SKG-RHO-LCA; LCA-FCO; LCA-VIE and LCA-LHR, which would be replaced by LCA-STN⁽⁹⁾. Also, the Company would reduce the frequency of three routes: LCA-LON, LCA-SKG and LCA-HER⁽¹⁰⁾. The following routes were envisaged to be maintained: LCA-ATH, LCA-SKG, LCA-HER, LCA-AMS, LCA-CDG, LCA-SVO, LCA-SOF, LCA-FRA, LCA-MUC, LCA-ZRH, LCA-TLV, LCA-BEY, LCA-STN⁽¹¹⁾. According to the Cypriot authorities, the 2013 restructuring plan thus envisaged a capacity reduction of 35 % in terms of ASK⁽¹²⁾ as compared to the 2012 capacity.
- (41) The plan envisaged a better allocation of flight times, in order to maximise fleet utilisation. The route to London was changed from Heathrow to Stansted and is considered as strategic, because of its attractiveness.

⁽⁸⁾ ATH: Athens; SKG: Thessaloniki; HER: Heraklion-Crete; RHO-Rhodes; LED: St. Petersburg.

⁽⁹⁾ FCO: Rome Fiumicino; VIE: Vienna, LHR: London Heathrow, STN: London-Stansted.

⁽¹⁰⁾ LON: Collectively referred to airports in the London area.

⁽¹¹⁾ AMS: Amsterdam Schiphol; CDG: Paris Charles de Gaulle; SVO: Moscow Sheremetyevo; SOF: Sofia; FRA: Frankfurt am Main; MUC: Munich; ZRH: Zurich; TLV: Tel Aviv; BEY: Beirut.

⁽¹²⁾ Available seat kilometres.

Cost reduction measures

- (42) The 2013 restructuring plan envisaged reduction of direct costs in the total amount of EUR 45,7 million by the end of the financial year 2014 as a base scenario. Of these cost reductions, EUR 16,2 million is due to a decline in volume including part of staff redundancies and pay-cuts related to this decline while the remaining EUR 29,5 million is due to additional savings. The main components are staff redundancies (EUR 17,6 million); other staff cost reduction (EUR 4,5 million); reduction in fuel costs (stemming from a unified fleet of Airbus A320 with reconfigured seat capacity — EUR 12,5 million); passenger savings costs (such as removal of the catering option in economy class — EUR 5,5 million); reduction and renegotiation of ground handling fees at LCA airport (EUR 4,2 million); reduction and renegotiation of airport and en route fees (EUR 3,3 million); ceased aircraft lease costs (EUR 4,5 million).
- (43) In addition to the fleet and routes reduction, the following measures had been implemented by January 2014: removal of catering in economy class, renegotiation of ground handling fees at LCA airport leading to EUR 1,2 million savings (as opposed to EUR 0,6 million expected in the 2013 restructuring plan); 10 % salary and Provident Fund contribution reductions. However, the reduction of landing and parking fees at LCA airport is not expected to be achieved in the foreseeable future due to on-going disputes on other charges which do not allow for renegotiation of the landing and parking fees at this stage.
- (44) As regards staff redundancies, the staff number decreased from 1 037 since December 2011 to 650 in January 2014, whereas further redundancies of 321 staff members seem to have been agreed but pending. The Cypriot authorities clarified that no *ex gratia* compensation had been granted for these redundancies.

Revenue initiatives

- (45) As regards new revenue initiatives, the 2013 restructuring plan assumed fare increases of 2-3 % per year as of 2015 in the base scenario. As a low case, the 2013 restructuring plan assumed a revenue decrease of 1 % in 2014 and no increase after 2015. In addition, the plan made reference to ancillary revenue from additional services provided to passengers, but it did not provide any amount.

Restoration of viability — assumptions

- (46) The 2013 restructuring plan envisaged the restoration of the Company's viability as of 2014. The plan contemplated the following financial results in the base scenario, assuming that the financial restructuring (under measure 4) would be implemented before the end of 2013:

Table 1
Envisaged profit and loss (base scenario) (in million EUR)

	2013	2014	2015	2016	2017
Revenues	168,1	108,2	109,6	111,7	113,1
EBIT	(18,8)	0,4	2,1	4,6	6,0
Net result before tax	(18,9)	0,4	2,1	4,6	6,0
EBIT %	(24,9) %	0,4 %	1,9 %	4,1 %	5,3 %
Capital reserves	0,0	0,0	0,0	0,0	0,0
Total reserves	(103,1)	(102,7)	(100,5)	(96,0)	(90,0)
Total equity	1,4	1,8	4,0	8,5	14,5

- (47) Concerning profitability, the 2013 restructuring plan contemplated the following profitability:

Table 2
Envisaged profitability

	(in %)			
	2014	2015	2016	2017
ROE (Return On Equity)	21,2	54,1	53,5	41,3
ROCE (Return On Capital Employed)	1,2	6,1	11,4	13,0

- (48) Apart from the above-mentioned restructuring measures, the results were based on the following assumptions:
- (a) Reduction in passengers and revenue, as a result of the reduced network;
 - (b) Savings in fuel costs because of increased use of a fuel management system. The price of fuel was assumed flat;
 - (c) Planned rescheduling of third-party debt leading to no interest to accrue or be paid and no new lending;
 - (d) Stable USD/EUR exchange ratio until 2017;
 - (e) No hedging against fuel price or USD/EUR exchange rate risks due to the inability to provide any collateral for such instruments.
- (49) The profitability was mainly driven by the remaining flights LCA-BEY, LCA-TLV, LCA-SOF and LCA-SVO, which are the only flights with positive EBIT during the restructuring period. The other maintained routes are envisaged to have zero or negative net profit.
- (50) The 2013 restructuring plan included a high (best-) and low (worst-) case scenario. The low case scenario reflected only the revenue decrease described in recital 45 above and resulted (at EBIT level) in a loss of EUR 0,3 million for 2014, EUR 0 for 2015 and a profit of EUR 0,3 million for 2016 and 2017.
- (51) The plan acknowledged certain risks related to the restoration of viability, without reflecting their impact on the different scenarios, notably the low case. In particular:
- (a) Macroeconomic risk, especially related to a possible rise of the oil price or a change in the USD/EUR exchange rate. For these two risks, the plan calculated separately the impact of a 1 % variation at approximately EUR 310 thousand and EUR 425 thousand for one year, respectively.
 - (b) Risk of increased competition on the routes to Tel Aviv (due to an Open Skies deregulation agreement expected to lead to increased competition on this route as of 2015) and Moscow (due to expected increase of the frequencies operated by Cyprus Airways' competitor Transaero). The potential impact of these risks on the future revenues of Cyprus Airways was not modelled.

Restructuring costs and funding

- (52) The total restructuring costs amounted to EUR 147,4 million and would be allocated according to the following categories:

Table 3
Restructuring costs (in EUR million)

Accumulated losses	99,7
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Other restructuring costs (aircraft lease settlements, redundancy entitlements etc.)	10,4
Working capital	37,4
Total restructuring costs	147,4

- (53) The total restructuring aid foreseen by the 2013 restructuring plan amounted to EUR 102,9 million, that is to say 69,8 % of the restructuring costs. The Company would contribute to the restructuring costs ('own contribution') through the sale or transfer of assets at an estimated total value of EUR 54,46 million. The 2013 restructuring plan envisaged that the own contribution would be composed of the following items:

Table 4

Suggested own contribution in the 2013 restructuring plan

	Amount (in EUR million)	Estimated realisation date
Sale of two Airbus A319 aircraft	22,1	Concluded in April 2012
Sale of evening LHR slot	15	Under negotiation
Sale of morning LHR slot	10	Late 2014
Sale of spare parts	3,5	EUR 2,0 million in 2013; EUR 1,1 million in 2014; EUR 0,4 million in 2015
Sale of property in Nicosia	3,1	Concluded on 6 August 2013
Transfer of property in Athens to Provident Fund	0,76	Transfer agreement concluded in August 2013
Total suggested own contribution	54,46	

- (54) As regards the concluded sales (two Airbus A319 aircraft, property in Nicosia), the Cypriot authorities provided the sale contracts which confirmed the amounts assumed by the 2013 restructuring plan. As regards non-realised sales, the Cypriot authorities had provided valuation studies carried out by specialised companies regarding the two LHR slots and the property in Athens.

Avoidance of undue distortions of competition

- (55) The Cypriot authorities proposed to consider some of the afore-mentioned measures as compensatory measures, in order to minimise the impact on competition and competitors. In particular:
- Discontinuing profitable routes⁽¹³⁾ representing 8,8 % of ASK of 2012: HER-SKG; LCA-FCO; LCA-LED; LCA-LED-PFO-LED-LCA; RHO-SKG-RHO. In addition, reduction of capacity on profitable routes: LCA-LON; LCA-ATH; LCA-SKG; LCA-HER. The Cypriot authorities considered that overall the ASK would be reduced by 24 % on profitable routes as compared to the 2012 capacity;
 - Sale of the two LHR slots. Since LHR is a fully coordinated airport, the Cypriot authorities considered that these slots would provide sufficient compensation to potential competitors;

⁽¹³⁾ The 2013 restructuring plan considered routes which have positive gross contribution to the company's costs, that is to say, revenue minus variable cost, to be profitable routes.

c. Fleet reduction by seven aircraft.

- (56) The Cypriot authorities maintained that the participation of the State to the 2012 capital increase was not State aid but nonetheless included measure 1 in their notified restructuring aid. They also argued that the 2013 restructuring plan was prudent, it included sufficient compensatory measures, the own contribution of the Company was as high as possible and that it would restore the Company's profitability in the medium term.
- (57) Overall, the Cypriot authorities explained the importance of air transport for the Cypriot economy and repeated the exceptional and unforeseeable circumstances, which should allow Cyprus Airways to receive additional restructuring aid. They also added to those circumstances the operation of an 'illegal' airport in the occupied northern part of Cyprus, which Turkish airlines are allegedly using to bring tourists from European destinations to Cyprus.

3.2.2.3. *Measure 5: Training aid*

- (58) According to the Cypriot authorities during the period 2010-2011 Cyprus Airways received training aid of EUR 269 317,94 under the Scheme for constant training programmes for individual enterprises implemented by the Cypriot authorities pursuant to Commission Regulation (EC) No 800/2008⁽¹⁴⁾ (General Block Exemption Regulation, 'GBER').
- (59) Contrary to their argumentation in relation to the notified measures (see e.g. recital 68), in their submissions regarding the training aid scheme and in particular the submission of 14 March 2013, the Cypriot authorities argued that Cyprus Airways was not in difficulty when the training aid in question was granted. The Cypriot authorities thus consider that the measure was in line with the national training aid scheme, which is based on the GBER, and thus compatible with the internal market.

3.3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

3.3.1. **The first formal investigation procedure**

- (60) In the decision of 6 March 2013 (recitals 41-46), the Commission reached the preliminary conclusion that Cyprus Airways could be considered a firm in difficulty within the meaning of the Communication of the Commission on Community guidelines on State aid on rescuing and restructuring firms in difficulty ('2004 Rescue and Restructuring Guidelines')⁽¹⁵⁾ since at least 2010.
- (61) Against that background, the Commission reached the preliminary conclusion that measures 1, 2 and 3 constituted State aid and it expressed doubts as regards their compatibility with the internal market. The measures did not seem to be in line with the 2004 Rescue and Restructuring Guidelines, due to the absence of a restructuring plan for the capital increase and the form of aid for the rescue aid, which seemed to include also part of the capital injection. The Commission also raised doubts as regards the 'one time, last time' principle, according to which a company may only receive rescue and/or restructuring aid only once every 10 years. It questioned in particular whether the justifications brought forward by the Cypriot authorities would constitute exceptional and unforeseeable circumstances that could allow further restructuring aid.

3.3.2. **The second formal investigation procedure**

- (62) In the decision of 4 February 2014, the Commission reiterated its preliminary conclusion that Cyprus Airways could be considered as a firm in difficulty since 2010. Thus, the Commission reached the preliminary conclusion that measures 4 (which included also measures 1 and 2) and 5 constituted State aid and it expressed doubts as regards their compatibility with the internal market, because the measures did not seem to be in line with the 2004 Rescue and Restructuring Guidelines (measures 1, 2 and 4) and the GBER (measure 5).

⁽¹⁴⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (OJ L 214, 9.8.2008, p. 3).

⁽¹⁵⁾ Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2), the validity of which was extended in 2009 (OJ C 156, 9.7.2009, p. 3) and in 2012 (OJ C 296, 2.10.2012, p. 3). Although the Commission has adopted and published new guidelines for rescue and restructuring aid (OJ C 249, 31.7.2014, p. 1), in this decision the Commission will continue to refer to the 2004 Rescue and Restructuring Guidelines, because the measures under investigation were notified before 1 August 2014. In addition, to the extent aid has already been granted without the Commission's authorisation and therefore in breach of Article 108(3) of the Treaty (i.e. measures 1, and 5), it was granted before the entry into force of the new guidelines.

- (63) In particular, the Commission expressed doubts that the restructuring plan was founded on prudent assumptions and would restore the viability of the Company within a reasonable timescale in line with relevant case practice. The Commission also did not consider that the level of own contribution of the Company was sufficient and questioned whether the proposed compensatory measures indeed concerned non-loss making routes.
- (64) Finally, the Commission repeated its doubts as to the circumstances justifying an exception from the 'one time, last time' principle. It noted that Cyprus Airways expanded its domestic flights in Greece between 2011 and 2013 and was thus consciously increasing its exposure to the Greek market. The Turkey overflight ban on Cypriot aircraft and the operation of an airport on the occupied territory of the island could also not qualify as exceptional circumstances, as they had been in place for a long time.
- (65) At any rate, the Commission noted that the amount granted as training aid should have been part of the restructuring aid to Cyprus Airways and thus taken into account also in the 2013 restructuring plan.
- (66) In the decision of 4 February 2014 the Commission did not take a position on the State aid qualification of a possible EUR 10 million short term loan, since the conditions were not clear.

4. COMMENTS ON THE FORMAL INVESTIGATION PROCEDURES

4.1. COMMENTS BY CYPRUS

- (67) Although this decision refers to three separate procedures, the Commission notes that there is an overlap of their scope, to the extent that they refer to the same beneficiary and some measures are the same. Thus, the Commission considers it opportune to summarise the comments by Cyprus on both formal investigation procedures together.
- (68) In its comments in the context of the first formal investigation procedure, the Cypriot authorities confirmed that Cyprus Airways has been a firm in difficulty since 2009.
- (69) As regards the contribution by the State to the 2012 share capital increase, the Cypriot authorities first insisted that the State acted like a prudent market economy investor, in order to protect the value of its investment and avoid a negative impact on other commercial activities in Cyprus which are related to Cyprus Airways. The lack of participation by other shareholders was attributed to the difficult situation of the Cypriot economy at that time. However, the Cypriot authorities accepted to include the participation of the State to the 2012 share capital increase in the notified restructuring aid.
- (70) As regards the rescue aid, the Cypriot authorities claimed that this was the minimum cash required by the Company until a new restructuring plan would be finalised, replacing the turnaround plan. They claimed that the interest rate of 1,66 %⁽¹⁶⁾ was the rate for healthy firms. They also pointed to the social impact of a bankruptcy of Cyprus Airways, without the rescue aid, and the importance of the Company for the connectivity of the island.
- (71) As regards the *ex gratia* compensation, the Cypriot authorities have argued that Cyprus Airways was not obliged to pay any such compensation to redundant personnel. Thus, if the State were to provide *ex gratia* compensation, this would not provide an advantage to Cyprus Airways, because it would not alleviate it from any contractual payment due.
- (72) As for the duration of the restructuring period, they pointed to the 2004 Rescue and Restructuring Guidelines, which require a restructuring period 'as short as possible', and quoted cases where the Commission had approved restructuring periods longer than five years⁽¹⁷⁾. They also explained that the period until December 2012 was essentially 'lost', due to a change in the Board of Directors, the preparation and non-implementation of the turnaround plan and the worsening financial situation of the Company, which did not allow the original plan to materialise, that is to say a *pari passu* capital increase not involving State aid and a rescue aid loan.

⁽¹⁶⁾ This is lower than the interest rate which was reported in the notification of the rescue aid, see recital 29.

⁽¹⁷⁾ Commission decision of 22 February 2006 in case N 464/2005, restructuring aid in favour of AB Kauno ketaus liejykla (OJ C 270, 7.11.2006, p. 2); Commission decision of 18 July 2001 in case NN 92/1999, measures in favour of Zentrum Mikroelektronik Dresden AG — Sachsen (OJ C 328, 23.11.2001, p. 5); Commission decision of 1 June 2005 in case N 584/2004, restructuring aid to AB Vingriai (OJ C 187, 30.7.2005, p. 15); Commission Decision 2010/3/EC of 6 November 2008 on State aid C 19/05 (ex N 203/05) granted by Poland to Stocznia Szczecińska (OJ L 5, 8.1.2010, p. 1).

- (73) In relation to the 2013 restructuring plan, the Cypriot authorities maintained their view that it would allow the Company to restore its viability, despite risks of increased competition and potential loss of passengers due to the elimination of catering in the economy class. They also argued that the plan was based on prudent assumptions about the financial position of the Company, the effectiveness of the maintained network, the fluctuation of fuel prices and the EUR/USD exchange rate. In addition, they pointed out that the 2013 restructuring plan envisaged medium to long-term revenue initiatives, which were not included in the 2013 restructuring plan calculations, such as possible introduction of direct marketing and selling methods.
- (74) For the loss-making routes, which the 2013 restructuring plan envisaged to maintain, the Cypriot authorities argued that they all had positive gross contribution (that is to say covering at least their variable costs) and that the Company needed to maintain a critical size of its network, in order to attract passengers.
- (75) In addition, the Cypriot authorities pointed to elements of the 2013 restructuring plan, which had developed better than anticipated, such as the successful reduction in ground handling expenses at LCA. They also clarified that there was no outstanding debt towards the ground handling Company at LCA.
- (76) As regards the compensatory measures, the Cypriot authorities indicated that all of the routes proposed to be abandoned or to reduce capacity, except for one ⁽¹⁸⁾, were profitable on a gross contribution level in 2012, that is to say covering their variable costs. They also provided a table with the ASK per route.
- (77) On the issues of aid limited to the minimum and own contribution, they provided additional assets, which Cyprus Airways intended to sell, in order to increase the level of own contribution, namely the remaining own aircraft and two engines. In the meantime, the two LHR slots had been sold for a total price that was higher than anticipated, thus increasing further the envisaged own contribution to 41,8 % of the restructuring costs.
- (78) The Cypriot authorities confirmed that the Provident Fund is part of Cyprus Airways but a separate legal entity and that the transfer of the property in Athens meant that Cyprus Airways would no longer have control over it. Thus, they insisted that the transfer of the property in Athens to the Provident Fund was a genuine own contribution, which reduced the restructuring costs stemming from the coverage of its deficit.
- (79) In fact, the Cypriot authorities also explained that the restructuring aid under measure 4 would be adjusted to the realised own contribution, so that the sum of the two amounts would cover only the restructuring costs. Thus, higher revenue through the own contribution would mean lower restructuring aid.
- (80) The final proposed own contribution was thus as follows:

Table 5
Updated suggested own contribution after comments by Cyprus

	Amount (in EUR million)	Realisation — Evaluation
Sale of two Airbus A319 aircraft	22,1	Concluded in April 2012
Sale of evening LHR slot	6,3	Transfer agreement concluded in March 2014
Sale of morning LHR slot	22,8	Transfer agreement concluded in June 2014

⁽¹⁸⁾ The route LCA-ATH-LCA appeared to have a negative gross contribution in 2012. The Cypriot authorities explained that this route was operated in combination with other domestic routes in Greece and that between LCA and ATH it was profitable on a gross contribution level. However, the Cypriot authorities never submitted the data that would justify this claim.

	Amount (in EUR million)	Realisation — Evaluation
Sale of spare parts	3,5	No expert evaluation — estimated: EUR 2,0 million in 2013; EUR 1,1 million in 2014; EUR 0,4 million in 2015 Realised based on evidence provided by the Cypriot authorities: EUR 0,86 million
Sale of property in Nicosia	3,1	Concluded on 6 August 2013
Transfer of property in Athens to Provident Fund	0,76	Backed by expert evaluation — Transfer agreement concluded in August 2013
Sale of one Airbus A320	2,5	No expert evaluation — sale pending
Sale of two engines	0,51	Concluded on 28 April 2014
Total suggested own contribution	61,57	

- (81) The Cypriot authorities acknowledged that the envisaged own contribution of 41,8 % is less than the level required by the 2004 Rescue and Restructuring Guidelines (50 % of the restructuring costs for large firms). However, they argued that the case of Cyprus Airways was one of particular hardship, which should justify a lower own contribution, in particular due to the economic and financial situation of the country and the Turkey overflight ban. They also pointed to the significant reduction of capacity.
- (82) As regards the 'one time, last time' principle, the Cypriot authorities in various submissions have reiterated their arguments as regards the impact of the financial crisis on Greece and Cyprus, the Turkey overflight ban on Cypriot aircraft, the operation of an 'illegal' airport in the occupied northern part of Cyprus, the unstable political situation in the Middle East and the fact that the granting of rescue and/or restructuring aid should not be a sufficient ground to prohibit further such aid to the same beneficiary.
- (83) The Cypriot authorities argued that the expansion of Cyprus Airways' domestic flights in Greece between 2011-2013 was a proof of the fact that the impact of the crisis was difficult to predict and that some Middle East routes, representing a 'not negligible' part of the Company's revenues, had a significant drop in passenger numbers, such as a 94 % drop of passengers from Egypt. Relevant warnings of the adverse effect of the economic situation in Europe and unrest in the Middle East on Cyprus Airways, already found in the Company's annual reports of 2007, 2008 and 2009 and mentioned by the Commission in the decision of 6 March 2013, were deemed 'generic statements'.
- (84) The Cypriot authorities also pointed out that the total number of passengers in the Cypriot market remained relatively stable during the recent years, but that most passengers now originated from Israel and Russia. The Turkey overflight ban meant that Cyprus Airways had a disadvantage in operating to the Russian market, due to the additional flight time. Furthermore, they provided evidence that although passenger numbers in the Greek market dropped marginally since 2008, the average fare of Greek flights (including domestic flights) dropped significantly.
- (85) As regards the EUR 10 million short-term loan, the Cypriot authorities explained that they expected to sell the evening LHR slot for a high price and therefore the granting of the loan would not be necessary.
- (86) Finally, the Cypriot authorities justified the provision of training aid during 2010-11 by arguing that Cyprus Airways only entered in difficulties in late 2011. This was in contradiction with their previous submissions (see recital 68 above).

4.2. COMMENTS BY INTERESTED PARTIES

- (87) During the two formal investigation procedures, comments were submitted by Air France Consulting, three competitors (Ryanair, International Airlines Group and a third competitor who did not wish its identity to be disclosed), trade unions of Cyprus Airways⁽¹⁹⁾ and the beneficiary.
- (88) Air France Consulting, who prepared the turnaround plan, clarified that the plan provided a turnaround in one year and full financial recovery of Cyprus Airways within two years and that the required capital could be provided through financial restructuring, as opposed to cash. It also stated its belief in the credibility of the turnaround plan and argued that the plan was based on Cyprus Airways developing operations out of Athens on international European routes. Further, it stated that decisions taken by Cyprus Airways in 2013 (reducing the fleet to 6 aircraft, making redundant 490 staff) would only make the Company's financial situation more fragile.
- (89) The three competitors disagreed with the arguments by the Cypriot authorities as regards the significance of Cyprus Airways for the infrastructure and development of Cyprus and declared themselves ready to expand routes to/from Cyprus.
- (90) As regards the existence of aid and compatibility, competitors agreed with the Commission that the participation of the State to the Company's share capital increase was not what a market economy investor would have done.
- (91) Competitors also questioned the restoration of the viability of the Company, expressing doubts as to the effectiveness of the maintained network and fleet and whether the assumptions of the plan and the envisaged profitability were realistic, especially with regard to the fuel savings and the additional revenue through a fare increase. They also pointed to increased competition risks for profitable routes envisaged to be maintained by Cyprus Airways, in addition to Tel Aviv and Moscow.
- (92) Competitors also doubted the existence of truly exceptional and unforeseeable circumstances that would justify an exception to the 'one time, last time' principle. In addition, the competitor who did not wish to disclose its identity considered that the profitability of the routes proposed as compensatory measures should be measured on a net profit level, that is to say including allocated fixed costs, and not only on a gross level, that is to say only including variable cost.
- (93) Finally, Ryanair questioned whether the Company could achieve the envisaged reduction in staff due to trade union resistance and suggested that, if the restructuring aid to Cyprus Airways was found compatible, this could be on the condition that the Company abandons routes that remained unprofitable three years after the approval. Ryanair also argued that it and other companies have been subject to the same conditions in relation to the unrest in the Middle East and the economic crisis in Greece and Cyprus. Despite that, Ryanair claimed that other companies have managed to adapt and grow in the new environment, citing as an example its own growth in the Greek and Cypriot market in recent years. Further, in its submission of 6 June 2014, Ryanair pointed to a press article of 19 May 2014 indicating that the Cypriot government had pledged EUR 4 million to be provided to Cyprus Airways' staff that have been made redundant and claimed this constitutes further State aid to Cyprus Airways.
- (94) Cyprus Airways and its trade unions supported the arguments of the Cypriot authorities and reiterated their belief in the viability of the Company and its role for the economy and connectivity of Cyprus.

4.3. COMMENTS BY CYPRUS ON THE COMMENTS BY INTERESTED PARTIES

- (95) The Cypriot authorities considered it unnecessary to comment on the turnaround plan and the comments by Air France Consulting, given the existence of an updated restructuring plan. They repeated the important role of Cyprus Airways for the economy and connectivity of the island and insisted that the unrest in the Middle East was an exceptional and unforeseeable situation having an impact on Cyprus Airways. They doubted that competitors could fill in any gaps in connectivity resulting from a possible bankruptcy of Cyprus Airways, given the seasonality of the market.

⁽¹⁹⁾ PASYPI-PALPU (Pancyprian Airline Pilots Union), SYNIKA (Cyprus Airways Employees Trade Union), ASYSEKA (Independent Trade Union of Employees in Cyprus Airways Group), SIDIKEK PEO (Trade Union of Semi-public, municipal and communal employees of Cyprus), SYPKKA (Trade Union of Flight Attendants of Cyprus Airways).

- (96) As regards the compatibility of the measures with the 2004 Rescue and Restructuring Guidelines, the Cypriot authorities insisted that the 2013 restructuring plan was founded on realistic assumptions and was not underestimating any negative effects stemming from the small fleet or difficulties in realising cost initiatives.
- (97) Finally, the Cypriot authorities stated in their submission of 9 September 2013 that no *ex gratia* payments would be granted to employees made redundant. Subsequently, in their submission of 3 August 2014, the Cypriot authorities explained that the Government has, for socioeconomic reasons, decided to compensate directly former Cyprus Airways employees that had already resigned or had been made redundant. The decision was taken and compensations were paid only after the resignations or redundancies had been finalised and thus would not constitute State aid to Cyprus Airways. All legal obligations of Cyprus Airways towards those employees were honoured fully by the Company itself.
- (98) The Cypriot authorities also did not consider that the approval of the aid should be subject to any conditions.

5. ASSESSMENT

- (99) This Decision will assess whether the measures under scrutiny constitute State aid to Cyprus Airways within the meaning of Article 107(1) of the Treaty and whether such aid may be compatible with the internal market.
- (100) The Commission notes that the aid provided by measure 4 notified together with the 2013 restructuring plan in October 2013 already includes the aid provided by measure 1 (disbursed as advanced payments between September and December 2012), as well as measure 2 (rescue aid notified in December 2012 and partially disbursed between January and July 2013). Both these measures were implemented with a view to ensure short-term survival of the Company before a comprehensive restructuring plan could be prepared. Since the turnaround plan of 2012 was not implemented, the Commission considers both these measures as part of the 2013 restructuring plan and it will thus only assess measures 1 and 2, to the extent they constitute State aid, in the context of measure 4, that is to say as one overall restructuring aid measure.

5.1. EXISTENCE OF STATE AID

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

5.1.1. Measures 1, 2 and 4

- (102) In the decision of 6 March 2013, the Commission reached the preliminary conclusion that measure 1, that is to say the participation of the State to the 2012 share capital increase of Cyprus Airways, constituted State aid.
- (103) The measure involved State resources and was imputable to the State. It provided a selective advantage to Cyprus Airways, because the Commission considered that a private investor would not have provided capital to the Company under such conditions, given the serious difficulties of Cyprus Airways, the absence of viability prospects at the date of granting as well as the alternative of a shareholder loan including appropriate securities. In addition, practically no existing private shareholder of Cyprus Airways participated in the capital increase since only EUR 106 thousand were collected from private shareholders (compared to EUR 13,67 million originally expected). The shareholding of the State in Cyprus Airways thus increased from 69 % to 93,67 %. The measure was therefore not in line with the market economy investor principle⁽²⁰⁾.

⁽²⁰⁾ See, for example, Case C-305/89 *Italy v Commission* ('ALFA Romeo') [1991] ECR I-1603, paragraphs 18 and 19; Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 51; Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* [1999] ECR II-17, paragraph 104; Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012] ECR II-0000, paragraph 48.

- (104) The Commission does not agree with the position of the Cypriot authorities that the State acted as a market economy investor in order to protect the value of its investment, because the capital increase of EUR 31,33 million was anyway not sufficient to allow the survival of the Company. This was proven by the fact that the Company received additional rescue funding as part of measure 2 (rescue aid) only a few months later. As regards the absence of participation of other investors due to the stressed situation of the Cypriot economy at that time, the Commission notes that if such an investment had been attractive for a market investor, one can expect that foreign investors would have expressed an interest.
- (105) At any rate, the Commission takes note of the intention of the Cypriot authorities to include the participation of the State to the 2012 share capital increase in the notified restructuring aid.
- (106) Measure 1 thus enabled Cyprus Airways to continue operating because the Company did not have to face the consequences normally following from its poor financial results. Since Cyprus Airways competes in the liberalised EEA market for air transport with other EEA airlines, measure 1 had the potential to distort competition and affect trade between Member States.
- (107) Measure 2 was notified as a rescue aid loan provided in the form of a government loan, which would bear an interest of 1,76 % and should be repaid by 30 June 2013. The Commission considered in its decision of 6 March 2013 that no prudent creditor would have provided a loan with such interest rate to a firm in difficulty. In addition, the Cypriot authorities have not demonstrated how Cyprus Airways would be able to repay the loan after six months. Since all other criteria under Article 107(1) of the Treaty are fulfilled (as further explained in the decision of 6 March 2013, to which the present decision refers on that point), measure 2 constitutes State aid. The Cypriot authorities acknowledge that the loan constitutes rescue aid in their reply to the decision of 6 March 2013. The Commission notes that the loan will not be repaid and has been notified by the Cypriot authorities in the context of the restructuring aid (measure 4).
- (108) Measure 4 was notified as restructuring aid. Indeed, all of its components involve State resources and are imputable to the State, either in the form of a capital injection, a conversion of debt into equity or by directly covering part of the Provident Fund's deficit. Measure 4 provides a selective advantage to Cyprus Airways, since a market economy investor would not have provided such funding to a company in such a financial situation, (with accumulated losses of EUR 99,7 million, highly over-leveraged and its capital base eliminated). Finally, for the reasons set out in recital 106 above, the measure is likely to affect trade between Member States and to distort competition.
- (109) Thus, the Commission concludes that measure 4 constitutes State aid within the meaning of Article 107(1) of the Treaty in favour of Cyprus Airways. In accordance with the notification, the aid amounts to EUR 102,9 million. The Commission takes note of the statement by the Cypriot authorities that the possible granting of the short-term loan of EUR 10 million will not be necessary and therefore does not include the loan into the total restructuring aid. As regards the granting date, the Commission notes that measure 4 has been granted in tranches.
- (110) Tranche (a) amounting to EUR 31,33 million (the State participation to the 2012 share capital increase) was granted as follows:

Table 6

Granting dates of the State's participation to the 2012 share capital increase

Amount (in EUR million)	Granting date
3,0	12 September 2012
3,0	20 September 2012
5,0	26 September 2012

Amount (in EUR million)	Granting date
4,0	11 October 2012
16,33	28 December 2012
Total: 31,33	

- (111) Tranche (b) amounting to EUR 34,5 million (the rescue aid loan) was granted as follows:

Table 7

Granting dates of the State's 2013 rescue aid loan

Amount (in EUR million)	Granting date
3,0	22 January 2013
5,0	29 January 2013
3,5	28 February 2013
10,0	2 May 2013
13,0	26 July 2013
Total: 34,5	

- (112) As regards the other tranches of measure 4, that is to say (c) the calling of the State guarantee and the subsequent conversion of the debt of EUR 28,5 million into equity, and (d) the coverage of EUR 8,6 million of the Provident Fund's deficit, the Commission does not have any indication that they have already been granted.

5.1.2. Measure 3

- (113) The Commission takes note of the clarification provided by the Cypriot authorities in September 2013 that no *ex gratia* compensation had been or would be granted to employees made redundant.
- (114) Almost one year later, in their submission of August 2014, the Cypriot authorities indicated that in May/June 2014 the Cypriot government has, for socioeconomic reasons, decided to compensate directly former Cyprus Airways employees that had already resigned or been made redundant. The decision was taken and compensations were paid only after the resignations or redundancies had been finalised. All legal obligations of Cyprus Airways towards those employees were honoured fully by the Company itself.
- (115) According to the Cypriot authorities, the resignations and redundancies of Cyprus Airways' employees under the 2013 restructuring plan were implemented without any additional compensation offered by the Cypriot government. Rather, the latter would have taken an *ex post* decision to directly compensate former Cyprus Airways employees.
- (116) It thus appears that the Cypriot authorities' initial intentions to provide *ex gratia* compensation to employees to be made redundant was abandoned and the Commission therefore considers that it is not necessary to conclude on the State aid qualification for measure 3.

5.1.3. Measure 5

- (117) The amount of EUR 269 317,94 was granted to Cyprus Airways in 2010 and 2011 through a State aid scheme, which allowed grants from the State budget to selected companies for training purposes. Thus, the Commission concludes that measure 5 constitutes State aid within the meaning of Article 107(1) of the Treaty in favour of Cyprus Airways. This qualification is not disputed by the Cypriot authorities.

- (118) The training aid was granted to Cyprus Airways for 303 training projects during the years 2010 and 2011. However, the Cypriot authorities did not provide a breakdown of the granting date of each project.

5.1.4. Conclusion on existence of State aid

- (119) In the light of the above, the Commission considers that it is not necessary to assess whether measure 3 constitutes State aid. The Commission considers that measures 1, 2, 4 and 5 constitute State aid within the meaning of Article 107(1) of the Treaty.
- (120) The total amount of State aid comprised in measures 1, 2 and 4 is EUR 102,9 million. The first two tranches, that is to say EUR 65,83 million, have already been granted on various dates between 12 September 2012 and 26 July 2013.
- (121) The State aid comprised in measure 5 is EUR 269 317,94 and was granted during 2010-2011.

5.2. UNLAWFUL AID

- (122) The measures 1, 2 and, hence, measure 4 constitute State aid and were granted in breach of the notification and stand-still obligations established in Article 108(3) of the Treaty. The same applies to measure 5. Consequently, each of those measures constitutes unlawful State aid.

5.3. COMPATIBILITY OF THE AID

- (123) Inasmuch as certain measures constitute State aid within the meaning of Article 107(1) of the Treaty, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article. According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ⁽²¹⁾.
- (124) The Cypriot authorities were initially of the view that measure 1 did not entail State aid and notified measure 2 as rescue aid. However, following the first formal investigation procedure and the doubts raised by the Commission therein, as well as the envisaged non-repayment of the rescue loan under measure 2, the Cypriot authorities have subsequently argued that measures 1, 2 and 4 are compatible as restructuring aid under the 2004 Rescue and Restructuring Guidelines.
- (125) In particular, the Cypriot authorities pre-notified a restructuring plan on 22 July 2013 and notified an updated plan on 23 October 2013. They subsequently provided additional clarifications. However, the main assumptions and ideas of the 2013 restructuring plan remained unchanged since the notification of 23 October 2013.
- (126) As regards measure 5, the Cypriot authorities argued that it was compatible training aid under the GBER. However, the Commission has established that Cyprus Airways has been a firm in difficulty since 2009, in line with a submission by the Cypriot authorities. According to point (c) of Article 1(6) of the GBER, companies in difficulties are excluded from its scope of application. Therefore, Cyprus Airways has not been eligible for training aid since 2009.
- (127) In addition, according to point 20 of the 2004 Rescue and Restructuring Guidelines, 'a firm in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. Consequently, the Commission considers that aid to firms in difficulty may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest only if the conditions set out in these Guidelines are met.' Thus, the Commission can only assess measure 5 as restructuring aid subject to the 2013 restructuring plan.
- (128) Given that only one compatibility basis is appropriate for measures 1, 2, 4 and 5, the Commission considers it opportune to assess all measures together. For this assessment, the Commission will make reference in particular to points 31-77 of the 2004 Rescue and Restructuring Guidelines.

⁽²¹⁾ Case C-364/90, *Italy v Commission*, [1993] ECR I-2097, paragraph 20.

5.3.1. Eligibility — Firm in difficulty

- (129) In the decision of 6 March 2013 (recitals 41-46) the Commission concluded on a preliminary basis that Cyprus Airways has been a firm in difficulty since 2010. This preliminary conclusion was reiterated in the decision of 4 February 2014 (recitals 83-84). Subsequently the Cypriot authorities acknowledged that Cyprus Airways has been a firm in difficulty since 2009.
- (130) According to information from publicly available financial reports, Cyprus Airways' key financial data since 2009 were as follows:

Table 8

Cyprus Airways' key financial data 2008-H1 2012 (in EUR million)

	2008	2009	2010	2011	H1 2012 (*)
Turnover	311,4	247,5	236,3	212,8	71,3
EBT	2,1	- 3,2	- 2,9	- 23,8	- 34,2
Registered capital	35,2	35,2	35,2	35,2	35,2
Own equity	13,9	9,4	7,7	- 15,9	- 48,6

(*) Cyprus Airways has not published financial statements since the first half of 2012.

- (131) Point 10(a) of the 2004 Rescue and Restructuring Guidelines states that a limited liability company is considered to be in difficulty where 'more than half of registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'.
- (132) Furthermore, according to point 11 of the 2004 Rescue and Restructuring Guidelines, a firm may be considered to be in difficulty 'where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value'. In this respect, according to the General Court case-law, 'the existence of negative own capital [...] may be considered to be an important indicator that an undertaking is in a difficult financial situation' ⁽²²⁾.
- (133) Point 10(a) of the 2004 Rescue and Restructuring Guidelines reflects the assumption that a company experiencing a massive loss in its registered capital will be unable to stem losses which will almost certainly condemn it to go out of business in the short or medium term. The Commission considers that the same assumption applies *a fortiori* to a company that has lost its entire registered capital and has negative equity ⁽²³⁾.
- (134) As indicated in Table 8 above, Cyprus Airways had negative own equity as of 2011. Further, own equity was decreasing already in 2009 and 2010 and was well below the level of the registered capital. With regard to point 11, Table 8 demonstrates that Cyprus Airways had diminishing turnover and increasing losses already since 2009. In 2009, turnover fell by almost 21 % as compared to 2008 and the Company recorded a loss (EBT) of EUR 3,2 million. This trend continued in the subsequent years.
- (135) In view of the above and taking into account the submissions of the Cypriot authorities (see recital 68 above), the Commission comes to the conclusion that Cyprus Airways has been a firm in difficulty since 2009 partly in accordance with point 10 (in particular as of 2011) and in any event in accordance with point 11 of the 2004 Rescue and Restructuring Guidelines.
- (136) According to point 33 of the 2004 Rescue and Restructuring Guidelines, 'The firm must qualify as a firm in difficulty within the meaning of these Guidelines'. This condition is therefore met.

⁽²²⁾ Joined Cases T-102/07 *Freistaat Sachsen v Commission* and T-120/07 *MB Immobilien and MB System v Commission*, [2010] ECR II-585, paragraph 106.

⁽²³⁾ See Commission Decision 2008/716/EC of 2 April 2008 on State aid C 38/07 (ex NN 45/07) implemented by France for Arbel Fauvet Rail SA, paragraph 35 (OJ L 238, 5.9.2008, p. 27).

5.3.2. Duration of the 2013 restructuring plan — Restoration of long term viability

- (137) Points 35-37 of the 2004 Rescue and Restructuring Guidelines provide that: '35. The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself. The plan must be submitted in all relevant detail to the Commission and include, in particular, a market survey. The improvement in viability must derive mainly from internal measures contained in the restructuring plan; it may be based on external factors such as variations in prices and demand over which the company has no great influence, but only if the market assumptions made are generally acknowledged. Restructuring must involve the abandonment of activities which would remain structurally loss-making even after restructuring.'
- (138) '36. The restructuring plan must describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It must take account, inter alia, of the present state of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses. It must enable the firm to progress towards a new structure that offers it prospects for long-term viability and enables it to stand on its own feet.'
- (139) '37. The plan must provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital must be enough to enable the restructured firm to compete in the marketplace on its own merits. Where the firm's difficulties stem from flaws in its corporate governance system, appropriate adaptations will have to be introduced.'
- (140) As regards the duration, the notified restructuring plan covers the period from the first sale of an asset in the context of the own contribution of the Company to its restructuring costs in April 2012 until the end of 2017 and envisages to restore the profitability of Cyprus Airways as of the financial year 2014. The duration of the restructuring period according to the notification is thus five years and six months.
- (141) The Commission observes that this is longer than the restructuring period approved by the Commission for other airlines, which is normally five years ⁽²⁴⁾.
- (142) In addition, the Commission observes that measure 5 was granted during the period 2010-11. Given that measure 5 was granted at a time when the Company was already in financial difficulty, it did not fall under the GBER. This means that it was either incompatible training aid or would have to be considered as restructuring aid the compatibility of which would have to be assessed in that context. In the latter scenario, this would extend the restructuring period to approximately seven years (and should then also form part of the notified restructuring plan).
- (143) A longer restructuring period may be accepted by the Commission in justified cases. However, in this case, the Cypriot authorities were not able to justify why Cyprus Airways would need longer than five years to conclude its restructuring. Indeed, the Commission observes that the 'lost' time described by the Cypriot authorities in recital 72 above due to delays in the internal decision making process of the State ⁽²⁵⁾ was within the control of the authorities. Further, unlike in other cases, the 2013 restructuring plan of Cyprus Airways does not present any of the specificities previously accepted by the Commission in the decisions referred to by the Cypriot authorities, which would allow

⁽²⁴⁾ See Commission decision of 9 July 2014 in case SA.34191 (2012/C) regarding measures implemented by Latvia for A/S Air Baltic Corporation (airBaltic), not yet published, recital 179; Commission decision of 9 July 2014 in case SA.32715 (2012/C) regarding Adria Airways d.d., not yet published, recital 131; Commission Decision 2013/151/EU of 19 September 2012 on the State aid SA.30908 (11/C, ex N 176/10) implemented by the Czech Republic for České aerolinie, a.s. (ČSA — Czech Airlines — Restructuring plan) (OJ L 92, 3.4.2013, p. 16), recital 107 and Commission Decision 2012/661/EU of 27 June 2012 on the State aid No SA.33015 (2012/C) which Malta is planning to implement for Air Malta plc. (OJ L 301, 30.10.2012, p. 29), recital 93; Commission decision of 29 July 2014 in case SA.36874 (2013/N) regarding restructuring aid for LOT Polish Airlines S.A., not yet published, recital 241.

⁽²⁵⁾ Around four months elapsed between the Board resolution in February 2012 and the Council of Ministers approval of a draft law allowing the capital increase in June 2012. Further, additional conditions were asked for by the House of Representatives before approving the capital increase.

the Commission to conclude that a longer restructuring period in the present case could be accepted. Such specificities could for instance be a very significant reduction in capacity or a particularly small market share⁽²⁶⁾.

- (144) Consequently, the Commission does not agree that the timescale of five years and six months (and even less so seven years) is reasonable in the case of Cyprus Airways.
- (145) As regards the content of the 2013 restructuring plan, the Commission observes that the Cypriot authorities did not sufficiently address the doubts expressed in the decision of 4 February 2014.
- (146) In particular, the Cypriot authorities maintained that the plan took into account the effectiveness of the maintained network and potential loss of passenger demand, that there was no risk of adverse fluctuation of fuel price and of the EUR/USD exchange rate, based on their fluctuation during the recent past. They also maintained that the envisaged financial position of the Company was satisfactory in comparison to its poor past performance. They pointed at elements of the 2013 restructuring plan that had developed better than anticipated, such as the renegotiation of the ground handling fees at Larnaca airport.
- (147) However, in the decision of 4 February 2014 the Commission expressed doubts because it had reasons to consider that many assumptions of the 2013 restructuring plan were not prudent enough, in light of its experience with other restructuring plans in the airline sector, given the competitive situation in the market and the general principle that a credible restructuring must also take into account the realistic possibility of adverse developments.
- (148) Indeed, the Commission notes that the assumptions made by Cyprus Airways are neither generally acknowledged nor supported by evidence about market prospects. In fact, competitors challenged those assumptions, especially in relation to the potential pressure by competitors on envisaged profit-making routes, the fuel savings and the anticipated revenue from the fare increase.
- (149) The Commission notes that the baseline scenario of the 2013 restructuring plan envisages that the Company will have a positive EBIT of EUR 0,4 million already in 2014 and increase it in the subsequent years. However, the Commission observes that the plan presumes that no interest on third party debts accrues or is paid during the whole restructuring period. However, the 2013 restructuring plan only indicates that the third party debt will thus need to be rescheduled without providing any details of how this will be achieved. The trade and other payables (excluding Hellenic bank debt) on the balance sheet for 2013-18 are forecasted to remain at the level of EUR 27,9 million. Therefore, the third party debt amount is significant and any failure to achieve its restructuring may have serious consequences for the financial forecasts.
- (150) The Commission reiterates its argument included in the decision of 4 February 2014 that at the end of the restructuring period, Cyprus Airways would be a company with zero capital reserves and negative total reserves. Such a company cannot be considered viable, since effectively no safety margin will exist.
- (151) The Commission further notes that the measures proposed in the 2013 restructuring plan do not seem to be appropriate to address the circumstances that led to the Company's difficulties, as established in the notification. In particular, the plan envisages maintaining three non-profit-making routes to Greece and two to the Middle East, despite the fact that those two markets contributed to the Company's difficulties. The plan also envisages maintaining at least four routes in direct competition with low cost airlines and increasing the fares. Finally, it maintains at least one route, which is significantly affected by the Turkey overflight ban.

⁽²⁶⁾ In the Commission decision of 22 February 2006 in case N 464/2005, restructuring aid in favour of AB Kauno ketaus liejykla, also cited by the Cypriot authorities, the Commission approved a longer restructuring period based among others on a 46 % reduction in capacity. Cyprus Airways will only reduce its capacity by 35 %. The Commission has also approved a longer restructuring period taking into account the very small market share of the company, the fact that measures occurred before the country was being considered a functioning market economy, and dramatic operational restructuring measures. Commission decision of 1 June 2005 in case N 584/2004, restructuring aid to AB Vingriai (OJ C 187, 30.7.2005, p. 15). The precedents of Zentrum Mikroelektronik Dresden AG — Sachsen and Stocznia Szczecińska, referred to by the Cypriot authorities, are also not relevant, because in the former the aid was approved under older guidelines for rescue and restructuring and took into account the specific situation of an originally State owned enterprise in the former East Germany, while in the latter the aid was not approved.

- (152) At any rate, the 2013 restructuring plan does not include any concrete assessment of the future prospects of supply and demand in the relevant markets, apart from acknowledging the risk for competition pressure on some routes to be maintained.
- (153) The Commission further notes that the worst-case scenario does not sufficiently take into account the weaknesses of the Company and risks applicable in the relevant markets, some of which had been identified in the plan itself. Such weaknesses and risks include the pressure by competitors, the deviation of key parameters underlying the financial projections of the baseline (for example, average unit revenue per passenger (yield), fuel price, USD/EUR exchange rate, drop in demand) and the economic situation in key markets.
- (154) In fact, the worst-case scenario reflected only a revenue decrease of 1 % and projected a positive EBIT of only EUR 0,3 million in 2016 and 2017. Yet, if any additional risk as admitted by the 2013 restructuring plan would materialise, such as a 1 % rise of the oil price or 1 % change in the EUR/USD exchange rate, this would be sufficient to wipe out the envisaged profits (see recital 51 above). These risks are further aggravated by the fact that Cyprus Airways does not have the necessary collateral to be able to hedge against the fuel price or exchange rate risk. Furthermore, the Commission observes that, in order to establish a worst-case scenario, previous airline cases normally had considered much larger deviations of the baseline parameters⁽²⁷⁾. Further, the risk of significantly increased competition in particular on routes Tel Aviv and Moscow, representing Cyprus Airways' fourth and fifth most important routes in terms of the number of passengers, were not taken into account despite being explicitly mentioned in the 2013 restructuring plan. In addition, the possibility of a prolonged recession in Greece and Cyprus should also have been taken into account.
- (155) The Commission therefore concludes that the 2013 restructuring plan does not sufficiently address the circumstances that led to Cyprus Airways' difficulties, does not fully take into account the future prospects of the market and does not include a credible worst-case scenario.
- (156) Finally, the Commission notes that the 2013 restructuring plan does not address the fundamental problems of the Company's business model, which appears to have contributed to its difficulties. Cyprus Airways' restructuring is based on the existing business model with traditional operation as a full-service airline relying mainly on intermediary parties for the sale of tickets, while it is in competition with either low-cost airlines or full-service airlines with a wider network, most of which rely on direct sales for tickets online.
- (157) The Commission therefore concludes that points 35-37 of the 2004 Rescue and Restructuring Guidelines are not fulfilled, because (i) the duration of the 2013 restructuring plan is unreasonably long, (ii) the plan does not restore the long-term viability of the Company within a reasonable timescale and is not based on realistic assumptions and (iii) the plan does not take into account the market situation with sufficiently variable scenarios.

5.3.3. Avoidance of undue distortions of competition

- (158) According to points 38-42 of the 2004 Rescue and Restructuring Guidelines, a company receiving restructuring aid must provide compensatory measures for the distortion done by the State aid to competition. Those measures may comprise divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned and must refer to non-loss making routes or products.
- (159) The Cypriot authorities have proposed compensatory measures, including discontinuing or reducing capacity of non-loss making routes, the sale of two LHR slots and the reduction of fleet and ASK.

⁽²⁷⁾ See for instance Commission decision of 9 July 2014 in case SA.34191 (2012/C) regarding measures implemented by Latvia for A/S Air Baltic Corporation (airBaltic), not yet published, recital 185; or Commission decision of 29 July 2014 in case SA.36874 (2013/N) regarding restructuring aid for LOT Polish Airlines S.A., not yet published, recital 234.

- (160) The Commission notes that the sale of two slots in LHR, a fully coordinated airport ⁽²⁸⁾, can be considered as a sufficient reduction of entry barrier for competitors, especially given the fact that Cyprus Airways would abandon this airport altogether. The significant reduction of fleet is also a significant sign of reduction in capacity.
- (161) As regards the routes proposed as compensatory measures, the Commission has consistently accepted as compensatory measures abandoning or reducing capacity in non-loss making routes, that is to say routes which have a positive gross contribution, taking into account variable costs ⁽²⁹⁾.
- (162) However, the Commission observes that the route LCA-ATH, for which the Cypriot authorities proposed to reduce the capacity operated by Cyprus Airways as a compensatory measure, had a negative gross contribution and the Cypriot authorities did not provide evidence to support their argument that the part of the route relevant as compensatory measure (reduction of frequency by 4 flights a week) was non-loss making.
- (163) Nevertheless, the Commission notes that the proposed 24 % reduction of ASK as compared to the 2012 capacity is higher than the reduction of ASK proposed in other airline restructuring cases ⁽³⁰⁾. This means that, even if the reduction in the capacity of the LCA-ATH route (representing only 0,84 % of total ASK) would not be taken into account, the reduction of ASK would still be sufficiently high.
- (164) The Commission therefore concludes that points 38-42 of the 2004 Rescue and Restructuring Guidelines are fulfilled.

5.3.4. Aid limited to the minimum: real contribution, free of aid

- (165) According to points 43-45 of the 2004 Rescue and Restructuring Guidelines, beneficiaries of restructuring aid are expected to make a significant contribution to the 2013 restructuring plan from their own resources, which should be at least 50 % of the restructuring costs for large firms, such as Cyprus Airways, except for exceptional circumstances and in cases of particular hardship. The own contribution must be real, that is to say, actual, excluding all future profits such as cash flow.
- (166) The Commission takes note of the updated amount of proposed own contribution of EUR 61,57 million. This represents 41,8 % of the total restructuring costs of EUR 147,4 million and the restructuring aid would be adjusted to the realised own contribution, so that the sum of the two amounts covers only the restructuring costs.
- (167) The Commission observes that the proposed own contribution of 41,8 %, even if it were fully achieved, would be below the threshold of 50 % set by the 2004 Rescue and Restructuring Guidelines.
- (168) Moreover, the Commission observes that based on table 5 in recital 79, only the sale of assets worth EUR 55,67 million has actually been realised. The sale of other proposed items, such as the spare parts and the Airbus A320, has not been fully realised and their values are not backed by an expert valuation.
- (169) As regards the sale of spare parts, the actual proceeds until now (EUR 0,86 million) demonstrate that the original estimates of EUR 2,0 million in 2013 and EUR 1,1 million in 2014 were largely overestimated. In the absence of any expert valuation of the remaining spare parts to be sold and without any other evidence such as an agreement indicating clearly the future purchase commitment by the buyer, possible future proceeds from the spare parts sales cannot be taken into account as sufficiently real and actual own contribution.

⁽²⁸⁾ Fully coordinated airports are defined in Article 2(g) 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). According to Article 3(4) of Regulation (EEC) No 95/93, those airports experience, at least during certain periods, capacity constraints.

⁽²⁹⁾ See Commission decision of 9 July 2014 in case SA.34191 (2012/C) regarding measures implemented by Latvia for A/S Air Baltic Corporation (airBaltic), not yet published, recital 194; Commission decision of 9 July 2014 in case SA.32715 (2012/C) regarding Adria Airways d.d., not yet published, recital 143; Decision 2013/151/EU, recital 130.

⁽³⁰⁾ See Commission decision of 9 July 2014 in case SA.34191 (2012/C) regarding measures implemented by Latvia for A/S Air Baltic Corporation (airBaltic), not yet published, recital 195; Commission decision of 9 July 2014 in case SA.32715 (2012/C) regarding Adria Airways d.d., not yet published, recital 136.

- (170) As regards the sale of the Airbus A320, which the Cypriot authorities in their submission of 11 May 2014 describe as 'an old aircraft', four out of the five offers submitted during 2014 have been withdrawn and in the case of the fifth offer the bidder has not responded to Cyprus Airways' counter-proposal. As the Cypriot authorities have not provided any expert valuation of the aircraft, the projected sales revenue of EUR 2,5 million cannot be accepted as a sufficiently real and actual own contribution.
- (171) In addition, the Commission does not agree with the Cypriot authorities and considers that the transfer of a property to the Provident Fund cannot be considered as an actual and real own contribution. That is because, as confirmed by the Cypriot authorities and as identified in the Company's annual accounts, the Provident Fund is controlled by Cyprus Airways, regardless of its legal status, its funds are ultimately at the disposal of the Company and its deficit is part of the restructuring costs⁽³¹⁾. Therefore, by transferring an asset to the Provident Fund, Cyprus Airways does not bring any real own contribution to its restructuring costs.
- (172) In light of the above, the Commission considers the level of actual and real own contribution as EUR 55,67 million, which is 37,8 % of the restructuring costs.
- (173) The Cypriot authorities argue that the own contribution can be exceptionally lower than 50 % in case of particular hardship. More specifically, they argue that a lower level of own contribution in case of Cyprus Airways can be justified by the economic and financial crisis as well as the Turkish airspace ban putting additional burden on the Company.
- (174) The Commission takes note of the particular situation of the Cypriot economy and acknowledges that disposing assets in such a situation may not be an easy process. However, the Commission notes that Cyprus Airways operates in an international and liquid market, because the potential buyers of its assets, including aircraft, slots, spare parts, may come from any part of the world and may thus not be concerned by the situation in the Cypriot economy, as they can obtain financing easier and can transfer the assets or use them without any link to Cyprus.
- (175) Further, the Turkey overflight ban has been in place for many years and is not related in any way to the sale of airline-related assets which can be used elsewhere. In addition, the significant reduction of capacity is relevant for competitors, whereas the own contribution aims to limit the State aid required and show that the markets believe in the feasibility of the return to viability.
- (176) Finally, while the Commission has based on the 2004 Rescue and Restructuring Guidelines accepted own contributions as low as 40 % of the restructuring costs, due to exceptional circumstances⁽³²⁾, this still exceeds the level of own contribution by Cyprus Airways.
- (177) The Commission therefore concludes that points 43-45 of the 2004 Rescue and Restructuring Guidelines are not fulfilled. The 2013 restructuring plan does not limit the aid to the minimum necessary, since it does not include a sufficiently high, real and actual own contribution to the restructuring costs of Cyprus Airways.

5.3.5. Special conditions in relation to companies in assisted areas

- (178) The 2004 Rescue and Restructuring Guidelines provide that the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures and the size of the beneficiary's contribution, when justified by reasons of regional development and in particular if the beneficiary of the aid is located in an assisted region.

⁽³¹⁾ The statutes of Cyprus Airways and the Company's annual accounts reveal that it operates a number of retirement benefit plans, including the Provident Fund and that the Company assumes the liability for safeguarding the value of the Provident Fund and this liability is included in the Company's payables and provisions. In addition, the Company guarantees the purchasing power of the retirement benefits so that these are not less than a defined minimum total benefit.

⁽³²⁾ See Commission Decision 2010/175/EC of 22 July 2009 on State aid C 18/05 (ex N 438/04, N 194/05 and PL 34/04) awarded by Poland to Stocznia Gdańsk (OJ L 81, 26.3.2010, p. 19), recital 276.

- (179) In the case of Cyprus, for the period 2007-13 as well as 2014-20, two regions covering together 50 % of the Cypriot population are eligible to receive regional investment aid under the derogation of article 107(3)(c) of the Treaty (the Western Zone and the Easter Zone) ⁽³³⁾. The Cypriot authorities have also argued that Cyprus exhibits a number of territorial features impacting its socioeconomic development, namely the peripheral nature and its dependence on air and sea transport. Finally, they argued that the economic recession of the Cypriot economy should *a fortiori* merit the treatment of Cyprus as an assisted area.
- (180) The Commission notes that Cyprus Airways has its seat in Nicosia, which is not situated in any of the two assisted areas of Cyprus. Larnaca airport, arguably the main centre of Cyprus Airways' operations, is also not situated in one of those assisted areas. In addition, the Commission notes that, in order to ensure a level playing field, the status of an assisted area can only be established by a Commission decision, according to the criteria of the applicable Regional Aid Guidelines, and not based on other territorial characteristics or an economic recession.
- (181) Thus, the Commission cannot accept less stringent conditions as regards the criteria for the aid.

5.3.6. 'One time, last time' principle

- (182) Point 73 Section 3.3 of the 2004 Rescue and Restructuring Guidelines stipulates that rescue and/or restructuring aid should be granted only once and 'where less than 10 years have elapsed since the rescue aid was granted or the restructuring period came to an end or implementation of the restructuring plan has been halted (whichever is the latest), the Commission will not allow further rescue or restructuring aid.' This condition is known as the 'one time, last time' principle.
- (183) An exception to the 'one time, last time' principle is provided for in point 73(c) of Section 3.3 [please confirm]:
- [...]
- (c) *in exceptional and unforeseeable circumstances.*
- (184) The Commission has approved restructuring aid to Cyprus Airways in 2007 on the basis of a restructuring plan. Cyprus Airways is therefore in principle not eligible for further restructuring aid at present according to the 'one time, last time' principle and the Commission raised doubts as to whether exceptional and unforeseeable circumstances within the meaning of point 73(c) exist in this case.
- (185) Despite having commented extensively on that point following the opening of two formal investigation procedures, the Cypriot authorities were not able to justify why Cyprus Airways was faced with exceptional and unforeseeable circumstances, which would merit further restructuring aid ⁽³⁴⁾.
- (186) In particular, the Turkey overflight ban was introduced in 1974 ⁽³⁵⁾ and Cyprus has put in place an approved scheme for compensation of the additional costs incurred by any affected airlines, including Cyprus Airways (see recital 23 above). Thus, this event cannot qualify as exceptional and unforeseeable circumstance and the Cypriot authorities did not bring forward new evidence in that respect.

⁽³³⁾ See Commission decision of 24 January 2006 in case N 814/2006, on the Regional aid map 2007-13 (OJ C 68, 24.3.2007, p. 28).

⁽³⁴⁾ The Cypriot authorities refer to the Air Malta rescue aid decision which would have acknowledged exceptional circumstances and allowed rescue aid in a period that was shorter than 10 years from a previous restructuring aid (Commission decision of 15 November 2010 in case N 504/2010 — Air Malta plc — Rescue aid (OJ C 102, 2.4.2011, p. 4). The Commission notes that there are significant differences between the Air Malta case and the current case. The previous measure in the Air Malta case was carried out in April 2004, before accession of Malta to the EU, and was thus not subject to approval by the Commission. The Maltese authorities argued that the 2004 measure was in line with the market economy investor principle and thus did not constitute State aid. Due to the urgency of the rescue aid approval, the Commission was not in a position to arrive at a definitive conclusion about the aid character of the 2004 measure. However, in the subsequent restructuring aid decision (Decision 2012/661/EU) the Commission concluded that the 2004 measure did not constitute State aid. In the current case, there is no doubt that Cyprus Airways received restructuring aid in 2007. Further, one of the exceptional circumstances accepted by the Commission concerned the fact that at the time of the 2004 measure, access to Malta International Airport was governed exclusively by traffic rights in bilateral air agreements, while in 2010 access was open to all EU carriers. There was no such fundamental change between 2007 and now as regards access to Cypriot airports. Finally, while Malta depended for more than 50 % of its air traffic on Air Malta, the share of Cyprus Airways of the Cyprus air traffic was only 15 % in 2012 and since then has been further decreasing.

⁽³⁵⁾ See Commission decision of 27 June 2012 in case SA.32523 (11/N), paragraph 11.

- (187) For similar reasons, the operation of an 'illegal' airport in the northern part of Cyprus also cannot be considered as exceptional and unforeseeable circumstance, as the possibility for tourists to travel to and from the northern part of Cyprus has been in place at least since 2004.
- (188) The Commission also disagrees with the Cypriot authorities that the entry of any competitor, either a low-cost or full-service airline, can be considered as an exceptional and unforeseeable circumstance, given that Cyprus Airways operates in a liberalised sector and provided that its competitors are operating legally. As regards the allegation that the Cypriot State is subsidising competitors of Cyprus Airways, the Commission did not receive any substantiation of this allegation. At any rate, the Commission stresses that it cannot be argued that the State needs to provide State aid to Cyprus Airways in order to offset the harmful effects of an alleged measure that the State is claimed to have introduced itself, and qualify the latter as exceptional and unforeseeable circumstance.
- (189) As regards the unrest in the Middle East, the Commission considers that such a situation cannot be considered as exceptional, given the persistent unrest in parts of the region for many decades. As regards the economic impact of the most recent unrest referred to by the Cypriot authorities, namely the 'Arab Spring', the Company's annual reports show that the revenue from routes connecting Cyprus to the Middle East and the Gulf region appears to represent traditionally approximately 10 % of the total revenues of Cyprus Airways. Thus, even a significant drop in traffic would have a relatively small (even if 'not negligible') impact, that is to say it would affect at maximum 10 % of the total revenues of Cyprus Airways.
- (190) As regards the deterioration of the Greek and Cypriot economies, the Commission acknowledges those events, as well as the possible drop in the average fare for the Greek flights. However, the Commission recalls that Cyprus Airways expanded its domestic flights in Greece between 2011 and 2013, and was thus consciously increasing its exposure to the Greek market.
- (191) The available evidence in the 2013 restructuring plan and the information provided by competitors suggests that the total passenger traffic in the Cypriot market has increased since 2009 while the market share of Cyprus Airways has been reduced. In addition, other airlines operating in the region have also been confronted with the economic crisis, but have adjusted their pricing policy and network, in order to remain in the market. In fact, Ryanair pointed that it has even achieved growth in those markets.
- (192) In the light of the above, the Commission considers that Cyprus Airways, despite acknowledging the risks through explicit, albeit 'generic', statements in the annual reports in 2007, 2008 and 2009⁽³⁶⁾, and despite the options available, failed to make the necessary adjustments to its business, in order to avoid the effect of the economic deterioration in its main markets and to profit from new markets, as its competitors did. Those effects can therefore not qualify as an exceptional and unforeseeable circumstance, but should rather be attributed to the poor management and performance of Cyprus Airways.
- (193) The Commission therefore concludes that the exception of point 73(c) of Section 3.3 of the 2004 Rescue and Restructuring Guidelines is not fulfilled and that restructuring aid to Cyprus Airways would breach the 'one time, last time' principle.

5.3.7. Conclusion

- (194) In view of the above, the Commission finds that Cyprus has unlawfully implemented measures 1, 2, 4 and 5 in favour of Cyprus Airways, in breach of Article 108(3) of the Treaty.
- (195) The Commission also considers that measures 1, 2, 4 and 5 and the 2013 restructuring plan do not meet the conditions of the 2004 Rescue and Restructuring Guidelines. The Commission has not identified any other compatibility basis and the Cypriot authorities have also not claimed any alternative basis for compatibility of the measures (with the exception of the application of the GBER to the training aid — measure 5). Therefore, the Commission considers the aid to be incompatible with the internal market.

⁽³⁶⁾ See 2007 Annual Report, p. 97; 2008 Annual Report, p. 88; 2009 Annual Report, p. 91.

5.4. RECOVERY

- (196) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ⁽³⁷⁾. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽³⁸⁾.
- (197) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽³⁹⁾.
- (198) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ⁽⁴⁰⁾ stated that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...]'.
- (199) Thus, given that the measures in question in the total amount of EUR 66 099 317,94 (EUR 31,33 million in the form of the State's participation to the capital increase (measure 1), EUR 34,5 million in the form of the rescue aid loan (measure 2) and EUR 269 317,94 in the form of the training aid (measure 5)) were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should therefore bear interest until effective recovery.

6. CONCLUSION

- (200) As regards measure 3, the procedure laid down in Article 108(2) of the Treaty has become devoid of purpose due to the non-implementation of the measure by Cyprus.
- (201) The Commission finds that measures 1, 2, 4 and 5 regarding the State's participation to the capital increase, rescue aid loan, restructuring aid and training aid respectively, in favour of Cyprus Airways constitute State aid within the meaning of Article 107(1) of the Treaty and are incompatible with the internal market, because the relevant conditions of the 2004 Rescue and Restructuring Guidelines were not met and no other compatibility grounds were identified.
- (202) As regards measures 1, 2, 4 and 5, the Commission finds that Cyprus has unlawfully implemented them in breach of Article 108(3) of the Treaty.
- (203) Finally, the Commission notes that Cyprus agreed to have the present decision adopted and notified in English.

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure under Article 108(2) of the Treaty initiated on 6 March 2013 in respect to potential *ex gratia* compensation by Cyprus to Cyprus Airways has become devoid of purpose, because Cyprus has abandoned the measure. That procedure is hereby closed.

⁽³⁷⁾ See Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

⁽³⁸⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽³⁹⁾ See Case C-75/97 *Belgium v Commission* [1999] ECR I-030671 paragraphs 64 and 65.

⁽⁴⁰⁾ 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).

Article 2

The State aid amounting to at least EUR 66 099 317,94, which results from the sum of EUR 31,33 million in the form of the State's participation to the capital increase, EUR 34,5 million in the form of the rescue aid loan and EUR 269 317,94 in the form of the training aid, unlawfully granted to Cyprus Airways by Cyprus in breach of Article 108(3) of the Treaty, is incompatible with the internal market.

Article 3

Any State aid in addition to the amounts referred to in Article 2 which Cyprus has granted or might want to grant to Cyprus Airways in the context of measure 4 is incompatible with the internal market.

Article 4

1. Cyprus shall recover the incompatible aid referred to in Article 2 from the beneficiary. It shall also recover any additional aid as referred to in Article 3 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁴¹⁾, and to Commission Regulation (EC) No 271/2008 ⁽⁴²⁾ amending Regulation (EC) No 794/2004.
4. As regards measure 4, Cyprus shall inform the Commission whether it has granted any additional amounts above those referred to in Article 2 in the context of this measure and shall also inform the Commission about the exact amounts granted and granting dates.
5. As regards measure 5, Cyprus shall inform the Commission about the dates when the individual amounts were granted.
6. Cyprus shall abolish measure 4 and cancel all outstanding payments of the aid referred to in Article 2 and 3 with effect from the date of adoption of this Decision.

Article 5

1. Recovery of the aid referred to in Article 2 and Article 3 shall be immediate and effective.
2. Cyprus shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 6

1. Within two months following notification of this Decision, Cyprus shall submit the following information:
 - (a) Information requested under Article 4 paragraphs 4 and 5;
 - (b) the total amount (principal and recovery interests) to be recovered from the beneficiary ⁽⁴³⁾;
 - (c) a detailed description of the measures already taken and planned to comply with this Decision;
 - (d) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Cyprus shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 and Article 3 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

⁽⁴¹⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽⁴²⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

⁽⁴³⁾ This information is to be provided in the form of the table attached to this Decision as an annex.

Article 7

This Decision is addressed to the Republic of Cyprus.

Done at Brussels, 9 January 2015.

For the Commission

Margrethe VESTAGER

Member of the Commission

ANNEX

**INFORMATION ABOUT THE AMOUNTS OF AID RECEIVED, TO BE RECOVERED AND ALREADY
RECOVERED (ALL AMOUNTS IN EUR)**

Identity of the beneficiary — measure	Total amount of aid received	Total amount of aid to be recovered (Principal)	Total amount already reimbursed	
			Principal	Recovery interest
Cyprus airways — State's participation to the capital increase	31 330 000 ⁽¹⁾	31 330 000		
Cyprus airways — Rescue aid loan	34 500 000 ⁽²⁾	34 500 000		
Cyprus airways — Training aid	269 317,94 ⁽³⁾	269 317,94		
<i>[Please adjust if any other aid was granted under Measure 4]</i>				

⁽¹⁾ Amount as referred to in recital 110 of the Decision.

⁽²⁾ Amount as referred to in recital 111 of the Decision.

⁽³⁾ Amount as referred to in recital 117 of the Decision.

COMMISSION DECISION (EU) 2015/1074**of 19 January 2015****on State aid SA.35842 (2014/C) (ex 2012/NN)****implemented by Italy — Additional public service compensation for CSTP***(notified under document C(2015)74)***(Only the Italian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By electronic notification of 5 December 2012, the Italian authorities notified, in accordance with Article 108(3) of the Treaty, the additional compensation awarded pursuant to a judgment by the *Consiglio di Stato* (Italy's Supreme Administrative Court) to Consorzio Salernitano Trasporti Pubblici SpA ('CSTP'), for the provision of passenger transport services by bus based on concessions granted by the Italian Region of Campania ('the Region') during the period 1997-2002 ('the period under review').
- (2) The notification was registered under case number SA.35843 and from 13 December 2012 treated as a non-notified measure since, according to the information available to the Commission, the Region was obliged to pay the additional compensation due to CSTP as from 7 December 2012, that is, after the Italian government had notified the measure to the Commission, but before a Commission decision had been adopted.
- (3) By letter dated 20 February 2014, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty ('the opening decision').
- (4) The opening decision was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission invited interested parties to submit their comments on the measure.
- (5) The Italian authorities submitted their observations on the opening decision by letters dated 21 and 25 March 2014.
- (6) The only third party to submit observations in reply to the opening decision was CSTP, the beneficiary of the measure. Its comments were received on 25, 26, 27 and 28 March 2014.
- (7) Italy did not submit any comments on the third-party observations.
- (8) After acceptance of a deadline extension by the Commission, the Italian authorities provided additional information by letter of 15 September 2014.

2. DESCRIPTION OF THE MEASURE**2.1. THE COMPANY**

- (9) CSTP is a public limited liability company providing local public transport services based on regional and municipal concessions. More specifically, according to the Italian authorities, CSTP operated a network of bus routes as concessionaire of the Region throughout the period under review covering approximately 9 million km per year.

⁽¹⁾ Commission Decision of 20 February 2014 on State aid SA.358423 (2012/NN) — Italy — PSO compensation for CSTP, OJ C 156 (23.5.2014, p. 39).

- (10) From the information provided by the Italian authorities, the Region has already paid EUR 131 632 525,80 to CSTP for the above-mentioned service during the period under review, of which EUR 125 869 212,47 for the operation and management of the service and EUR 5 763 313,32 for investments. Since it appears that that compensation was awarded to CSTP more than 10 years before the Commission sent its first request for information to the Italian State, that compensation will not be subject to an assessment in the current proceedings ⁽²⁾.
- (11) In addition to the above-mentioned sums already received, CSTP requested from the Region additional compensation of EUR 14 545 946 on the basis of Council Regulation (EEC) No 1191/69 ⁽³⁾ for the economic disadvantages it allegedly suffered as a result of public service obligations ('PSOs') allegedly being imposed upon it.
- (12) In 2008, the Regional Administrative Court in Salerno rejected CSTP's claim for additional compensation on the basis of Regulation (EEC) No 1191/69. That court held that, in accordance with Article 4 of Regulation (EEC) No 1191/69 ⁽⁴⁾, CSTP could not request compensation for economic disadvantages resulting from the imposition of PSOs without having previously requested the termination of those PSOs.

2.2. THE JUDGMENTS OF THE CONSIGLIO DI STATO

- (13) By judgment of 27 July 2009 (*Sentenza No 4683/09*), the Consiglio di Stato upheld the appeal by CSTP against the judgment of the Regional Administrative Court in Salerno and concluded that CSTP was entitled to receive additional compensation for the public service it had carried out in accordance with Articles 6, 10 and 11 of the Regulation (EEC) No 1191/69. That judgment does not precisely define from which legal act and in what form the PSOs were imposed, but stresses that an undertaking operating a public service cannot be denied its claim for repayment of the costs effectively incurred in performing that service. The Consiglio di Stato further considered that CSTP was entitled to receive public service compensation even in the absence of a prior request for the elimination of the PSOs.
- (14) According to the Consiglio di Stato, the precise amount of the additional compensation owed to CSTP had to be determined by the Region on the basis of reliable data taken from the accounts of the company, showing the difference between the costs attributable to the portion of CSTP's activities associated with the PSO and the corresponding revenues. However, the Region claimed that it was unable to do so, due to a lack of clear and reliable data.
- (15) By order (*ordinanza*) No 8736/2010 of 13 December 2010, the Consiglio di Stato appointed an expert to undertake that task. According to the Italian authorities, that expert was also unable to determine the amount to be compensated and it was only with the help of an additional expert, appointed by the Consiglio di Stato by order No 5897/2011 of 7 November 2011, that a specific amount of compensation was calculated using an 'inductive method', as prescribed by the Consiglio di Stato by order No 3244/2011 of 25 July 2011. On the basis of those calculations, the experts concluded that CSTP was undercompensated only for 1998 as a result of the application of the formula provided in Article 11 of Regulation (EEC) No 1191/69 (i.e. tariff obligation). The experts could not use an inductive method to calculate the undercompensation (if any) on the basis of Article 10 (i.e. obligation to operate or carry) of the same Regulation because of the lack of reliable data and the risk that such a method would duplicate the compensation calculated under Article 11. Implicitly, the experts thus assumed that a tariff obligation had been imposed on CSTP.

⁽²⁾ The Commission recalls that pursuant to Article 15 of 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), the powers of the Commission to recover aid are subject to a limitation period of 10 years, beginning on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period.

⁽³⁾ Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1).

⁽⁴⁾ Article 4(1) of Regulation (EEC) No 1191/69 states that: 'It shall be for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them'. Article 6(3) reads: 'The competent authorities of the Member States shall take decisions within one year of the date on which the application is lodged as regards obligations to operate or to carry, and within six months as regards tariff obligations. The right to compensation shall arise on the date of the decision by the competent authorities...'

- (16) Accordingly, the Consiglio di Stato issued Judgment No 5649/2012 of 7 November 2012 quantifying the additional compensation the Region was obliged to pay to CSTP at EUR 4 951 838, which represented the amount of undercompensation it suffered in 1998, and ordered payment of this sum to take place by 7 December 2012. Payment of that sum was made by the Region to CSTP on 21 December 2012.
- (17) It is the payment of this additional compensation by the Region to CSTP as a consequence of judgment No 5649/2012 that constitutes the non-notified measure and the subject matter of this Decision.

2.3. ADDITIONAL INFORMATION/OBSERVATIONS PROVIDED BY THE ITALIAN AUTHORITIES

- (18) According to the Italian authorities, CSTP, like other providers of regional scheduled bus transport services, operated on the basis of provisional licences (concessions) which had to be renewed annually upon the request of the company. Those concessions provided the company with the exclusive right to provide the relevant services.
- (19) The Italian authorities further maintain that CSTP requested concessions to provide services on the relevant routes from the Region in each year of the period under review and that those concessions always stipulated that the services were carried out entirely at the risk of the undertakings in question and, specifically, 'without the performance of the service constituting a right to a subsidy or compensation of any kind'. The Italian authorities provided a copy of a sample concession contract from 1973 and claimed that this corresponded to the one used with CSTP as regards the period under review. However, the Italian authorities did not provide any concession contracts actually concluded with CSTP during the period under review.
- (20) The Italian authorities maintain that under those concessions CSTP was free to propose the substitution of the forms of transport to be used by it or to apply for the termination in whole or in part of its PSOs where such obligations entailed an economic disadvantage to it, but that the company never exercised that right. The Italian authorities further allege that the company never informed the Region that it was suffering economic disadvantages or that it was carrying out obligations that it would not have performed if not obliged to do so under a PSO. Finally, according to the Italian authorities, CSTP never requested the termination of the PSO as allegedly required by Article 4(1) of Regulation (EEC) No 1191/69.
- (21) According to the Italian authorities, the public contributions granted to CSTP in the past were based on standard cost methodology, calculated on the basis of certain parameters established in Regional Law No 16/1983 ⁽⁵⁾, such as the number of kilometres awarded vis-à-vis the kilometres travelled, the number of employees and buses, which would vary depending on the type of service performed (urban, mountain, hill services), the legal and economic treatment of employees, the size of the undertaking, and the costs of the buses.
- (22) The Italian authorities also doubt whether CSTP has demonstrated that it had efficiently and correctly operated the PSOs in accordance with the requirements of Regulation (EEC) No 1191/69 and submit that CSTP did not have an account separation system as required by Article 1(5) of that same Regulation.

2.4. AMOUNT OF COMPENSATION

- (23) As explained in recital (15), the Consiglio di Stato appointed two experts to determine the additional compensation owed to CSTP by the Region on the basis of Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. On 27 September 2012, the two experts each issued their respective reports, but only the second expert was able to calculate the additional compensation due to CSTP by the Region.
- (24) As regards additional compensation for the obligation to operate or carry — Article 10 of Regulation (EEC) No 1191/69 — the experts frequently reiterate in their report that CSTP's additional compensation claims were not supported by sufficient documentary data to calculate this amount precisely. Moreover, the parties (i.e. CSTP and the Region) also submitted data that did not match or that were not precise enough, constituting only an approximation. Accordingly, the experts conclude in their report that the parties have provided inadequate documentary evidence for the assessment of unprofitable bus transport lines, which makes it impossible to have a reliable estimate in their regard, even using the 'inductive method' prescribed by the Consiglio di Stato. The experts therefore conclude that the additional compensation for the obligation to operate or carry, calculated on the basis of Article 10 of Regulation (EEC) No 1191/69 ⁽⁶⁾, should be zero.

⁽⁵⁾ *Legge Regionale 25 gennaio 1983, n. 16 Interventi regionali in materia di servizi di trasporto pubblico locale per viaggiatori* (Regional measures for local passenger transport services) available at: http://jtest.ittig.cnr.it:8080/cocoon/regioneCampania/xhtml?css=4&doc=/db/nir/RegioneCampania/1983/urn_nir_regione.campania_legge_1983-01-25n16&datafine=19830205

⁽⁶⁾ Article 10 of Regulation (EEC) No 1191/69 provides that the amount of compensation related to an obligation to provide transport services is to be determined as the difference between the reduction of revenues and the reduction of costs resulting from the termination of the corresponding obligation during the period concerned.

- (25) As regards additional compensation in relation to tariff-related obligations — Article 11 of Regulation (EEC) No 1191/69 — the experts conclude that it could not be calculated on the basis of paragraph 2 of that provision, since the parties never defined the state of the market, and that, accordingly, any compensation should be calculated on the basis of paragraph 1 of that provision. However, the experts acknowledge that a calculation on the basis of paragraph 1 is not possible either because of missing or unreliable data. Therefore, the 'inductive method' prescribed by the Consiglio di Stato was applied, whereby the concept of 'standard costs' based on a 'standard cost per unit' and the number of kilometres concerned by the concession were used to calculate whether CSTP was undercompensated during the period under review for the tariff obligations imposed on it.
- (26) On that basis, the experts calculated the amount of additional compensation using the formula provided in Article 11 of Regulation (EEC) No 1191/69, assuming that the tariff obligations were imposed on CSTP during the period under review, as summarised in the table below:

	1997	1998	1999	2000	2001	2002
A Revenues attributable to commercial management	40 303 387,71	42 312 390,51	41 174 023,85	42 399 523,59	42 010 059,97	42 010 059,97
B Actual revenues attributable to management in the present case	9 484 545,48	8 705 924,03	8 577 234,29	9 254 374,76	9 447 735,00	9 430 225,00
C Contributions already paid	34 106 026,86	29 935 681,81	34 124 760,15	35 199 742,20	33 496 192,00	33 869 048,00
A - (B + C)	-3 287 184,64	3 670 784,68	-1 527 970,59	-2 054 593,37	-933 867,03	-1 289 213,03
A - (B + C)		3 670 784,68				

- (27) It follows from those calculations that only in 1998 could CSTP claim to have been undercompensated as a result of the alleged tariff obligations being imposed on it. The amount of undercompensation was EUR 3 670 784,68, to which legal interest of EUR 1 281 053,57 was added, resulting in additional compensation of EUR 4 951 838,25. It is this amount which the Consiglio di Stato ordered the Region to pay to CSTP, which it actually paid on 21 December 2012.

2.5. GROUNDS FOR INITIATING THE PROCEDURE

- (28) As explained in the opening decision, the Commission had several doubts regarding the compatibility of the measure with the internal market.
- (29) First, the Commission questioned whether the four conditions laid down by the Court of Justice of the European Union ('CJEU') in its *Altmark* case-law⁽⁷⁾ had been fulfilled.
- (30) Second, the Commission had doubts regarding the exemption from the notification obligation under Regulation (EEC) No 191/69. The question of whether Article 17(2) of Regulation (EEC) No 1191/69 indeed exempted the Italian authorities from prior notification in the present case thus depends, first, on whether a PSO was in fact

⁽⁷⁾ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] EU.C.2003.415.

unilaterally imposed on CSTP by the Region and, second, on whether the compensation paid pursuant to that obligation complies with the requirements of Regulation (EEC) No 1191/69. The Commission could not conclude whether the compensation awarded to CSTP fulfilled those conditions.

- (31) Third, the Commission had doubts regarding the possible compatibility of the measure under Regulation (EC) No 1370/2007 of the European Parliament and of the Council⁽⁸⁾. If it was confirmed that at least one of the conditions for exemption from notification pursuant to Regulation (EEC) No 1191/69 was not met and an assessment under Regulation (EC) No 1370/2007 had to be conducted, the Commission had doubts whether the conditions of that Regulation were complied with in the present case.

3. COMMENTS BY ITALY

- (32) The Italian authorities at the national level did not provide any comments on the opening decision. Only the Campania Region did.
- (33) First, the Region observed that CSTP did not provide any evidence of a proper accounting separation.
- (34) It then reiterated that no unilateral imposition of PSOs took place during the period under review. Rather, the company, under the rules then in force, requested yearly renewal of concession services, so none of the concession acts entailed a unilateral imposition of PSOs. Moreover, the Region repeatedly asked CSTP to provide documentary evidence of the acts or contracts which imposed PSOs on it, in order to comply with the judgment, but, according to the Region, the company never replied to these requests. Nor did CSTP provide evidence that it had asked the Region to modify the conditions laid down in the concession contracts in terms of routes, times and tariffs, or that the Region had rejected such requests, if any had been forthcoming. Regarding the cap on tariffs, the Region noted that the tariffs imposed by the concession contracts derived from general measures of price policy applied by all companies operating in the same sector.

4. COMMENTS BY INTERESTED PARTIES

- (35) The only third party to submit observations in response to the opening decision was CSTP, the beneficiary of the measure. In its submissions, CSTP disagreed with the preliminary positions taken by the Commission in the opening decision.
- (36) First, it maintained that the Region unilaterally imposed PSOs on it during the period under review. To substantiate that claim, CSTP argued that those PSOs were not set out in the document awarding the concession, since that document did not exist, but derived solely from the internal acts of the Region, which predetermined the organisation of the undertaking and the compensation through the 'standard cost' mechanism. CSTP explained that Italy had regulated the PSOs by means of Law No 151/81, Regional Law No 16/83, Article 4 of Law No 59/97 and Legislative Decree No 422/97. The PSOs were entrusted to CSTP by the Region by means of a concession act in 1972/73 and renewed every year until 2003. The fact that the PSOs were imposed on CSTP during the period under review, such as tariff obligations, routes, times and stops, can be allegedly inferred from the following documents:
- the 'bridging service contract' signed by CSTP and the Region for the year 2003 in compliance with Article 46 of Regional Law No 3/02, revoking and replacing the existing concessions;
 - decision of the Regional Government (*delibera della Giunta Regionale*) No 4873 of 30 December 1999, authorising CSTP to modify some routes following requests from both the company and other petitioners;
 - decision of the Regional Government No 327 of 4 May 2000 which extended the duration of the suspension of the increase in costs for season tickets for bus transport services in the Region;
 - note 5171/2000, communicating the distinction between how to calculate the tariff for ordinary season tickets and season tickets for 'work lines' (*linee operaie*);

⁽⁸⁾ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

- decree of the Region's *Assessore dei Trasporti* No 1609/2001 concerning the change from lira to the euro, reminding the service providers that any irregular increase in tariffs was forbidden and that that prohibition constituted a 'concession/contractual obligation'.
- (37) Finally, CSTP argued that, since the Region repeatedly reduced the amount of the standard cost and applied that cost unevenly across the different routes and concessions, some operators decided to close certain bus routes consistently operated at a loss. The Region allegedly responded by saying that the operators were duty bound to operate the routes under the PSOs and that legal action would be taken against them for interrupting a public service if the routes were indeed withdrawn. According to CSTP, this showed that the PSOs were imposed upon it. However, CSTP did not provide evidence to support this claim.
- (38) Second, CSTP claimed that since it operated exclusively as a local public transport service provider and it carried on no other business, it was under no obligation to maintain separate accounts. CSTP explained that the applicable rules simply required that the accounting data relating to the public transport service operated under a PSO be supplied separately from those of any other business activities, but did not require any further accounting breakdown showing separately the costs and revenue for each route covered. CSTP is a fully public company whose corporate object, in the period under review, and still to this day, was solely to provide public transport services under PSOs. Consequently, the company's accounts contained only data on activities relating to PSOs, for the obvious and crucial reason that — apart from the rental services provided in 1998, shown separately in the company's accounts — during the years in question the company engaged in no other form of business activity. CSTP added that the reliability of the accounting data was never questioned by the Region, which, on the contrary, used them correctly as the basis for calculating and paying out the annual contributions.
- (39) Third, after having recalled the final national ruling of the Consiglio di Stato, CSTP challenged the three arguments put forward by the Region:
- the calculation was not supported by separate management accounts by cost centres such as to distinguish the activities subject to PSOs;
- given the absence of accounting data allowing the identification of the specific elements to be calculated pursuant to Articles 10 and 11 of Regulation (EEC) No 1191/69, the calculation had been performed inductively, with a method the Region termed as 'abstruse and aberrant';
- the calculation took no account of the fact that management by CSTP was not based on the criteria of efficiency required by Article 12 of Regulation (EEC) No 1191/69, as shown by comparison of the data relating to its activity with those concerning another local transport operator, SITA SpA.
- (40) CSTP considered that the accounting documents supplied by it could not be claimed to be insufficient to support the compensation claim merely because they consisted of annual financial statements and 'E forms' ⁽⁹⁾ and were not accompanied by full copies of the underlying accounting and administrative entries (accounting register, ledgers, invoices issued and received, ticket receipts, etc.). According to CSTP, this argument could easily be countered by noting that the Region had accepted the same data in the past, considering them reliable. Furthermore, the requirement to keep full accounting and administrative documentation for the period in question has now expired, and it is hence objectively difficult to demand copies at present. Therefore, it is fully appropriate to reconstruct the amount of compensation due via an inductive approach, as prescribed by the Consiglio di Stato. Finally the financial statements had been duly certified and their correctness and truthfulness had never been called into question. In conclusion, the accounts submitted by CSTP were clearly sufficient for calculating the compensation in full compliance with the requirements of Regulation (EEC) No 1191/69.
- (41) Concerning the correctness of the calculation method and its consistency with Union law, CSTP considered that it should be compensated for the disadvantage incurred in terms of the difference between lower revenue and greater costs, as a consequence of its PSOs. To establish the value of lower revenue on the basis of reliable data, CSTP first considered the actual annual operating revenue, which was the product of the actual number of units of measure of transport and the tariff imposed. It then identified the amount to be subtracted in accordance with Union rules, considering the revenue needed to balance the actual costs recorded in the annual accounts. The amount of the annual operating revenue coincides with the actual revenue obtained by the company in the activity provided under

⁽⁹⁾ *Modelli E*, namely the documents based on the accounts of the company containing the information necessary for the annual calculation of the public contribution.

a tariff obligation which is CSTP's sole activity. The revenue figure is taken from the annual financial statements of CSTP and from the E forms sent each year to the Region, which never questioned their reliability. Therefore there is really no need to break down those amounts into their component parts. As to the amount to be subtracted, CSTP claimed that it used a criterion that fully complied with the instructions contained in Regulation (EEC) No 1191/69 which allowed the use of the tariff the company would have applied had it operated on a commercial basis, which had to cover the actual costs incurred. As far as the difference between the costs which the undertaking would have incurred by applying the most favourable existing rate or operating on a commercial basis and the costs actually incurred were concerned, CSTP considered that its calculation is fully consistent with Article 11 of Regulation (EEC) No 1191/69, as it captured the lower cost incurred by the undertaking as a consequence of the PSOs on account of the contributions received from the Region to cover operating costs. Moreover, CSTP noted that both Articles 10 and 11 of that Regulation established the right of public transport companies subject to PSOs to be compensated for all negative financial impacts resulting from their obligations.

- (42) Fourth, concerning the state aid assessment in the opening decision, CSTP argued that the market for public transport in Italy in the period in question was not open to competition from undertakings established in other Member States. CSTP therefore concluded that there was no effect on trade or distortion of competition. Likewise, in view of the current organisation of the local public transport service based on the unilateral, exclusive concessions of certain routes, the compensation was not likely to distort competition. Furthermore, the standard cost/km was imposed by the Region and accepted by the concessionaire together with all the other PSOs, so there would therefore be no advantage. The tariff obligation, unlike the obligations to operate and carry, is not affected by any differentiation of the company's transport activities. Therefore, CSTP considered that at least three of the conditions laid down by the CJEU for identifying state aid were not met in the case at issue.
- (43) CSTP is of the opinion that the compatibility of the compensation had to be assessed with reference to Regulation (EEC) No 1191/69 and not to the Treaty provisions on state aid.
- (44) Concerning the exemption from the requirement to notify under Regulation (EEC) No 1191/69, CSTP considered that, since the Region imposed the tariff obligation unilaterally and the amounts do not constitute PSOs under a service contract but stem from correct application of the calculation under Article 11 of Regulation (EEC) No 1191/69 in the framework of a concession, the payment awarded as compensation was exempted from the notification requirement of Article 17(2) of that Regulation.

5. COMMENTS BY ITALY ON THE COMMENTS BY INTERESTED PARTIES

- (45) The Italian authorities did not send any comments on CSTP's comments.

6. ASSESSMENT OF THE AID

6.1. EXISTENCE OF AID

- (46) Pursuant to Article 107(1) of the Treaty, 'any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (47) Accordingly, for a support measure to be considered state aid within the meaning of Article 107(1) of the Treaty, it must cumulatively fulfil all of the following conditions:

- it must be granted by the State or through state resources;
- it must confer a selective advantage by favouring certain undertakings or the production of certain goods;
- it must distort or threaten to distort competition;
- it must affect trade between Member States.

6.1.1. State resources and imputability

- (48) The Commission notes that the judgment of the Consiglio di Stato requires the Region to pay additional compensation to CSTP with respect to the provision of scheduled bus services in the period under review on routes under the remit of the Region. The court-appointed experts calculated that CSTP suffered an economic disadvantage

in the form of undercompensation only for 1998 in the amount of EUR 4 951 838 as a result of alleged tariff obligations being imposed on it. On 21 December 2012, the Region paid this sum to CSTP in order to comply with that judgment.

- (49) The fact that the Region was obliged by a national court to pay compensation to an undertaking does not mean that the aid cannot be imputed to the Region complying with that judgment, since the domestic courts of that State are to be considered organs of that State and are thus bound by their duty of sincere cooperation ⁽¹⁰⁾.
- (50) The measure is thus imputable to the State and the resources from which that compensation has been paid are state resources.

6.1.2. Selective economic advantage

- (51) The Commission notes at the outset that CSTP is engaged in an economic activity, namely passenger transport for remuneration. Therefore, CSTP should be considered an 'undertaking' within the meaning of Article 107(1) of the Treaty.
- (52) The granting of the measure should also be considered selective, since it will only benefit CSTP.
- (53) As regards the granting of an economic advantage, it follows from the *Altmark* judgment that compensation granted by the State or through state resources to undertakings as consideration for PSOs imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute state aid within the meaning of Article 107(1) TFEU, provided that four cumulative conditions are satisfied ⁽¹¹⁾:
 - First, the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined;
 - Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
 - Third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
 - Fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (54) The *Altmark* judgment requires all four conditions to be satisfied cumulatively to exclude the presence of an economic advantage where compensation is granted to undertakings as consideration for public service obligations imposed on them.
- (55) The Commission notes first that neither the Italian authorities nor CSTP were able to provide it with any entrustment act related to the period under review and that CSTP has not been able to identify clearly obligations that it was required to discharge that could qualify as PSOs, as explained in more detail below in section 6.2, subsection (i).
- (56) Second, the Commission observes that the compensation awarded by the judgment of the Consiglio di Stato is based solely on an *ex post* calculation using an 'inductive method' in the absence of necessary and reliable data. The Commission therefore concludes that the parameters on the basis of which the alleged undercompensation was calculated by the court-appointed experts were not established in advance and that therefore the second *Altmark* condition does not appear to have been complied with in relation to the non-notified measure.
- (57) Considering the cumulative nature of the *Altmark* conditions, there is no need for the Commission to examine whether the other two *Altmark* conditions have been met in the present case. Accordingly, the payment of an additional compensation to CSTP for services performed during the period under review confers on that company a selective economic advantage within the meaning of Article 107(1) of the Treaty.

⁽¹⁰⁾ Case C-527/12 *Commission v Germany*, EU:C:2014:2193, paragraph 56 and the case-law cited. See also Case C-119/05 *Lucchini*, EU:C:2007:434, paragraph 59, described in recital (94) below.

⁽¹¹⁾ Case C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg*, [2003] EU:C:2003:415, paragraphs 87 and 88.

6.1.3. Distortion of competition and effect on trade between Member States

- (58) In its observations, CSTP argued that the market for public transport in Italy was not open to competition from undertakings established in other Member States during the period under review, so there could be no effect on trade between Member States or distortion of competition as a result of the disputed measure.
- (59) The Commission recalls, in the first place, that the disputed measure was implemented on 21 December 2012, long after the market for public passenger transport was opened to competition in Italy. Since it is at that point in time that the measure under review produces its effects on the market, it is also at that point in time that it must be assessed whether that measure is liable to distort competition or affect trade between Member States.
- (60) In any event, the Commission further notes that, as observed in the *Altmark* judgment, since 1995 several Member States had started to open certain transport markets to competition from undertakings established in other Member States, so a number of undertakings were already offering urban, suburban or regional transport services in Member States other than their State of origin by that point in time.
- (61) Therefore, any compensation granted to CSTP should be considered likely to distort competition for the provision of passenger transport services by bus and likely to affect trade between Member States to the extent that it impairs the ability of transport undertakings established in other Member States to offer their services in Italy and strengthens the market position of CSTP by releasing it from costs which it would normally have had to bear in its day-to-day management or normal activities⁽¹²⁾.
- (62) The Commission also notes that CSTP is active on other markets, i.e. rental services, even if according to CSTP they were rendered only in 1998, and thus competes with other companies within the Union on those markets. Any compensation granted to CSTP would necessarily also distort competition and affect trade between Member States on those markets as well.
- (63) Accordingly, the Commission concludes that the measure distorts competition and affects trade between Member States.

6.1.4. Conclusion

- (64) In light of the above, the Commission finds that the non-notified measure constitutes aid within the meaning of Article 107(1) of the Treaty.

6.2. EXEMPTION FROM THE NOTIFICATION OBLIGATION UNDER REGULATION (EEC) No 1191/69

- (65) According to CSTP, since the Region imposed the tariff obligation unilaterally on it and the amounts do not constitute PSOs under a service contract but stem from correct application of the calculation under Article 11 of Regulation (EEC) No 1191/69 in the framework of a concession, the payment awarded as compensation was exempted from the notification requirement under Article 17(2) of that Regulation. CSTP admitted that these PSOs were not set out in the document awarding the concession, which made no mention of them, but transpired solely from internal acts of the Region.
- (66) In accordance with Article 17(2) of Regulation (EEC) No 1191/69, compensation paid pursuant to the Regulation is exempted from the preliminary information procedure laid down in Article 108(3) of the Treaty and thus from the prior notification requirement.
- (67) However, it follows from the *Combust* judgment that the concept of 'public service compensation' within the meaning of that provision (Article 17(2)) must be interpreted in a very restrictive manner⁽¹³⁾. The exemption from notification provided by Article 17(2) of Regulation (EEC) No 1191/69 covers only compensation for PSOs imposed unilaterally on an undertaking pursuant to Article 2 of that Regulation that is calculated using the method described in Articles 10 to 13 of the same Regulation (the common compensation procedure), and not public service contracts as defined by Article 14 of that Regulation. Compensation paid pursuant to a public service contract as defined by Article 14 of Regulation (EEC) No 1191/69 which entails state aid must be notified to the Commission before it is put into effect. Failure to do so will result in that compensation being deemed unlawfully implemented aid in accordance with Article 108 of the Treaty.

⁽¹²⁾ Case C-172/03 *Heiser*, EU:C:2005:130, paragraph 55.

⁽¹³⁾ Case T-157/01 *Danske Busvognmænd*, [2004] EU:2004:76, paragraphs 77, 78 and 79.

- (68) The question of whether Article 17(2) of Regulation (EEC) No 1191/69 indeed released the Italian authorities from prior notification in the present case thus depends first, (i) on whether a PSO was in fact unilaterally imposed on CSTP by the Region and, second, (ii) on whether the compensation paid pursuant to that obligation complies with the requirements of Regulation (EEC) No 1191/69. The Commission will examine both questions in turn.

(i) *PSO unilaterally imposed*

- (69) The Commission notes that neither the Italian authorities nor CSTP were able to provide it with any entrustment act related to the period under review. CSTP only provided the Commission with contracts which were implemented as from 2003.
- (70) The Italian authorities claim that the sample concession contract provided by them — which concerned another undertaking — was the standard one in use in the Region during the period under review. However, the sample concession contract was only valid from April 1972 to December 1973, which is more than 20 years before the period under review, and before the entry into force of national Law No 151/1981, as enacted by Regional Law No 16/1983, on which basis CSTP was compensated in the first instance. Although that sample concession contract would seem to provide for some obligations that could qualify as PSOs (e.g. at points 2, 9 and 10), including the duty to apply discounts for students, workers, teachers and private and public employees, and the duty to carry certain categories of passengers for free, the Commission has no evidence that the same obligations were actually applicable to CSTP during the period under review, because of the absence of an entrustment act. Rather, considering that the services provided were regular scheduled services, it was necessary for the concession regulations, which granted CSTP an exclusive right to provide those services, to specify in advance the arrangements of the services to be provided. CSTP has not provided evidence to show that those arrangements were unilaterally imposed by the Region, rather than proposed by the operator, in return for the right to provide services on an exclusive basis, and subsequently authorised by the Region. In any case, the methodology used by the court-appointed expert to calculate the alleged undercompensation does not refer to those obligations.
- (71) The Commission has also assessed whether a PSO could be inferred from Regional Law No 16/1983, it being the legal basis identified by both the Region and CSTP for the compensation granted to the company in the period under review (see recitals 23 and 40). In this respect, it must be noted that that Regional Law only provides that entities and public or private undertakings providing public local transport services under a concession regime may receive public contributions. Moreover, Article 2 of the Regional Law clearly states that ‘any possible loss or deficit not covered by the regional contributions as determined above [in Article 2] remains chargeable to the single undertakings’.
- (72) The Commission further notes that the Regional acts provided by CSTP (see recital 40) mentioned some contractual obligations in place between CSTP and the Region in the period under review. However, those acts do not clearly identify obligations that could qualify as PSOs, despite being an indicator of their possible existence. Moreover, the existence of contractual obligations excludes a PSO being unilaterally imposed on CSTP. In any case, the methodology used by the court-appointed expert to calculate the alleged undercompensation does not refer to those obligations.
- (73) On the possible existence of a tariff obligation, although the calculation of additional compensation by the court-appointed expert was made on the basis of Article 11 of Regulation (EEC) No 1191/69, the Commission has no evidence that such obligations were in fact unilaterally imposed on CSTP. According to Article 2(5) of Regulation (EEC) No 1191/69 tariff obligations are limited to ‘obligation[s] imposed on transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions’. By contrast, the definition of tariff obligations ‘shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof’. The Commission acknowledges that Point 27 of the sample concession contract from 1972/73 lays down applicable tariffs for the operators its covers, but recalls that it has received no similar concession or entrustment act concerning CSTP for the period under review which could establish the imposition of such obligations on the latter. In any event, the Commission notes that, under Article 2 of Regional Law No 16/1983, the annual compensation to undertakings providing public transport services was calculated *ex ante* as the difference between the revenues deriving from the application of minimum tariffs and the so-called ‘standard cost’ (see recital (23)). The Commission therefore concludes that the Regional Law provided for minimum tariffs, which also excludes the existence of a general tariff obligation.

- (74) In any event, it does not appear that any PSO that CSTP might have been required to carry out was imposed on it unilaterally. The Commission notes, in this respect, that CSTP took the initiative in requesting the renewal of concessions for all seven years during the period under review. Moreover, following the judgment of the Consiglio di Stato in 2009, the Region repeatedly asked CSTP to produce the acts or contracts imposing PSOs in order to comply with the judgment. According to it, the company never replied.
- (75) CSTP's argument that the operators were duty bound to operate the routes under PSOs, even if the Region repeatedly reduced the amount of the standard costs, and that they would have faced legal action for interrupting a public service if they did indeed stop their activities, has not been backed up by any evidence, so it cannot be used to support the finding of unilaterally imposed PSOs in the present case.
- (ii) *Compliance of the compensation with the common compensation procedure*
- (76) Even if PSOs were shown to have been unilaterally imposed on CSTP in this instance, which is not the case, the compensation for those services would still need to comply with the common compensation procedure (Section IV) of Regulation (EC) No 1191/69 to be exempted from prior notification under Article 17(2) of that Regulation. The Commission does not consider this to be the case.
- (77) First, the Commission notes that the additional compensation awarded to CSTP concerns only 1998. CSTP has admitted that in that year, in addition to its alleged PSOs, it also engaged in commercial activities, namely rental services. The Commission recalls, in that respect, that with effect from 1 July 1992, Regulation (EEC) No 1191/69, by virtue of Article 1(5)(a) thereof, required transport undertakings, which operate not only services subject to PSOs but also engage in other activities, to operate the public services as separate divisions whereby: (i) the operating accounts corresponding to each of those activities are separate and the proportion of the assets pertaining to each is used in accordance with the accounting rules in force, and (ii) expenditure is balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking's activity.
- (78) The Commission further notes that, according to the Court of Justice in the *Antrop* judgment, the requirements set out by that procedure are not fulfilled where it is not possible to ascertain on the basis of reliable data from the relevant accounts the difference between the costs imputable to the parts of its activities in the area covered by the concession and the corresponding income and, consequently, where it is not possible to calculate the additional cost deriving from the performance of public service obligations by that undertaking ⁽¹⁴⁾.
- (79) CSTP has not provided any evidence that during the period under review, and especially in 1998, proper separate accounts were kept for its commercial activities. Moreover, the Commission considers that the argument put forward by CSTP that the legal requirement to keep full accounting and administrative documentation for the period under review has now expired, is not relevant to justify *ex post* an additional amount of compensation via an inductive approach. In any event, such a requirement deriving from national law, were it to be shown to exist, cannot undermine an obligation deriving from the case-law of the Court of Justice or Regulation (EEC) No 1191/69, which must be shown to be fulfilled before public service compensation can be paid to a transport operator.
- (80) Second, the Commission notes that Article 13 of Regulation (EEC) No 1191/69 requires that the administration to fix the amount of the compensation in advance. The calculation of the additional compensation on the basis of an *ex post* assessment, as prescribed by the Consiglio di Stato, is at odds with that provision, as already explained in recitals 54 and 55.
- (81) In the light of these observations, the Commission concludes that the additional compensation the Consiglio di Stato considers due to CSTP did not comply with the common compensation procedure laid down in Section IV of Regulation (EEC) No 1191/69, and was therefore not exempted from compulsory prior notification pursuant to Article 17(2) of that Regulation.

⁽¹⁴⁾ Case C-504/07 *Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (Antrop) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (Carris) and Sociedade de Transportes Colectivos do Porto SA (STCP)*, [2009] EU:C:2009.290.

6.3. COMPATIBILITY OF THE AID

- (82) Since it has not been shown that the measure under review was exempt from prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/69, the compatibility of those payments with the internal market will have to be examined, as they are considered to constitute state aid within the meaning of Article 107(1) of the Treaty, as explained in section 6.1 above.
- (83) Article 93 of the Treaty contains rules for the compatibility of state aid in the area of coordination of transport and PSOs in the field of transport and constitutes a *lex specialis* with respect to Article 107(3), as well as Article 106(2), as it contains special rules for the compatibility of state aid. The Court of Justice has ruled that that Article 'acknowledges that aid to transport is compatible with the internal market only in well-defined cases which do not jeopardise the general interests of the [Union]' ⁽¹⁵⁾.
- (84) On 3 December 2009, Regulation (EC) No 1370/2007 entered into force and repealed Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 of the Council ⁽¹⁶⁾. Regulation (EC) No 1370/2007 applies to the compensation of PSOs concerning public passenger transport services by rail and by road.
- (85) The Commission considers that the examination of the compatibility of the non-notified measure should be conducted under Regulation (EC) No 1370/2007, which entered into force on 3 December 2009 and repealed Regulation (EEC) No 1191/69, since that was the legislation in force at the time this Decision was adopted ⁽¹⁷⁾. It further notes that the additional compensation awarded to CSTP by the Consiglio di Stato was paid on 21 December 2012, so Regulation (EC) No 1370/2007 had already been in effect for more than three years on the date on which the effects of the disbursed aid occurred ⁽¹⁸⁾.
- (86) Article 9(1) of Regulation (EC) No 1370/2007 states that: 'Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the [internal] market. Such compensation shall be exempt from the prior notification requirement laid down in Article [108(3)] of the Treaty'.
- (87) For the reasons set out below, the Commission considers that the notified compensation does not comply with Regulation (EC) No 1370/2007 and cannot therefore be declared compatible with the internal market under Article 9(1) of that Regulation.
- (88) First, pursuant to Article 3 of Regulation (EC) No 1370/2007, where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation in return for the discharge of public service obligations, it must do so within the framework of a public service contract, unless the public service obligation aims at establishing maximum tariffs and is imposed through a measure applicable without discrimination to all public passenger transport services of the same type in a given geographical area (general rules).
- (89) In the present case, the Commission considers that no evidence has been put forward that a contractual scheme existed between CSTP and the Region or that general rules establishing maximum tariffs for all passengers or certain categories of passengers were put in place. The Commission has received only one sample concession contract for the year 1972/73, from which it is not possible to extract reliable information on the relationship between CSTP and the Region in the period under review (1997-2002). Moreover, the Commission notes that, in accordance with Article 2 of Regional Law No 16/1983 — the legal basis identified by both the Region and CSTP for the period under review (see recitals 19 and 36) — the revenues of public transport providers derived from the application of minimum tariffs established by the Region. No reference is made to maximum tariffs.

⁽¹⁵⁾ Case 156/77 *Commission v Belgium*, [1978] ECR 1881, paragraph 10.

⁽¹⁶⁾ Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ L 130, 15.6.1970, p. 1).

⁽¹⁷⁾ The Commission refers in this respect to the reasoning developed in recitals 307 to 313 of its Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C41/08) (ex NN 35/08) (OJ L 7, 11.1.2011, p. 1). That Decision was annulled by the General Court in Case T-92/11 *Jørgen Andersen v European Commission*, [2013] not yet published, and an appeal against that judgment is currently pending before the Court of Justice in Case C-303/13 P. The outcome of that appeal is not relevant for the outcome of the present case, since the General Court confirmed in the judgment under appeal that it is the date on which the effects of the disbursed aid occurred which determines which set of rules applies. In this case the aid was paid on 21 December 2012, so the rules, principles and criteria for assessing the compatibility of state aid which are in force at the date on which the Commission takes its decision should be applied (see, paragraph 39 of that judgment).

⁽¹⁸⁾ Case C-334/0 P *Commission v Freistaat Sachsen*, [2008] ECR I-9465, paragraphs 50 to 53; Case T-3/09 *Italy v Commission*, [2011] ECR II-95, paragraph 60.

- (90) The Commission therefore concludes that Article 3 of Regulation (EC) No 1370/2007 has not been complied with.
- (91) Second, the Commission notes that regardless of whether CSTP concluded a public service contract or was subject to tariff obligations by way of general rules, not all the provisions of Article 4 of that Regulation (EC) No 1370/2007, which establishes the mandatory content of public service contracts and general rules, appear to have been respected. For instance, Article 4(1)(b) requires the parameters on the basis of which the compensation is calculated to be established in advance in an objective and transparent manner in a way that prevents overcompensation, while Article 4(1)(c) and Article 4(2) lay down the arrangements with regard to the allocation of costs and revenues. As explained in relation to the Commission's examination of the second condition laid down by the Court of Justice's *Altmark* judgment in section 6.1, the parameters on the basis of which the alleged undercompensation was calculated by the second expert were not established in advance and therefore Article 4 of Regulation (EC) No 1370/2007 has not been complied with.
- (92) Third, Article 6(1) provides that, in the case of directly awarded public service contracts, compensation must comply with the provisions of Regulation (EC) No 1370/2007 and with the provisions laid down in the Annex to ensure that the compensation does not go beyond what is necessary to carry out the public service obligation. The Annex to Regulation (EC) No 1370/2007 provides that the compensation may not exceed an amount corresponding to the financial amount composed of the following factors: costs incurred in relation to the PSO minus ticket revenue, minus any positive financial effects generated within the network operated under the PSO, plus a reasonable profit. In addition, the Annex requires costs and revenues to be calculated in accordance with the accounting and tax rules in force. Furthermore, for transparency reasons, there should be separation of accounts (Point 5 of the Annex to Regulation (EC) No 1370/2007).
- (93) As noted in recital 82, CSTP did not apply proper separation of accounts for 1998, the year for which it has been awarded compensation as a result of the Consiglio di Stato's judgment. Consequently, it is impossible to demonstrate that the additional compensation paid out by the Italian State on 21 December 2012 does not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the PSOs on the costs and revenue of the public service operator (point 2 of the Annex to Regulation (EC) No 1370/2007).
- (94) Moreover, as far as the period under review is concerned, in the absence of compensation parameters laid down in advance, any cost allocation must necessarily be conducted *ex post* on the basis of arbitrary assumptions, as was done through the inductive methodology.
- (95) Accordingly, the Commission considers that the additional compensation awarded by the Consiglio di Stato was not paid in accordance with Regulation (EC) No 1370/2007 and therefore that it is incompatible with the internal market.

6.4. THE COMPENSATION AWARDED BY THE CONSIGLIO DI STATO DOES NOT CONSTITUTE DAMAGES

- (96) In the opening decision, the Commission invited all interested parties to comment on whether the judgment of the Consiglio di Stato concerns an award for damages for alleged breach of law as opposed to an award of public service compensation based on the applicable Council Regulations. Neither the Italian authorities nor CSTP addressed this question in their observations.
- (97) The Commission notes in this respect that, under certain circumstances, compensation for damages due to the wrongful acts or other conduct by the national authorities ⁽¹⁹⁾ does not provide an advantage and is therefore not to be considered as state aid within the meaning of Article 107(1) of the Treaty ⁽²⁰⁾. The purpose of compensation for damage suffered is different from that of state aid since it aims to bring the damaged party back to the situation in which it found itself prior to the damaging act, as if the latter had not occurred (*restitutio in integrum*). The Commission further notes, in that respect, that for compensation for damages to fall outside the state aid rules, it must be based on a general rule of compensation ⁽²¹⁾. The Commission finally recalls that the Court of Justice, in its judgment in *Lucchini*, held that a national court was prevented from applying national law where the application of that law would have the effect of frustrating 'the application of Community law in so far as it would make it

⁽¹⁹⁾ For example tort or unjust enrichment.

⁽²⁰⁾ Joined Cases 106 to 120/87, *Asteris AE and others v Greece and EEC*, EU:C:1988:457.

⁽²¹⁾ See Commission Decision of 16 June 2004 on Dutch aid in favour of Akzo Nobel in order to minimise chlorine transports (Case N 304/2003), summary notice in OJ C 81, 2.4.2005, p. 4; see also Commission Decision of 20 December 2006 on Dutch aid for relocation of car dismantling company Steenbergen (Case N 575/2005), summary notice in OJ C 80, 13.4.2007, p. 1.

impossible to recover State aid that was granted in breach of Community law' ⁽²²⁾. The principle underlying this pronouncement is that a rule of national law cannot be applied where such application would frustrate the proper application of Union law ⁽²³⁾.

- (98) As regards the additional compensation awarded to CSTP by the Consiglio di Stato, the Commission observes that, while no reference was made to Regulation (EEC) No 1191/69 in the operative part of the Consiglio di Stato's judgment, that judgment refers to CSTP's right to receive amounts by way of compensation pursuant to Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, which must be determined by the administration on the basis of reliable data. This would suggest that CSTP's right to additional compensation flows, according to the Consiglio di Stato, not from a general rule of compensation for damages as a result of a wrongful act or other conduct of the national authorities, but from rights allegedly derived from Regulation (EEC) No 1191/69.
- (99) In any event, the Commission considers that an award of damages in favour of CSTP for the alleged illegal unilateral imposition of PSOs by the Italian authorities, calculated on the basis of the common compensation procedure laid down by Regulation (EEC) No 1191/69, would be in breach of Articles 107 and 108 of the Treaty. This is because such an award would produce the same result for CSTP as an award of public service compensation for the period under review, despite the fact that the concession specifications governing the services in question were neither exempt from prior notification nor complied with the substantive requirements of Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007, as demonstrated above. The availability of such an award would thus effectively enable the circumvention of the state aid rules and of the conditions laid down by the Union legislator under which competent authorities, when imposing or contracting for PSOs, compensate public service operators for costs incurred in return for the discharge of PSOs. Indeed, an award of damages equal to the sum of the amounts of aid that were planned to be granted would constitute an indirect grant of state aid found to be unlawful and incompatible with the internal market ⁽²⁴⁾. Following that line, the General Court has considered indemnification clauses for the recovery of state aid to constitute state aid ⁽²⁵⁾.
- (100) In any event, the sample concession contract from 1972 under which CSTP was supposedly providing the transport services in question did not provide for the payment of any financial compensation. CSTP agreed to run the services under the conditions established in the concession at its own risk. That conclusion is also confirmed by Article 2 of Regional Law No 16/1983, which provided that any loss or deficit not covered by public contributions was to be borne by the service providers.
- (101) Accordingly, the Commission does not consider the judgment of the Consiglio di Stato to constitute an award of compensation for damages suffered by CSTP as a result of the wrongful act or other conduct of the national authorities, but as the grant of unlawful and incompatible state aid, which is prohibited under Article 107(1) of the Treaty.
- (102) In light of the foregoing, the Commission concludes that the non-notified measure constitutes state aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.

7. RECOVERY OF THE AID

- (103) In accordance with the Treaty and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid ⁽²⁶⁾ when it has found that it is incompatible with the internal market. The Court of Justice has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽²⁷⁾. In this context, the CJEU has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽²⁸⁾.

⁽²²⁾ Case C-119/05 *Lucchini*, EU:C:2007:434, paragraph 59.

⁽²³⁾ *Ibid*, paragraph 61.

⁽²⁴⁾ Opinion of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzori*, EU:C:2005:256, paragraph 198.

⁽²⁵⁾ Case T-384/08 *Elliniki Nafpigoataskevastiki AE Chortofylakeiou v Commission*, EU:T:2011:650, and Case T-565/08 *Corsica Ferries v Commission*, EU:T:2012:415, paragraphs 23, 114 and 120 to 131. See also, by analogy, Case C-111/10 *Commission v Council*, EU:C:2013:785, paragraph 44.

⁽²⁶⁾ Case C-70/72 *Commission v Germany*, [1973] ECR 813, paragraph 13.

⁽²⁷⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission*, [1994] ECR I-04103, paragraph 75.

⁽²⁸⁾ Case C-75/97 *Belgium v Commission*, [1999] ECR I-3671, paragraphs 64 and 65.

- (104) In line with that case-law, Article 14 of Council Regulation (EC) No 659/1999 ⁽²⁹⁾ provides that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (105) Therefore, the state aid identified in this Decision must be recovered by Italy, insofar as it has already been paid out to CSTP. Italy must add recovery interest to that aid amount, calculated from the date on which the unlawful aid was put at the disposal of CSTP (i.e. from 21 December 2012) until the date of its recovery ⁽³⁰⁾, according to Chapter V of Commission Regulation (EC) No 794/2004 ⁽³¹⁾.
- (106) Accordingly, the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The state aid amounting to EUR 4 951 838 in favour of CSTP unlawfully granted by the Italian Republic, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

Article 2

1. The Italian Republic shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from 21 December 2012 until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 ⁽³²⁾ amending Regulation (EC) No 794/2004.
4. The Italian Republic shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. The Italian Republic shall ensure that this Decision is implemented within four months following the date of its notification.

Article 4

1. Within two months following notification of this Decision, Italy shall submit the following information to the Commission:
 - (a) the total amount (principal and interest) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. The Italian Republic shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the aid referred to in Article 1 has been fully recovered. At the Commission's request, it shall submit information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the recipient.

⁽²⁹⁾ 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).

⁽³⁰⁾ See Article 14(2) of Regulation (EC) No 659/99.

⁽³¹⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1.

⁽³²⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 19 January 2015.

For the Commission

Margrethe VESTAGER

Member of the Commission

COMMISSION DECISION (EU) 2015/1075**of 19 January 2015****on State aid SA.35843 (2014/C) (ex 2012/NN)****implemented by Italy — Additional public service compensation for Buonotourist***(notified under document C(2015) 75)***(Only the Italian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By electronic notification of 5 December 2012, the Italian authorities notified, in accordance with Article 108(3) of the Treaty, the additional compensation awarded pursuant to a judgment by the *Consiglio di Stato* (Italy's highest administrative court) to Buonotourist S.r.l. ('Buonotourist'), for the provision of passenger transport services by bus based on concessions granted by the Italian Region of Campania ('the Region') during the period 1996-2002 ('the period under review').
- (2) The notification was registered under case number SA.35843 and from 13 December 2012 treated as a non-notified measure since, according to the information available to the Commission, the Region was not obliged to pay the additional compensation due to Buonotourist until 7 December 2012, that is, after the Italian government had notified the measure to the Commission, but before a Commission decision had been adopted.
- (3) By letter dated 20 February 2014, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the aid ('the opening decision').
- (4) The opening decision was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission invited interested parties to submit their comments on the measure.
- (5) The Italian authorities submitted their observations on the opening decision by letters dated 21 and 24 March 2014.
- (6) The only third party to submit observations in reply to the opening decision was Buonotourist, the beneficiary of the measure. Its comments were received on 25 March 2014.
- (7) On 11 July 2014, the Italian authorities provided comments on the third party submissions and additional information in response to a request for information dated 11 June 2014.
- (8) After acceptance of a deadline extension by the Commission, the Italian authorities completed the provision of additional information by letter of 15 September 2014.

⁽¹⁾ Commission Decision of 20 February 2014 on State aid SA.35843 (2012/NN) — Italy — PSO compensation for Buonotourist (OJ C 156, 23.5.2014, p. 51).

2. DESCRIPTION OF THE MEASURE

2.1. THE COMPANY

- (9) Buonotourist is a private company providing local public transport services based on regional and municipal concessions. More specifically, according to the Italian authorities, Buonotourist operated a network of bus routes as concessionaire of the Region throughout the period under review covering approximately 1,8 million km per year.
- (10) From the information provided by the Italian authorities, the Region has already paid EUR 19 507 121,54 to Buonotourist for the above-mentioned service during the period under review, of which EUR 17 036 021,13 for the operation and management of the service and EUR 2 471 100,41 for investments. Since it appears that this compensation was awarded to Buonotourist more than 10 years before the Commission sent its first request for information to the Italian State, that compensation will not be subject to an assessment in the current proceedings ⁽²⁾.
- (11) In addition to the above-mentioned sums already received, Buonotourist requested from the Region additional compensation of EUR 5 567 582,57 on the basis of Council Regulation (EEC) No 1191/69 ⁽³⁾ for the economic disadvantages it allegedly suffered as a result of public service obligations ('PSOs') allegedly being imposed upon it. According to the Region, the request was made in January 2007 when Buonotourist started proceedings before the Italian administrative courts.
- (12) In 2008, the Regional Administrative Court in Salerno rejected Buonotourist's claim for additional compensation on the basis of Regulation (EEC) No 1191/69. That court held that, in accordance with Article 4 of Regulation (EEC) No 1191/69 ⁽⁴⁾, Buonotourist could not request compensation for economic disadvantages resulting from the imposition of PSOs without having previously requested the termination of those PSOs.

2.2. THE JUDGMENTS OF THE CONSIGLIO DI STATO

- (13) By judgment of 27 July 2009 (*Sentenza* No 4683/09), the Consiglio di Stato upheld the appeal by Buonotourist against the judgment of the Regional Administrative Court in Salerno and concluded that Buonotourist was entitled to receive additional compensation for the public service it had carried out in accordance with Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. That judgment does not precisely define from which legal act and in what form the PSOs were imposed, but stresses that an undertaking operating a public service cannot be denied its claim for repayment of the costs effectively incurred in performing that service. The Consiglio di Stato further considered that Buonotourist was entitled to receive public service compensation even in the absence of a prior request for the elimination of the PSOs.
- (14) According to the Consiglio di Stato, the precise amount of the additional compensation owed to Buonotourist had to be determined by the Region on the basis of reliable data taken from the accounts of the company, showing the difference between the costs attributable to the portion of Buonotourist's activities associated with the PSO and the corresponding revenues. However, the Region claimed that it was unable to do so, due to a lack of clear and reliable data.

⁽²⁾ The Commission recalls that, pursuant to Article 15 of the 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), the powers of the Commission to recover aid are subject to a limitation period of 10 years, beginning on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period.

⁽³⁾ Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1).

⁽⁴⁾ Article 4(1) of Regulation (EEC) No 1191/69 states that: 'It shall be for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them'. Article 6(3) reads: 'The competent authorities of the Member States shall take decisions within one year of the date on which the application is lodged as regards obligations to operate or to carry, and within six months as regards tariff obligations. The right to compensation shall arise on the date of the decision by the competent authorities...'.

- (15) By order (*ordinanza*) No 8737/2010 of 13 December 2010, the Consiglio di Stato appointed an expert to undertake that task. According to the Italian authorities, that expert was also unable to determine the amount to be compensated. By order (*ordinanza*) No 5880/2011 of 7 November 2011, the Consiglio di Stato appointed a second expert ('the second expert'). It appears from paragraph 9 of the judgment of the Consiglio di Stato (*giudizio per l'ottemperanza*) No 5650/2012 of 7 November 2012 that both experts excluded the existence of a right to compensation pursuant to Article 10 of Regulation (EEC) No 1191/69 (i.e. obligation to operate or carry), but both concluded that Buonotourist was undercompensated for 1998, 1999 and 2000 as a result of the application of the formula provided in Article 11 of Regulation (EEC) No 1191/69 (tariff-related obligation). Implicitly, the experts thus assumed that a tariff obligation had been imposed on Buonotourist by the Region.
- (16) However, while the first expert concluded that it would have been inappropriate to use an 'inductive method' to calculate the additional costs borne by the undertaking due to tariff costs and recommended calculating the additional compensation by means of equity appreciation (*in via equitativa*), the second expert calculated the sum to be compensated by the Region to the company through the use of such an 'inductive method', observing that the Consiglio di Stato held that the choice of the 'inductive method' was to be considered definitive, having been used in various judgments without being challenged.
- (17) The second expert was nevertheless unable to calculate the compensation pursuant to Article 11 of Regulation (EEC) No 1191/69 due to a lack of essential data on both the anticipated and the actual number of units of measure of transport. The second expert therefore calculated the possible amount of undercompensation as the difference between the potential revenues that the company could have obtained by operating the service on a commercial basis (estimate) and the sum of the actual revenues and the public contributions received. For Buonotourist, those calculations result in an undercompensation for 1998, 1999 and 2000 only, totalling EUR 1 111 572 including interest. The expert concluded that this amount could be taken as the amount of undercompensation.
- (18) Accordingly, the Consiglio di Stato issued judgment No 5650/2012 of 7 November 2012, quantifying the additional compensation the Region was obliged to pay to Buonotourist at EUR 1 111 572 and ordered payment of that sum to take place by 7 December 2012 ⁽⁵⁾. Payment of this sum was made by the Region to Buonotourist on 21 December 2012.
- (19) It is the payment of that additional compensation by the Region to Buonotourist as a consequence of judgment No 5650/2012 that constitutes the non-notified measure and the subject matter of this Decision.

2.3. ADDITIONAL INFORMATION/OBSERVATIONS PROVIDED BY THE ITALIAN AUTHORITIES

- (20) According to the Italian authorities, Buonotourist, like other providers of regional scheduled bus transport services, operated on the basis of provisional licences (concessions) which had to be renewed annually upon the request of the company. Those concessions provided the company with the exclusive right to provide the relevant services.
- (21) The Italian authorities further maintain that Buonotourist requested concessions to provide services on the relevant routes from the Region in each year of the period under review and that those concessions always stipulated that the services were carried out entirely at the risk of the undertakings in question and, specifically, 'without the performance of the service constituting a right to a subsidy or compensation of any kind'. The Italian authorities provided a copy of a sample concession contract concerning another undertaking ('the sample concession contract') from 1972/73 attesting that it was the same as the one used with Buonotourist for the period under review. However, the Italian authorities did not provide any concession contracts actually concluded with Buonotourist during the period under review.
- (22) The Italian authorities maintain that under those concessions Buonotourist was free to propose the substitution of the forms of transport to be used by it or to apply for the termination in whole or in part of its PSOs where such obligations entailed an economic disadvantage to it, but that the company never exercised that right. The Italian authorities further allege that the company never informed the Region that it was suffering economic disadvantages or that it was carrying out obligations that it would not have performed if not obliged to do so under a PSO. Finally, according to the Italian authorities, Buonotourist never requested the termination of the PSO as required by Article 4 (1) of Regulation (EEC) No 1191/69.

⁽⁵⁾ That sum therefore replaced the original claim for compensation by Buonotourist of EUR 5 567 582,57.

- (23) According to the Italian authorities, the public contributions granted to Buonotourist in the past were based on standard cost methodology, calculated on the basis of certain parameters established in Regional Law No 16/1983 ⁽⁶⁾, such as the number of kilometres awarded vis-à-vis the kilometres travelled, the number of employees and buses, which vary depending on the type of service performed (urban, mountain, hill services), the legal and economic treatment of employees, the size of the undertaking, and the costs of the buses.
- (24) The Italian authorities also doubt whether Buonotourist has demonstrated that it had efficiently and correctly operated the PSOs in accordance with Regulation (EEC) No 1191/69 and submit that Buonotourist did not have an account separation system as required by Article 1(5) of that Regulation.

2.4. AMOUNT OF COMPENSATION

- (25) As explained in recital 15, the Consiglio di Stato appointed two experts to determine the additional compensation owed to Buonotourist by the Region on the basis of Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. On 27 September 2012, the two experts each issued their respective reports, but only the second expert was able to calculate the additional compensation due to Buonotourist by the Region ('the report').
- (26) In the report, the second expert frequently reiterates that the parties submitted data that did not match or that were not precise enough, constituting only an approximation. In particular, the second expert observes that the parties have provided contradictory documentary evidence regarding the compensation paid in the past. In contrast to the claim made by the Italian authorities, the second expert notes that Buonotourist kept separate accounts for its public and private transport activities, but explains that no verification could be made of the correct imputation of some costs to the one or the other sector of activity. The second expert further explains that it was not possible to acquire reliable data on the costs that would not have been incurred in case of termination of the PSO — even using the 'inductive method' prescribed by the Consiglio di Stato.
- (27) Accordingly, the second expert concluded that no additional compensation for the obligation to operate or carry, calculated on the basis of Article 10 of Regulation (EEC) No 1191/69 could be determined.
- (28) As regards additional compensation in relation to tariff obligations — Article 11 of Regulation (EEC) No 1191/69 — the second expert acknowledges that it could not be calculated on the basis of paragraph 1 of that provision, because of missing and/or unreliable data. Therefore, the 'inductive method' prescribed by the Consiglio di Stato was applied.
- (29) Article 11 of Regulation (EEC) No 1191/69 provides, inter alia, that the amount of the compensation must, in the case of a tariff obligation, be equal to the difference between the following two amounts.

— The first amount is equal to the difference between, on the one hand, the product of the anticipated number of units of measure of transport and:

— either the most favourable existing rate which might be claimed by users if the obligation in question did not exist,

— or where there is no such rate, the rate which the undertaking, operating on a commercial basis and taking into account both the costs of the operation in question and the state of the market, would have applied,

and, on the other hand, the product of the actual number of units of measure of transport and the rate imposed for the period under consideration.

— The second amount is equal to the difference between the costs which would be incurred applying either the most favourable existing rate or the rate which the undertaking would have applied if operating on a commercial basis and the costs actually incurred under the obligatory rate.

⁽⁶⁾ *Legge Regionale 25 gennaio 1983, n. 16 Interventi regionali in materia di servizi di trasporto pubblico locale per viaggiatori* (Regional measures for local passenger transport services) available at: http://jtest.itig.cnr.it:8080/cocoon/regioneCampania/xhtml?css=4&doc=/db/nir/RegioneCampania/1983/urn_nir_regione.campania_legge_1983-01-25n16&datafine=19830205

- (30) In the absence of the data required to determine those amounts, the second expert calculated the amount of compensation due as the difference between the two amounts as interpreted below.
- In the absence of the anticipated and the actual number of units of measure of transport, the first amount is equal to the amount necessary to cover the real costs (or the 'standard costs' if lower) ⁽⁷⁾, minus the revenues obtained from the traffic carried ⁽⁸⁾.
 - As regards the second amount, the expert considered that it should be equal to the real costs (or the 'standard costs' if lower) ⁽⁹⁾ minus the difference between the real costs (or the 'standard costs' if lower) and the amount of compensation already received ⁽¹⁰⁾.
- (31) According to the second expert, it follows from those calculations that during the period under review Buonotourist could only claim to have been undercompensated in 1998, 1999, and 2000 as a result of alleged tariff obligations being imposed upon it. The amount of undercompensation for those three years was calculated by the second expert to amount to EUR 838 593,21, to which legal interest of EUR 272 979,13 was added, resulting in additional compensation of EUR 1 111 572. It was this amount which the Consiglio di Stato ordered the Region to pay to Buonotourist, which it actually paid on 21 December 2012.

2.5. GROUNDS FOR INITIATING THE PROCEDURE

- (32) As explained in the opening decision, the Commission had several doubts regarding the compatibility of the measure with the internal market.
- (33) First, the Commission questioned whether the four conditions laid down by the Court of Justice of the European Union ('the CJEU') in its *Altmark* case-law ⁽¹¹⁾ had been fulfilled.
- (34) Second, the Commission had doubts regarding the exemption from the notification obligation under Regulation (EEC) No 1191/69. The question of whether Article 17(2) of Regulation (EEC) No 1191/69 indeed exempted the Italian authorities from prior notification in the present case thus depends, first, on whether a PSO was in fact unilaterally imposed on Buonotourist by the Region and, second, on whether the compensation paid pursuant to that obligation complies with the requirements of Regulation (EEC) No 1191/69. The Commission could not conclude whether the compensation awarded to Buonotourist fulfilled those conditions.
- (35) Third, the Commission had doubts regarding the possible compatibility of the measure under Regulation (EC) No 1370/2007 of the European Parliament and of the Council ⁽¹²⁾. If it was confirmed that at least one of the conditions for exemption from notification pursuant to Regulation (EEC) No 1191/69 was not met and an assessment under Regulation (EC) No 1370/2007 had to be conducted, the Commission had doubts whether the conditions of that Regulation were complied with in the present case.

3. COMMENTS BY ITALY

- (36) The Italian authorities at the national level did not provide any comments on the opening decision. Only the Campania Region did.
- (37) First, the Region submitted documentation meant to show that Buonotourist performed 'authorised services' at its own risk, in addition to the services under concession in the period concerned. For example, Buonotourist appears to have provided international and interregional bus transport services in the period under review. In addition, the Region explained that Buonotourist only had accounting separation between rental services and bus transport services, without further distinguishing the 'authorised services' that the company performed at its own risk.

⁽⁷⁾ Instead of the difference between, on the one hand, the product of the anticipated number of units of measure of transport and — either the most favourable existing rate which might be claimed by users if the obligation in question did not exist or — where there is no such rate, the rate which the undertaking, operating on a commercial basis and taking into account both the costs of the operation in question and the state of the market, would have applied.

⁽⁸⁾ Instead of the product of the actual number of units of measure of transport and the rate imposed for the period under consideration.

⁽⁹⁾ Instead of the costs which would be incurred applying either the most favourable existing rate or the rate which the undertaking would have applied if operating on a commercial basis.

⁽¹⁰⁾ Instead of the costs actually incurred under the obligatory rate.

⁽¹¹⁾ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] EU:C:2003:415.

⁽¹²⁾ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

- (38) Second, the Region reiterated that no unilateral imposition of PSOs took place during the period under review. The Region noted that the company, under the rules then in force, requested yearly renewal of the concession services and that none of the concession acts entailed the unilateral imposition of PSOs. Moreover, following the judgment of the Consiglio di Stato in 2009, the Region repeatedly asked Buonotourist to provide the acts or contracts imposing PSOs on it in order to comply with the judgment. According to the Region, the company never replied to these requests. Regarding the cap on tariffs, the Region noted that the tariffs indicated by the concession contracts derived from general measures of price policy applied by all companies operating in the same sector.

4. COMMENTS BY INTERESTED PARTIES

- (39) The only third party to submit observations in response to the opening decision was Buonotourist, the beneficiary of the measure. In its submissions, Buonotourist disagreed with the preliminary positions taken by the Commission in the opening decision.
- (40) To substantiate its claim that obligations were imposed on it, Buonotourist argued that the PSOs were not set out in the document awarding the concession, which did not exist, but derived solely from internal acts of the Region which predetermined the organisation of the undertaking and the compensation through the 'standard cost' mechanism. Buonotourist explained that Italy had regulated the PSOs by means of Law No 151/81, Regional Law No 16/83, Article 4 of Law No 59/97 and Legislative Decree No 422/97. The public service was entrusted to Buonotourist by the Region by means of a concession act in 1972/73 and renewed every year until 2003. That PSOs were imposed on Buonotourist for the years 1996-2002, such as tariff obligations, routes, times and stops, can be allegedly inferred from the following documents:
- the 'bridging service contract' signed by Buonotourist and the Region for the year 2003 in compliance with Article 46 of Regional Law No 3/02, recalling and replacing the existing concessions,
 - decision of the Regional Government (*delibera della Giunta Regionale*) No 8726 of 30 December 1999, authorising Buonotourist to modify some routes following requests from both the company and other petitioners,
 - decision of the Regional Government No 323 of 4 May 2000, which extended the duration of the suspension of the increase in costs for season tickets for bus transport services in the Region,
 - note 4770/2000 communicating the distinction between how to calculate the tariff for ordinary season tickets and season tickets for 'work lines' (*linee operaie*),
 - decree of the Region's *Assessore di Trasporti* No 1609/2001 concerning the change from lira to euros, reminding the service providers that any irregular increase in tariffs was forbidden and that prohibition constituted a 'concession/contractual obligation'.
- (41) Moreover, Buonotourist argued that since the Region repeatedly reduced the amount of the standard cost and applied that cost unevenly across the different routes and concessions, some operators decided to close certain bus routes consistently operated at a loss. The Region allegedly replied that the operators were duty bound to operate the routes under the PSOs and that legal action would be taken against them for interrupting a public service if indeed they did stop providing their activity. According to Buonotourist, this showed that PSOs were imposed upon it. However, Buonotourist did not provide evidence to support this claim.
- (42) Buonotourist also claimed that it mainly operated as a local public transport service provider (80 % of its activity). For the remaining diversified economic activity, it maintained separate accounts.
- (43) After having recalled the final national ruling by the Consiglio di Stato, Buonotourist challenged the following arguments put forward by the Region:
- the calculation was not supported by separate management accounts by cost centres such as to distinguish the activities subject to PSOs,
 - given the absence of accounting data allowing the identification of the specific elements to be calculated pursuant to Articles 10 and 11 of Regulation (EEC) No 1191/69, the calculation had been performed inductively, with a method the Region termed as 'abstruse and aberrant'.

- (44) Buonotourist explained that the applicable rules simply required the accounting data relating to the public transport service operated under a PSO to be supplied separately from those of any other business activities, but did not require any further accounting breakdown showing separately the costs and revenue for each route covered. Buonotourist claimed to keep separate accounts for the accounting data concerning public service activities and those concerning the business activities, and it added that the reliability of such accounting data was never questioned by the Region, which on the contrary used them correctly as the basis for calculating and paying out the annual contributions.
- (45) Buonotourist further disputed that the accounting documents supplied were insufficient to support the compensation claim merely because they consisted of annual financial statements and 'E forms' ⁽¹³⁾ and were not accompanied by full copies of the underlying accounting and administrative entries (accounting register, ledgers, invoices issued and received, ticket receipts, etc.). According to Buonotourist, this argument could be easily countered by noting that the Region had accepted the same data during the period under review, considering them reliable at the time. Furthermore, the requirement to keep full accounting and administrative documentation for the period under review has now expired and it is, therefore, objectively difficult to demand copies at present. It is therefore appropriate to reconstruct the amount of compensation due via an inductive approach, as prescribed by the Consiglio di Stato. Finally, the financial statements had been duly certified and their correctness and truthfulness had never been called into question. In conclusion, the accounts submitted by Buonotourist are clearly sufficient for calculating the compensation in full compliance with the requirements of Regulation (EEC) No 1191/69.
- (46) Concerning the correctness of the calculation method and its consistency with Union law, Buonotourist considered that the company had to be compensated for the disadvantage incurred in terms of the difference between lower revenue and greater costs as a consequence of its PSOs. To establish the value of lower revenue on the basis of reliable data, Buonotourist, first, considered the actual annual operating revenue, which was the product of the actual number of units of measure of transport and the tariff imposed. It then identified the amount to be subtracted in accordance with Union rules, considering the revenue necessary to cover the actual costs as recorded in the annual accounts. The amount of the annual operating revenue coincides with the actual revenue obtained by the company in the activity provided under a tariff obligation which was separately indicated in the annual financial statements of Buonotourist and in the E forms sent each year to the Region, which never questioned their reliability. There is, therefore, no need to break down those amounts into their component parts, even though they include revenues for routes that were not subject to concessions and are therefore overstated. As for the amount to be subtracted, Buonotourist claimed that it used a criterion that fully complied with the instructions contained in Regulation (EEC) No 1191/69, which allowed the use of the tariff that the company would have applied had it operated on a commercial basis, which had to cover the actual costs incurred. As far as the difference between the costs which the undertaking would have incurred by applying the most favourable existing rate or operating on a commercial basis and the costs actually incurred were concerned, Buonotourist considered that its calculation is fully consistent with Article 11 of that Regulation, as it captured the lower cost incurred by the undertaking as a consequence of the PSO on account of the contributions received from the Region to cover operating costs. Moreover, Buonotourist is of the opinion that it would be impossible to estimate the passenger traffic in a free market scenario. Therefore the 'inductive method' prescribed by the Consiglio di Stato is legitimate. Finally, Buonotourist recalled that both Articles 10 and 11 established the right of public transport companies subject to PSOs to be compensated for all negative financial impacts resulting from their obligations.
- (47) Concerning the notion of State aid, Buonotourist argued that the market for public transport in Italy in the period in question was not open to competition from undertakings established in other Member States. Buonotourist therefore concluded that there was no effect on trade. Likewise, in view of the current organisation of the local public transport service based on the unilateral, exclusive concession of certain routes, the compensation was not likely to distort competition. Furthermore, the standard cost/km was imposed by the Region and accepted by the concessionaire together with all the other PSOs, therefore there would be no advantage. Buonotourist thus considered that at least three of the conditions laid down by the CJEU for identifying State aid were not met in the case at issue.
- (48) Buonotourist is of the opinion that the compatibility of the compensation had to be assessed with reference to Regulation (EEC) No 1191/69. Concerning the exemption from the requirement to notify under Regulation (EEC) No 1191/69, Buonotourist considered that since the Region imposed the tariff obligation unilaterally and the

⁽¹³⁾ *Modelli E*, namely the documents based on the accounts of the company containing the information necessary for the annual calculation of the public contribution.

amounts do not constitute PSOs under a service contract but stem from the correct application of the calculation under Article 11 of that Regulation in the framework of a concession, the payment awarded as compensation was exempted from the notification requirement of Article 17(2) of the same Regulation.

5. COMMENTS BY ITALY ON THE COMMENTS BY INTERESTED PARTIES

- (49) The Italian authorities at the national level did not submit any comments on Buonotourist's comments. Only the Campania Region did, on 11 July 2014.
- (50) In the submission, the Region explained that the separate accounting kept by Buonotourist only concerned the rental services (*noleggio* or *fuorilinea*) vis-à-vis the bus services in general. The bus services provided by Buonotourist, however, included interregional and international routes (so-called 'authorised' transport services) that were performed at the company's own risk. The Region provided evidence of the provision by Buonotourist of such authorised services during the period under review. In particular, the Region provided Decision of the Regional Government No 8734/1999 authorising services between two regions and note No 4765/2011 of the Ministry of Infrastructure and Transport certifying the provision of three interregional routes. Moreover, the notes to the accounts of the company for 1998 and 2000 clearly mention the international and interregional activities, as does judgment No 2157/2004 of the Lazio Regional Administrative Court (*Tribunal Amministrativo Regionale*).
- (51) The provision of 'authorised' interregional and international transport services was not separately indicated in the accounts of Buonotourist. Finally, the account separation for those services cannot be inferred from the E forms submitted by Buonotourist to the Region every year, where the actual costs and revenues for the provision of bus services are indicated separately under 'Local Public Transport Campania Region' and the rental services are indicated under 'Rental' (*noleggio* or *fuorilinea*). According to the Region, the column 'Local Public Transport Campania Region' shows all the costs and revenues indicated in the 'Bus Services Income Statement', which represented all bus services in general, including authorised interregional and international transport services.

6. ASSESSMENT OF THE AID

6.1. EXISTENCE OF AID

- (52) Pursuant to Article 107(1) 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 provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (53) Accordingly, for a support measure to be considered State aid within the meaning of Article 107(1) TFEU, it must cumulatively fulfil all of the following conditions:
- it must be granted by the State or through state resources,
 - it must confer a selective advantage by favouring certain undertakings or the production of certain goods,
 - it must distort or threaten to distort competition, and
 - it must affect trade between Member States.

6.1.1. State resources and imputability

- (54) The Commission notes that the judgment of the Consiglio di Stato requires the Region to pay additional compensation to Buonotourist with respect to the provision of scheduled bus services during the period under review on routes under the remit of the Region. The second court-appointed expert calculated that Buonotourist suffered an economic disadvantage in the form of undercompensation only for 1998, 1999, and 2000 in the amount of EUR 1 111 572 as a result of alleged tariff obligations being imposed on it. On 21 December 2012, the Region paid this sum to Buonotourist in order to comply with that judgment.
- (55) The fact that the Region was obliged by a national court to pay compensation to an undertaking does not mean that the aid cannot be imputed to the Region complying with that judgment, since the domestic courts of that State are to be considered organs of that State and are thus bound by their duty of sincere cooperation⁽¹⁴⁾.

⁽¹⁴⁾ Case C-527/12 *Commission v Germany*, EU:C:2014/2193, paragraph 56 and the case-law cited. See also Case C-119/05 *Lucchini*, EU:C:2007:434, paragraph 59, described in recital 94 below.

- (56) The measure is thus imputable to the State and the resources from which that compensation has been paid are state resources.

6.1.2. Selective economic advantage

- (57) The Commission notes at the outset that Buonotourist is engaged in an economic activity, namely passenger transport for remuneration. Therefore, Buonotourist should be considered an 'undertaking' within the meaning of Article 107(1) of the Treaty.
- (58) The granting of the measure should also be considered selective, since it will benefit only Buonotourist.
- (59) As regards the granting of a selective economic advantage, it follows from the *Altmark* judgment that compensation granted by the State or through state resources to undertakings as consideration for PSOs imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute State aid within the meaning of Article 107(1) of the Treaty, provided that four cumulative conditions are satisfied ⁽¹⁵⁾.
- First, the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined.
 - Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.
 - Third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
 - Fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (60) The *Altmark* judgment requires all four conditions to be cumulatively satisfied to exclude the presence of an economic advantage where compensation is granted to undertakings as consideration for public service obligations imposed on them.
- (61) The Commission notes first that neither the Italian authorities nor Buonotourist were able to provide it with any entrustment act related to the period under review and that Buonotourist has not been able to identify clearly obligations that it was required to discharge that could qualify as PSOs, as explained in more detail below in 6.2, subsection (i).
- (62) Second, the Commission observes that the compensation awarded by the judgment of the Consiglio di Stato is based solely on an *ex post* calculation using an 'inductive method' in the absence of necessary and reliable data. The Commission therefore concludes that the parameters on the basis of which the alleged undercompensation was calculated by the court-appointed experts were not established in advance and that therefore the second *Altmark* condition does not appear to have been complied with in relation to the non-notified measure.
- (63) Considering the cumulative nature of the *Altmark* conditions, there is no need for the Commission to examine whether the other two *Altmark* conditions have been met in the present case. Accordingly, the payment of additional compensation to Buonotourist for services performed during the period under review confers on that company a selective economic advantage within the meaning of Article 107(1) of the Treaty.

6.1.3. Distortion of competition and effect on trade between Member States

- (64) In its observations, Buonotourist argued that the market for public transport in Italy was not open to competition from undertakings established in other Member States during the period under review, so there could be no effect on trade or distortion of competition as regards the disputed measure.

⁽¹⁵⁾ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] EU:C:2003:415, paragraphs 87 and 88.

- (65) The Commission recalls, in the first place, that the disputed measure was implemented on 21 December 2012, long after the market for public passenger transport was opened to competition in Italy. Since it is at that point in time that the measure under review produces its effects on the market, it is also at that point in time that it must be assessed whether the measure is liable to distort competition or affect trade between Member States.
- (66) In any event, the Commission further notes that, as the CJEU remarked in its *Altmark* judgment, since 1995 several Member States had started to open certain transport markets to competition from undertakings established in other Member States, so a number of undertakings were already offering their urban, suburban or regional transport services in Member States other than their State of origin by that point in time.
- (67) Therefore, any compensation granted to Buonotourist should be considered likely to distort competition for the provision of passenger transport services by bus and likely to affect trade between Member States to the extent that it impairs the ability of transport undertakings established in other Member States to offer their services in Italy and strengthens the market position of Buonotourist by releasing it from costs which it would normally have had to bear in its day-to-day management or normal activities ⁽¹⁶⁾.
- (68) The Commission also notes that Buonotourist is active on other markets, i.e. rental services, and thus competes with other companies within the Union on those markets. Any compensation granted to Buonotourist might also threaten to distort competition and affect trade between Member States on those markets as well.
- (69) Accordingly, the Commission concludes that the measure distorts competition and affects trade between Member States.

6.1.4. Conclusion

- (70) In the light of the above, the Commission concludes that the measure constitutes aid within the meaning of Article 107(1) of the Treaty.

6.2. EXEMPTION FROM THE NOTIFICATION OBLIGATION UNDER REGULATION (EEC) NO 1191/69

- (71) According to the reasoning of the Consiglio di Stato, Buonotourist acquired the right to obtain additional compensation for the provision of the transport services in question at the time at which it carried out those services. For this reasoning to hold, the compensation payments must have been exempted from the compulsory notification procedure pursuant to Article 17(2) of Regulation (EEC) No 1191/69. Otherwise, to the extent the compensation constitutes State aid within the meaning of Article 107(1) TFEU, failure to notify that compensation would render that compensation unlawful in accordance with Article 108 of the Treaty.
- (72) This is because, in accordance with Article 17(2) of Regulation (EEC) No 1191/69, compensation paid pursuant to that Regulation is exempted from the preliminary information procedure laid down in Article 108(3) of the Treaty and thus from notification.
- (73) However, it follows from the *Combis* judgment that the concept of 'public service compensation' within the meaning of that provision must be interpreted in a very restrictive manner ⁽¹⁷⁾. The exemption from notification provided by Article 17(2) of Regulation (EEC) No 1191/69 covers only compensation for PSOs imposed unilaterally on an undertaking pursuant to Article 2 of that Regulation that is calculated using the method described in Articles 10 to 13 of the same Regulation (the common compensation procedure), and not public service contracts as defined by Article 14 of the Regulation. Compensation paid pursuant to a public service contract as defined by Article 14 of Regulation (EEC) No 1191/69 which entails State aid must be notified to the Commission before it is put into effect. Failure to do so will result in that compensation being deemed to be unlawfully implemented aid in accordance with Article 108 of the Treaty.
- (74) The question of whether Article 17(2) of Regulation (EEC) No 1191/69 indeed released the Italian authorities from prior notification in the present case thus depends, first, on whether a PSO was in fact unilaterally imposed on Buonotourist by the Region and, second, on whether the compensation paid pursuant to that obligation complies with the requirements of Regulation (EEC) No 1191/69. The Commission will examine both questions in turn.

⁽¹⁶⁾ Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55.

⁽¹⁷⁾ Case T-157/01 *Danske Busvognmænd*, [2004] EU:T:2004:76, paragraphs 77 to 79.

(i) *PSO unilaterally imposed*

- (75) The Commission notes that neither the Italian authorities nor Buonotourist were able to provide it with any entrustment act related to the period under review. Buonotourist only provided the Commission with contracts which were implemented as from 2003.
- (76) The Italian authorities claim that the sample concession contract provided by them — which concerned another undertaking — was the standard one in use in the Region during the period under review. However, the sample concession contract was only valid from April 1972 to December 1973, which is more than 20 years before the period under review, and before the entry into force of Law No 151/1981, as enacted by Regional Law No 16/1983, on which basis Buonotourist was compensated in the first instance. Although the sample concession contract would seem to provide for some obligations that could qualify as PSOs (e.g. at points 2, 9 and 10), including the duty to apply discounts for students, workers, teachers, and private and public employees and the duty to transport certain categories of passengers for free, the Commission has no evidence that the same obligations were actually applicable to Buonotourist during the period under review because of the absence of an entrustment act. Rather, considering that the services provided were regular scheduled services, it was necessary for the concession regulations, which granted Buonotourist an exclusive right to provide those services, to specify in advance the arrangements for the services to be provided. Buonotourist has not provided evidence to show that those arrangements were unilaterally imposed by the Region, instead of being proposed by the operator, in return for the right to provide services on an exclusive basis, and subsequently authorised by the Region. In any case, the methodology used by the court-appointed expert to calculate the alleged undercompensation does not refer to those obligations.
- (77) The Commission has also assessed whether a PSO could be inferred from Regional Law No 16/1983, it being the legal basis identified by both the Region and Buonotourist for the compensation granted to the company in the period under review (see recitals 23 and 40). In this respect, it must be noted that that Regional Law only provides that entities and public or private undertakings providing public local transport services under a concession regime could receive public contributions. Article 2 of the Regional Law clearly states that: ‘any possible loss or deficit not covered by the regional contributions as determined above [in Article 2] remains chargeable to the individual undertakings’.
- (78) The Commission further notes that the Regional acts provided by Buonotourist (see recital 40) mentioned some contractual obligations in place between Buonotourist and the Region during the period under review. However, those acts do not clearly identify obligations that could qualify as PSOs, despite being an indicator of their possible existence. Moreover, the existence of contractual obligations excludes a PSO being unilaterally imposed on Buonotourist. In any case, the methodology used by the court-appointed expert to calculate the alleged undercompensation does not refer to those obligations.
- (79) On the possible existence of a tariff obligation, although the calculation of additional compensation by the court-appointed expert was made on the basis of Article 11 of Regulation (EEC) No 1191/69, the Commission has no evidence that such obligations were in fact unilaterally imposed on Buonotourist. According to Article 2(5) of Regulation (EEC) No 1191/69, tariff obligations are ‘obligation[s] imposed on transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions’. By contrast, the definition of tariff obligations ‘shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof’. The Commission acknowledges that Point 27 of the sample concession contract from 1972/73 lays down applicable tariffs for the operator it covers, but recalls that it has received no similar concession or entrustment act concerning Buonotourist for the period under review from which it could establish the imposition of such obligations on the undertaking. In any event, the Commission notes that, under Article 2 of Regional Law No 16/1983, the annual compensation to undertakings providing public transport services was calculated *ex ante* as the difference between the revenues deriving from the application of minimum tariffs and the so-called ‘standard cost’ (see recital 23). The Commission therefore concludes that the Regional Law provided for minimum tariffs, which also excludes the existence of a general tariff obligation.
- (80) In any event, it does not appear that any PSO Buonotourist might have been required to carry out was unilaterally imposed on it. The Commission notes in this respect that Buonotourist took the initiative in requesting the renewal of concessions for all seven years during the period under review.

- (81) Buonotourist's argument that the operators were duty bound to operate the routes under PSOs, even if the Region repeatedly reduced the amount of the standard cost, and that legal action would have been taken against them for interrupting a public service if they did indeed stop their activities, has not been backed up by any evidence, so it cannot be used to support the finding of unilaterally imposed PSOs in the present case.
- (ii) *Compliance of the compensation with the common compensation procedure*
- (82) Even if the PSOs were shown to have been unilaterally imposed on Buonotourist in this instance, which is not the case, the compensation for those services would still need to comply with the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69 to be exempted from prior notification under Article 17(2) of that Regulation. The Commission does not consider this to be the case.
- (83) First, the Commission notes that the common compensation procedure under Regulation (EEC) No 1191/69 sets out a method for calculating the amount of compensation to be granted in respect of the financial burdens resulting from the imposition of a public service obligation. With effect from 1 July 1992, Regulation (EEC) No 1191/69, by virtue of Article 1(5)(a) thereof, required transport undertakings, which operate not only services subject to PSOs but also engage in other activities, to operate the public services as separate divisions whereby: (i) the operating accounts corresponding to each of those activities are separate and the proportion of the assets pertaining to each is used in accordance with the accounting rules in force, and (ii) expenditure is balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking's activity.
- (84) The Commission further notes that, according to the Court of Justice in the *Antrop* judgment, the requirements set out by that procedure are not fulfilled where it is not possible to ascertain on the basis of reliable data from the relevant accounts the difference between the costs imputable to the part of its activities in the area covered by the concession and the corresponding income and, consequently, where it is not possible to calculate the additional cost deriving from the performance of public service obligations by that undertaking ⁽¹⁸⁾.
- (85) The Commission considers that the compensation awarded to Buonotourist does not comply with these requirements. Buonotourist confirmed that, in addition to its alleged PSO activities, it also engaged in rental services activities. In addition, the Region alleges that Buonotourist also engaged in other activities — in interregional and international bus services (see recitals 50 to 52). However, neither the Italian authorities nor Buonotourist demonstrated that proper separate accounts were kept for these activities. This seems to be implicitly confirmed by Buonotourist when it asserts that the amounts indicated in the 'E forms' sent each year to the Region also included revenues for routes that were not subject to concessions (see recital 45).
- (86) The Commission considers that the argument put forward by Buonotourist that the legal requirement to keep full accounting and administrative documentation for the period under review has now expired is not relevant to justify *ex post* an additional amount of compensation via an inductive approach. In any event, such a requirement deriving from national law, were it to be shown to exist, cannot undermine an obligation deriving from the case-law of the CJEU or Regulation (EEC) No 1191/69, which must be shown to have been fulfilled before public service compensation can be paid to a transport operator.
- (87) Second, the Commission notes that Article 13 of Regulation (EEC) No 1191/69 requires the administration to fix the amount of the compensation in advance. The calculation of the additional compensation on the basis of an *ex post* assessment, as prescribed by the Consiglio di Stato, is at odds with that provision, as already explained in recitals 62 and 63.
- (88) In the light of these observations, the Commission concludes that the additional compensation the Consiglio di Stato considers due to Buonotourist was not exempted from compulsory prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/69.

⁽¹⁸⁾ Case C-504/07 *Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (Antrop) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (Carris) and Sociedade de Transportes Colectivos do Porto SA (STCP)*, [2009] EU:C:2009:290.

6.3. COMPATIBILITY OF THE AID

- (89) Since it has not been shown that the measure under review was exempt from prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/69, the compatibility of the payment with the internal market will have to be examined, as they are considered to constitute State aid within the meaning of Article 107(1) of the Treaty, as explained in section 6.1.
- (90) Article 93 of the Treaty contains rules for the compatibility of State aid in the area of coordination of transport and PSOs in the field of transport and constitutes a *lex specialis* with respect to Article 107(3), as well as Article 106(2), as it contains special rules for the compatibility of State aid. The CJEU has ruled that that Article ‘acknowledges that aid to transport is compatible with the internal market only in well-defined cases which do not jeopardise the general interests of the [Union]’⁽¹⁹⁾.
- (91) On 3 December 2009, Regulation (EC) No 1370/2007 entered into force and repealed Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 of the Council⁽²⁰⁾. Regulation (EC) No 1370/2007 applies to the compensation of PSOs concerning public passenger transport services by rail and by road.
- (92) The Commission considers that the examination of the compatibility of the non-notified measure should be conducted under Regulation (EC) No 1370/2007, since that was the legislation in force at the time that this Decision was adopted⁽²¹⁾. It further notes that the additional compensation awarded to Buonotourist by the Consiglio di Stato was paid on 21 December 2012, so Regulation (EC) No 1370/2007 had already been in effect for more than three years on the date on which the effects of the disbursed aid occurred⁽²²⁾.
- (93) Article 9(1) of Regulation (EC) No 1370/2007 states that ‘Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the [internal] market. Such compensation shall be exempt from the prior notification requirement laid down in Article [108(3)] of the Treaty’.
- (94) For the reasons set out below, the Commission considers that the notified compensation does not comply with Regulation (EC) No 1370/2007, so it cannot be declared compatible with the internal market under Article 9(1) of that Regulation.
- (95) First, pursuant to Article 3 of Regulation (EC) No 1370/2007, where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation in return for the discharge of PSOs, it must do so within the framework of a public service contract, unless the public service obligation aims to establish maximum tariffs and is imposed through a measure applicable without discrimination to all public passenger transport services of the same type in a given geographical area (general rules).
- (96) In the present case, the Commission considers that no evidence has been put forward that a contractual scheme existed between Buonotourist and the Region or that general rules establishing maximum tariffs for all passengers or certain categories of passengers were put in place. The Commission has received only one sample concession contract for the year 1972/73 concerning another company, from which it is not possible to extract reliable information on the relationship between Buonotourist and the Region in the period under review (1996-2002). Moreover, the Commission notes that, in accordance with Article 2 of Regional Law No 16/1983 — the legal basis identified by both the Region and Buonotourist for the period under review (see recitals 21 and 39) — the revenues of public transport providers derive from the application of minimum tariffs established by the Region. No reference is made to maximum tariffs.

⁽¹⁹⁾ Case 156/77 *Commission v Belgium*, [1978] EU:C:1978:180, paragraph 10.

⁽²⁰⁾ Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ L 130, 15.6.1970, p. 1).

⁽²¹⁾ The Commission refers in this respect to the reasoning developed in recitals 307 to 313 of its Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)) (OJ L 7, 11.1.2011, p. 1). That Decision was annulled by the General Court in Case T-92/11 *Jørgen Andersen v European Commission*, [2013] EU:T:2013:143, and an appeal against that judgment is currently pending before the Court of Justice in Case C-303/13 P. The outcome of that appeal is not relevant for the outcome of the present case, since the General Court confirmed in the judgment under appeal that it is the date on which the effects of the disbursed aid occurred which determines which set of rules applies. In this case the aid was paid on 21 December 2012, so the rules, principles and criteria for assessing the compatibility of state aid which are in force on the date on which the Commission takes its Decision should be applied (see paragraph 39 of that judgment).

⁽²²⁾ Case C-334/07 P *Commission v Freistaat Sachsen*, [2008] EU:C:2008:709, paragraphs 50 to 53; Case T-3/09 *Italy v Commission*, [2011] EU:T:2011:27, paragraph 60.

- (97) The Commission therefore concludes that Article 3 of Regulation (EC) No 1370/2007 has not been complied with.
- (98) Second, the Commission notes that regardless of whether Buonotourist concluded a public service contract or was subject to tariff obligations by way of general rules, not all the provisions of Article 4 of Regulation (EC) No 1370/2007, which establishes the mandatory content of public service contracts and general rules, appear to have been respected. For instance, Article 4(1)(b) requires the parameters on the basis of which the compensation is calculated to be established in advance in an objective and transparent manner in a way that prevents overcompensation, while Article 4(1)(c) and Article 4(2) lay down the arrangements with regard to the allocation of costs and revenues. As explained in relation to the Commission's examination of the second condition laid down by the CJEU's *Altmark* judgment in section 6.1, the parameters on the basis of which the alleged undercompensation was calculated by the second expert were not established in advance and therefore Article 4 of Regulation (EC) No 1370/2007 has not been complied with.
- (99) Third, Article 6(1) provides that in the case of directly awarded public service contracts, compensation must comply with the provisions of Regulation (EC) No 1370/2007 and with the provisions laid down in the Annex to ensure that the compensation does not go beyond what is necessary to carry out the public service obligation. The Annex to Regulation (EC) No 1370/2007 provides that the compensation may not exceed an amount corresponding to the financial amount composed of the following factors: costs incurred in relation to the PSO minus ticket revenue, minus any positive financial effects generated within the network operated under the public service obligation, plus a reasonable profit. In addition, that Annex requires costs and revenues to be calculated in accordance with the accounting and tax rules in force. Furthermore, for transparency reasons, there should be separation of accounts (Point 5 of the Annex to Regulation (EC) No 1370/2007).
- (100) As noted in recital 85, Buonotourist did not apply proper account separation. Consequently, it is impossible to demonstrate that whatever compensation is ultimately awarded does not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator (point 2 of the Annex).
- (101) Moreover, in the absence of compensation parameters laid down in advance, any cost allocation must necessarily be conducted *ex post* on the basis of arbitrary assumptions, as was done through the inductive methodology.
- (102) Accordingly, the Commission considers that the additional compensation ordered by the Council of State was not paid in accordance with Regulation (EC) No 1370/2007, and therefore that the non-notified measure is incompatible with the internal market.

6.4. THE COMPENSATION AWARDED BY THE CONSIGLIO DI STATO DOES NOT CONSTITUTE DAMAGES

- (103) In the opening decision, the Commission invited interested parties to comment on whether the judgment of the Consiglio di Stato concerns an award for damages for alleged breach of law as opposed to an award of public service compensation based on the applicable Council Regulations. Neither the Italian authorities or Buonotourist addressed the question in their observations.
- (104) The Commission notes in this respect that, under certain circumstances, compensation for damages due to the wrongful acts or other conduct by the national authorities ⁽²³⁾ does not provide for an advantage and is therefore not to be considered State aid within the meaning of Article 107(1) of the Treaty ⁽²⁴⁾. The purpose of compensation for damage suffered is different from that of State aid since it aims to bring the damaged party back to the situation in which it found itself prior to the damaging act, as if the latter had not occurred (*restitutio in integrum*). The Commission further notes, in that respect, that for compensation for damages to fall outside the State aid rules, it must be based on a general rule of compensation ⁽²⁵⁾. The Commission finally recalls that the CJEU, in its judgment in *Lucchini*, held that a national court was prevented from applying national law where the application of that law would have the effect of frustrating the application of Community law in so far as it would make it impossible to

⁽²³⁾ For example, tort or unjust enrichment.

⁽²⁴⁾ Joined Cases 106 to 120/87, *Asteris and others v Greece and EEC*, [1988] EU:C:1988:457.

⁽²⁵⁾ See Commission Decision of 16 June 2004 on Dutch aid in favour of Akzo Nobel in order to minimise chlorine transports (Case N 304/2003), summary notice in OJ C 81, 2.4.2005, p. 4; See also Commission Decision of 20 December 2006 on Dutch aid for relocation of car dismantling company Steenbergen (Case N 575/2005), summary notice in OJ C 80, 13.4.2007, p. 1.

recover State aid that was granted in breach of Community law' ⁽²⁶⁾. The principle underlying this pronouncement is that a rule of national law cannot be applied where such application would frustrate the proper application of Union law ⁽²⁷⁾.

- (105) As regards the additional compensation awarded to Buonotourist by the Consiglio di Stato, the Commission observes that, while no reference was made to Regulation (EEC) No 1191/69 in the operative part of the Consiglio di Stato's judgment, that judgment refers to Buonotourist's right to receive amounts by way of compensation pursuant to Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, which must be determined by the administration on the basis of reliable data. This would suggest that Buonotourist's right to additional compensation flows, according to the Consiglio di Stato, not from a general rule of compensation for damages as a result of a wrongful act or other conduct of the national authorities, but from rights allegedly derived from Regulation (EEC) No 1191/69.
- (106) In any event, the Commission considers that an award of damages in favour of Buonotourist for the alleged illegal unilateral imposition of PSOs by the Italian authorities, calculated on the basis of the common compensation procedure laid down by Regulation (EEC) No 1191/69, would be in breach of Articles 107 and 108 of the Treaty. This is because such an award would produce the same result for Buonotourist as an award of public service compensation for the period under review, despite the fact that the concession specifications governing the services in question were neither exempt from prior notification nor complied with the substantive requirements of Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007, as demonstrated above. The availability of such an award would thus effectively enable the circumvention of the State aid rules and of the conditions laid down by the Union legislator under which competent authorities, when imposing or contracting for PSOs, compensate public service operators for costs incurred in return for the discharge of PSOs. Indeed, an award of damages equal to the sum of the amounts of aid that were planned to be granted would constitute an indirect grant of State aid found to be unlawful and incompatible with the internal market ⁽²⁸⁾. Following that line, the General Court has considered indemnification clauses for the recovery of State aid to constitute State aid ⁽²⁹⁾.
- (107) In any event, the sample concession contract from 1972 under which Buonotourist supposedly provided the transport services in question did not provide for the payment of any financial compensation. Buonotourist agreed to run the services under the conditions established in the concession at its own risk. This conclusion is also confirmed by Article 2 of Regional Law No 16/1983, which provided that any loss or deficit not covered by public contributions was to be borne by the service providers.
- (108) Accordingly, the Commission does not consider the judgment of the Consiglio di Stato to constitute an award of compensation for damages suffered by Buonotourist as a result of the wrongful act or other conduct of the national authorities, but as the grant of unlawful and incompatible State aid, which is prohibited under Article 107(1) of the Treaty.
- (109) In the light of the foregoing, the Commission concludes that the non-notified measure constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.

7. RECOVERY OF THE AID

- (110) In accordance with the Treaty and the CJEU's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid ⁽³⁰⁾ when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽³¹⁾. In this context, the CJEU has established that that objective is attained once the recipient has repaid the

⁽²⁶⁾ Case C-119/05 *Lucchini*, EU:C:2007:434, paragraph 59.

⁽²⁷⁾ *Ibid*, paragraph 61.

⁽²⁸⁾ Opinion of 28 April in Joined Cases C-346/03 and C-529/03 *Atzori*, EU:C:2005:256, paragraph 198.

⁽²⁹⁾ Case T-384/08 *Elliniki Nafpigoikataskevastiki AE Chartofylakeiou v Commission*, EU:T:2011:650, and Case T-565/08 *Corsica Ferries v Commission*, EU:T:2012:415, paragraphs 23, 114 and 120 to 131. See also, by analogy, Case C-111/10 *Commission v Council*, EU:C:2013:785, paragraph 44.

⁽³⁰⁾ Case C-70/72 *Commission v Germany*, [1973] ECR 813, paragraph 13.

⁽³¹⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission*, [1994] ECR I-4103, paragraph 75.

amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽³²⁾.

- (111) In line with that case-law, Article 14 of Council Regulation (EC) No 659/1999 ⁽³³⁾ laid down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (112) Therefore the State aid identified in this Decision must be recovered by Italy, insofar as it has already been paid out to Buonotourist. Italy must add recovery interest to that aid amount, calculated from the date on which the unlawful aid was put at the disposal of Buonotourist (i.e. from 21 December 2012) until the date of its recovery ⁽³⁴⁾, pursuant to Chapter V of Commission Regulation (EC) No 794/2004 ⁽³⁵⁾.
- (113) Accordingly, the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 1 111 572 in favour of Buonotourist unlawfully granted by the Italian Republic, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

Article 2

1. The Italian Republic shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from 21 December 2012 until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 ⁽³⁶⁾ amending Regulation (EC) No 794/2004.
4. The Italian Republic shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. The Italian Republic shall ensure that this Decision is implemented within 4 months following the date of its notification.

Article 4

1. Within 2 months following notification of this Decision, the Italian Republic shall submit the following information to the Commission:
 - (a) the total amount (principal and interest) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. The Italian Republic shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the aid referred to in Article 1 has been fully recovered. At the Commission's request, it shall

⁽³²⁾ Case C-75/97 *Belgium v Commission*, [1999] ECR I-3671, paragraphs 64 and 65.

⁽³³⁾ 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).

⁽³⁴⁾ See Article 14(2) of Regulation (EC) No 659/1999.

⁽³⁵⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽³⁶⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

immediately submit information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 19 January 2015.

For the Commission

Margrethe VESTAGER

Member of the Commission

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



Publications Office of the European Union
2985 Luxembourg
LUXEMBOURG

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