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<sup>(1)</sup> Text with EEA relevance

EN

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

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## II

*(Non-legislative acts)*

## DECISIONS

**COMMISSION DECISION (EU) 2016/151****of 1 October 2014****on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring***(notified under document C(2014) 3634)***(Only the German text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

**1. PROCEDURE****1.1. FORMAL INVESTIGATION**

- (1) Between 2002 and 2012, Germany undertook a number of support measures regarding the German race track Nürburgring, including support measures relating to the construction of a leisure park, hotels and restaurants as well as the organisation of Formula 1 races. The Nürburgring complex was owned by State-owned companies Nürburgring GmbH ('NG'), Motorsport Resort Nürburgring GmbH ('MSR') and Congress- und Motorsport Hotel Nürburgring GmbH ('CMHN').
- (2) In July 2010, Eifelpark GmbH ('Eifelpark'), an owner of a leisure park in the German Eifel region informed the Commission about alleged State aid involved in the so-called 'Nürburgring 2009' project and concerning the financing of the construction of leisure facilities at the Nürburgring racetrack. In April 2011, the Commission received a second State aid complaint by the German motorsport association 'Ja zum Nürburgring e.V.'. The latter was concerned that the — allegedly loss-making — Nürburgring 2009 project puts the activities of the racetrack itself into jeopardy.
- (3) By letter dated 21 March 2012 ('the decision of 21 March 2012'), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the aid measures 1-17 described in Section 2 of the present decision ('the formal

<sup>(1)</sup> Case SA.31550 (2012/C) (OJ C 216, 21.7.2012, p. 14) and case SA.34890 (2012/C) (OJ C 333, 30.10.2012, p. 1).

investigation procedure<sup>(2)</sup>. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(3)</sup>. The Commission invited interested parties to submit their comments on the measures.

- (4) On 15 May 2012, Germany granted new support measures (measures 18 and 19) described in Section 2 below and notified them on 25 May 2012. By letter dated 7 August 2012 ('the decision of 7 August 2012'), the Commission informed Germany that it had decided to extend the formal investigation procedure in respect of the new aid measures <sup>(4)</sup>. The Commission decision to extend the procedure was published in the *Official Journal of the European Union* <sup>(5)</sup>. The Commission invited interested parties to submit their comments on the new measures.
- (5) The Commission received comments from Germany on 23 April 2012, 15 June 2012, 18 July 2012, 20 July 2012, 17 August 2012, 7 September 2012 and 18 January 2013. Concerning the decision of 21 March 2012, nine interested parties provided the Commission with comments between 9 August 2012 and 18 October 2012. On 18 October 2012 and 23 October 2012, the Commission forwarded the comments of the interested parties to Germany. Germany replied on 15 November 2012. In relation to the decision of 7 August 2012, comments from three interested parties were received by the Commission between 5 November 2012 and 30 November 2012. On 3 December 2012, the Commission forwarded the comments of the interested parties to Germany. Germany replied on 2 January 2013.
- (6) The Commission requested further information from Germany on 29 January 2013, 4 June 2014 and 5 June 2014, to which Germany replied on 15 April 2013, 4 June 2014 and 6 June 2014, respectively.

## 1.2. INSOLVENCY PROCEEDINGS AND SALE OF ASSETS

- (7) On 24 July 2012, the local court in Bad Neuenahr-Ahrweiler ordered a preliminary own administration of the assets ('*vorläufige Eigenverwaltung des Vermögens*') of the companies owning the Nürburgring, i.e. NG, MSR and CMHN. Insolvency proceedings in the form of own administration of the assets ('*Eigenverwaltung des Vermögens*') were eventually launched by the local court on 1 November 2012. The business of NG, MSR and CMHN has been managed since by the managing director under insolvency law ('*Eigenverwalter*' or '*Sanierungsgeschäftsführer*') and the insolvency administrator ('*Sachwalter*') (hereunder both referred to as 'the insolvency administrators') that are both not bound by instructions of the shareholders. NG, MSR and CMHN retained KPMG AG ('KPMG') to act on their behalf as the exclusive financial advisor to the sale of their assets in the insolvency proceedings, and to handle all contacts with the interested bidders.
- (8) Since October 2012, the Commission has been discussing with Germany and the insolvency administrators the State aid issues that could arise in the sale of the assets of NG, MSR and CMHN.
- (9) Since 1 November 2012, the whole complex has been operated by Nürburgring Betriebsgesellschaft mbH ('NBG'), a 100 % subsidiary of NG, established by the insolvency administrators. NBG replaced the previous operator Nürburgring Automotive GmbH ('NAG') <sup>(6)</sup>.
- (10) In the context of the insolvency of NG, MSR and CMHN, the insolvency administrators have undertaken a sale of their assets since May 2013. On 15 May 2013, a tender process for the sale of those assets was launched. By two letters dated 23 May 2013, the Commission services provided to Germany and the insolvency administrator an opinion on the various options for selling the assets that would be compliant with the State aid rules <sup>(7)</sup>.

<sup>(2)</sup> A corrigendum of the decision of 21 March 2012 was sent to Germany by Commission decision of 20 June 2012.

<sup>(3)</sup> OJ C 216, 21.7.2012, p. 14.

<sup>(4)</sup> On 22 August 2012, case SA.34890 (2012/C), opened by the decision of 7 August 2012 extending the formal investigation procedure, was administratively merged with case SA.31550(2012/C).

<sup>(5)</sup> OJ C 333, 30.10.2012, p. 1.

<sup>(6)</sup> On the basis of the settlement agreement ('*Vergleichsvertrag*') concluded between NG, NAG and NBG on 27 November 2012.

<sup>(7)</sup> In particular, the Commission services advised that (1) in case of an exclusion of the racetrack from the tender procedure, the presence of further state aid for the buyer and a transfer of 'old' aid could not be ruled out; (2) the imposition of general public access to the racetrack — with the exception of the use of the Nürburgring race track for commercial purposes, such as testing by the automotive industry — could under certain conditions be regarded as a neutral element in the pending state aid procedure; (3) in view of an employment guarantee for the employees until the end of 2016, the Commission decision in the SERNAM case (Commission decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*) should be taken into account; (4) the sale should not a priori lead to a transfer of state aid potentially subject to recovery from the owners of the assets to any purchaser(s) of the assets.

- (11) As regards the sale of assets of NG, MSR and CMHN, Germany provided information by submissions of 10 April 2013, 15 April 2013, 30 April 2013, 9 October 2013, 27 February 2014 and — following Commission's requests for information of 13 March 2014, 23 May 2014, 4 July 2014 and 7 July 2014 — on 23 April 2014, 26 May 2014 and 10 July 2014, respectively. Meetings between the Commission, Germany and the insolvency administrators took place in Brussels on 18 October 2012, 7 March 2013, 11 October 2013 and 26 February 2014. The Commission also received further submissions from interested parties.
- (12) On 23 December 2013, 'Ja zum Nürburgring e.V.' ('complainant 1') <sup>(8)</sup> and on 2 January 2014, the German automotive club ADAC e.V. ('complainant 2'), the latter automotive club participating in the sale process, submitted letters claiming that the ongoing sale of the Nürburgring assets was carried out by the insolvency administrators in breach of the State aid rules. On 4 February 2014, complainant 1 asked the Commission to suspend the sales process and provided new information. Following a letter from the Commission of 13 January 2014, Germany sent its comments on the claims raised by the two complainants by letter dated 10 February 2014. Complainant 1 submitted further comments on 8 July 2014, on which Germany submitted its comments on 14 July 2014.
- (13) On 10 April 2014, [Bidder 3], Inc. ('complainant 3' or '[Bidder 3]'), participating in the sale process, lodged a complaint on that process with the Commission. On 17 April 2014, Mr Meyrick Cox ('complainant 4'), a member of the consortium [Bidder 2], participating in the sale process and consisting of [Bidder 2] European Capital Partners LLP, Mr Meyrick Cox, Mr Marcus Graf von Oeynhausen-Sierstorff and Wadell & Reed, Inc. ('[Bidder 2]'), filed a complaint on that process with the Commission. These complaints were forwarded to Germany on 16 April 2014 and 17 April 2014, respectively. As for the complaint filed by complainant 4, Germany sent its comments on 25 April 2014. As for the complaint filed by complainant 3, Germany sent its comments on 5 May 2014. Complainant 3 sent additional arguments on 19 May 2014. Germany sent its comments to these additional arguments on 22 May 2014. Complainant 3 submitted a further piece of information on 23 May 2014, on which Germany submitted its answer on 10 July 2014, and sent further comments on 16 June 2014 and 7 July 2014, on which Germany sent its comments on 11 July 2014. The German authorities submitted further information on 29 July 2014, 20 August 2014, 8 September 2014 and 12 September 2014, which also covered comments submitted by complainants 3 and 4 on 3 September 2014, 21 August 2014 and 12 September 2014. Finally, two meetings between the Commission services and the German authorities, the insolvency administrators and KPMG took place on 22 July and 5 September 2014 in Brussels.
- (14) In view of a potential conclusion of the formal investigation procedure by a negative Commission decision requesting the recovery of incompatible aid, Germany has requested the Commission to confirm that a recovery obligation imposed on NG, MSR and CMHN would not concern the buyer of the assets sold or its subsidiary being an operating company, and that that recovery obligation would not hinder the operation of the Nürburgring by NRG during the season of 2014, following which a liquidation of the latter company is foreseen.

## 2. DESCRIPTION OF THE AID MEASURES

### 2.1. THE AID DONORS

- (15) Five entities have granted funding: (1) the Land Rhineland-Palatinate <sup>(9)</sup> ('the Land'); (2) Investitions- und Strukturbank Rheinland-Pfalz GmbH ('ISB'), fully owned by the Land; (3) Rheinland-Pfälzische Gesellschaft für Immobilien und Projektmanagement GmbH ('RIM'), fully owned by ISB; (4) the district ('Landkreis') of Ahrweiler; and (5) NG <sup>(10)</sup>.

### 2.2. THE ALLEGED BENEFICIARIES

- (16) Until 30 April 2010, the Nürburgring complex <sup>(11)</sup> was owned and managed by NG.

<sup>(8)</sup> Following the termination of the business lease contract between NG and NAG in February 2012, complainant 1, one of the two initial complainants, dropped its negative position to the state aid to the race ring by arguing that the measures notified as rescue aid in 2012 should be approved, that the race ring itself had not received aid and it should therefore be taken out from the investigation, and that the operation of the Nürburgring is a service of general economic service ('SGEI').

<sup>(9)</sup> 'Land Rheinland-Pfalz'

<sup>(10)</sup> NG's business objective includes the support of the car sector and motor sport as well as promotion of tourism in the Eifel region. NG is 90 % owned by the Land and 10 % by the district of Ahrweiler. NG's supervisory board represents the Land and the district of Ahrweiler as NG's shareholders.

<sup>(11)</sup> For a description of the Nürburgring complex, please refer to Section 2.1 of the decision of 21 March 2012.

- (17) On 1 May 2010, a restructuring of the ownership and management of the Nürburgring complex took place. NG remained the owner of the race track and the leisure park and acquired indirect ownership of the hotels and restaurants via the 93,3 % ownership of MSR <sup>(12)</sup> and the indirect 93,3 % ownership of CMHN <sup>(13)</sup> (MSR and CMHN remained the direct owners of the hotels and restaurants). The operation of the race track, the leisure park, hotels and restaurants was granted to NAG <sup>(14)</sup> on the basis of a business lease contract (*'Betriebspachtvertrag'*), see measure 10 <sup>(15)</sup>.
- (18) As described above, the beneficiaries NG, MSR and CMHN are subject to insolvency proceedings. Further beneficiaries for which a liquidation procedure has been launched are IPC Gesellschaft für internationale Projektcoordination mbH ('IPC') <sup>(16)</sup>, Weber Projektierungs- und Realisierungs GmbH ('Weber') <sup>(17)</sup> and Cash Settlement and Ticketing GmbH ('CST') <sup>(18)</sup>.
- (19) The beneficiaries which still operate and are not in an insolvency procedure are Mediinvest GmbH, renamed to Return Projektmanagement GmbH in the meantime ('Mediinvest') <sup>(19)</sup>, Geisler & Trimmel General Contractor GmbH ('Geisler & Trimmel') <sup>(20)</sup>, NAG and Fahrsicherheitszentrum am Nürburgring GmbH & Co. KG ('FSZ') <sup>(21)</sup>. The beneficiaries which do not exist any longer are Erlebnispark Nürburgring GmbH & Co. KG ('EWN') <sup>(22)</sup>, Motorsport Akademie Nürburgring GmbH & Co. KG ('MAN') <sup>(23)</sup>, Test & Training International GmbH ('TTI') <sup>(24)</sup>, Bike World Nürburgring GmbH ('BWN1') <sup>(25)</sup>, BikeWorld Nürburgring Besitz ('BWNB'), BikeWorld Nürburgring GmbH ('BWN2'), Camp 4 Fun GmbH & Co. KG ('Camp4Fun') <sup>(26)</sup> and MI-Beteiligungs- und Verwaltungs GmbH ('MIB') <sup>(27)</sup>.
- 
- <sup>(12)</sup> The business objective of MSR is the project development or the construction of real property, vacation facilities, hotels and resorts as well as the participation in undertakings which are in connection with the project development of Nürburgring. Since 25 March 2010 MSR is 93,3 % owned by NG and 6,7 % owned by RIM. Until 25 March 2010 the shareholders of MSR were Mediinvest GmbH (49,5 %), Geisler & Trimmel General Contractor GmbH (33,8 %), NG (10 %) and Weber Projektierungs- und Realisierungs GmbH (6,7 %).
- <sup>(13)</sup> The business objective of CMHN is the construction and operation of hotels, vacation real property and resorts. CMHN is 100 % owned by MSR.
- <sup>(14)</sup> NAG's business objective is the operation of the race tracks, hotels, safety driving centre, driving school, multifunctional halls, *ringwerk* as well as all the other destinations at Nürburgring. Mediinvest GmbH and Lindner Unternehmensgruppe GmbH & Co Hotel KG hold each 50 % shares of NAG.
- <sup>(15)</sup> The hotels and the restaurants were managed by Lindner Hotels AG due to a contract with NAG.
- <sup>(16)</sup> The liquidation of IPC was registered in the trade register on 4 December 2008. The conclusion of the liquidation has not yet been notified to the trade register.
- <sup>(17)</sup> Weber carried out the construction of the hotels and the restaurants. On 23 November 2010, the liquidation of Weber was launched.
- <sup>(18)</sup> The business objective of CST was the operation of a cash free payment system allowing the customers to pay for their visit to any attraction of the complex with a card (*ringcard*). CST was 50 % owned by NG and 50 % owned by MIB until 1 November 2012. On 19 December 2012 NG as 100 % owner started the liquidation. The assets were transferred to NG. Pursuant to Germany, the elimination of the company from the trade register was filed on 22 May 2014.
- <sup>(19)</sup> The business objective of Mediinvest is mediation of conclusion of contracts regarding land and buildings, project development as well as the construction of real property, vacation facilities and resorts. Mediinvest is 100 % owned by Mr Kai Richter. On 18 June 2013, Mediinvest was renamed to Return Projektmanagement GmbH.
- <sup>(20)</sup> Geisler & Trimmel carried out the construction of the hotels and the restaurants.
- <sup>(21)</sup> The business objective of FSZ is the construction, the ownership and the operation of a driving safety centre. It was 41 % owned by NG. The majority owners terminated the participation of NG in October 2013.
- <sup>(22)</sup> The business objective of EWN was the operation of the '*Erlebniswelt*' with motor sport related attractions at Nürburgring. The company was renamed to *ringwerk* GmbH & Co. KG on 31 March 2011 and it was 100 % owned by NG until 24 August 2011 when its property accrued to NG and its elimination without formal liquidation was registered in the trade register.
- <sup>(23)</sup> The business objective of MAN was the support of the German motor sport through the operation of an educational facility. NG was the only owner. The company was liquidated, the elimination of the company was registered in the trade register on 11 December 2013. All assets were transferred to NG.
- <sup>(24)</sup> The business objective of TTI was the support, launch, construction and operation of driving safety centres. NG owned 26 % of the company, the remaining 74 % were owned by Brands Hatch Leisure Group Limited, Fawkham Longfield, Kent, UK (26 %), Test & Training Gesellschaft mbH, Teesdorf/Austria (26 %) and Tilke GmbH, Aachen (22 %). The company was liquidated. The elimination of the company was registered in the trade register on 4 December 2007.
- <sup>(25)</sup> The business objective of BWN was trade with new and used motor bikes and the promotion of motor bike tourism in the region. With effect on 6 September 2005, Bike World Nürburgring GmbH ('BWN1') merged with BikeWorld Nürburgring Besitz GmbH ('BWNB'). The name of the acquiring company BWNB was subsequently changed into BikeWorld Nürburgring GmbH ('BWN2'). On 15 May 2007, NG sold its 49 % of the shares in the latter company to Mr Norbert Brückner and Mr Jörg Jovy and waived the repayment of its loans. BWN2 ceased operations at the Nürburgring in 2008, Pursuant to Germany, BWN2 was renamed to BikeWorld GmbH and changed the company's seat to St. Ingbert in the German Land Saarland.
- <sup>(26)</sup> The business objective of Camp4Fun was the operation of an off-road-park. The company was 100 % owned by NG until 18 October 2010 when its property accrued to NG and its elimination without formal liquidation was registered in the German trade register.
- <sup>(27)</sup> The business objective of MIB was the participation in other undertakings and the takeover of their business management. MIB was 80 % owned by Mr Kai Richter and 20 % owned by Mr Klaus König. On 18 June 2013, MIB merged with NAG.

## 2.3. DESCRIPTION OF THE MEASURES

- (20) The current investigation concerns the financing of the construction and operation of the facilities linked to the race track and the facilities for tourism before the 'Nürburgring 2009' project, of the construction of all such facilities under the 'Nürburgring 2009' project and of the organisation of Formula 1 races. The project 'Nürburgring 2009' intended to provide the race track with various attractions in order to increase its attractiveness over the whole year. The 'Nürburgring 2009' project consisted of part I (mainly tribune and entertainment facilities) and part II (mainly accommodation facilities) <sup>(28)</sup>.

## (a) Measures covered by the decision of 21 March 2012

- (21) Measure 1 (provision of capital by the Land and the district of Ahrweiler to NG in the form of transfers to the capital reserve and increases of own capital): Capital in the form of transfers to the capital reserve ('*Einstellungen in die Kapitalrücklage*') <sup>(29)</sup> was granted by the Land to NG in the amounts of EUR 2 179 000 <sup>(30)</sup> on 1 May 2002 and EUR 22 839 241 <sup>(31)</sup> on 21 December 2004. In addition, the Land and the district of Ahrweiler carried out the increases of own capital ('*Kapitalerhöhung*') of NG of EUR 4 887 000 <sup>(32)</sup> on 31 August 2004 and EUR 10 000 000 on 4 September 2007. In total, the Land and the district of Ahrweiler provided to NG capital amounting to EUR 39 905 241 between 2002 and 2007.
- (22) Measure 2 (shareholder loans of NG to its subsidiaries before the 'Nürburgring 2009' project): Independently from the 'Nürburgring 2009' project, NG granted to its subsidiaries the shareholder loans in the total amount of EUR 11 176 953,14, listed in Tables 1-4. The interest rate was agreed at 6 % and no collaterals were provided.

Table 1

## Loans granted by NG to EWN, FSZ, MAN, TTI and Camp4Fun

| Beneficiary | Date of contract | Amount (in EUR) | Interest rate (%) |
|-------------|------------------|-----------------|-------------------|
| EWN (*)     | 1.1.2006         | 4 853 553,04    | 6                 |
| EWN         | 30.6.2006        | 350 000         | 6                 |
| EWN         | 22.12.2006       | 350 000         | 6                 |
| EWN         | 4.7.2007         | 450 000         | 6                 |
| EWN         | 17.3.2009        | 182 313,24      | 6                 |
| EWN         | 29.4.2009        | 9 303,74        | 6                 |
| FSZ (**)    | 12.4.2002        | [...] (****)    | 6                 |

<sup>(28)</sup> For a more detailed description of part I and part II of the Nürburgring project, please refer to Section 2.2 of the decision of 21 March 2012.

<sup>(29)</sup> Capital reserve (capital surplus) is a deposit of a shareholder which is not subscribed capital. This term frequently appears as a balance sheet item as a component of shareholders' equity. Capital reserve is used to account for the amount that a firm raises in excess of the par value (nominal value) of the shares (common stock). Taken together, common stock issued and paid plus capital reserve represent the total amount actually paid by investors for shares when issued.

<sup>(30)</sup> The transfer of EUR 2 179 000 to the capital reserve through a waiver of interest due in 1999 for a loan taken over by the Land from the Federal Republic of Germany in 1981 ('*Altdarlehen Bund*').

<sup>(31)</sup> The transfer of EUR 22 839 241 to the capital reserve through a waiver of claims from a loan taken over by the Land from the Federal Republic of Germany in 1981 ('*Altdarlehen Bund*').

<sup>(32)</sup> The amount of EUR 4 887 000 consists of a contribution by the Land through a waiver of claims from a loan taken over by the Land from the Federal Republic of Germany in 1981 ('*Altdarlehen Bund*') of EUR 4 398 300 and of a contribution by the district of Ahrweiler through liquidity of EUR 488 700.

| Beneficiary     | Date of contract | Amount (in EUR) | Interest rate (%) |
|-----------------|------------------|-----------------|-------------------|
| FSZ             | 21.3.2003        | [...]           | 6                 |
| FSZ             | 4.3.2008         | [...]           | 6                 |
| MAN (**)        | 10.12.2002       | 100 000         | 6                 |
| TTI             | 15.8.2002        | 25 000          | 6                 |
| Camp4Fun (****) | 26.5.2009        | 100 000         | 6                 |
| Camp4Fun        | 22.7.2009        | 100 000         | 6                 |
| Camp4Fun        | 2.11.2009        | 50 000          | 6                 |
| Camp4Fun        | 2.11.2009        | 50 000          | 6                 |
| Camp4Fun        | 18.12.2009       | 150 000         | 6                 |
| <b>TOTAL</b>    |                  | [...]           |                   |

(\*) Since 2002, the loans to EWN were repaid in the amount of EUR 722 264,49.

(\*\*) Since 2002, the loans to FSZ were repaid save the amount of EUR [...] that was settled in the context of a compensation payment of EUR [...] in connection with the exclusion of NG from Fahrsicherheitszentrum am Nürburgring Verwaltungs GmbH and the termination of the participation of NG in FSZ.

(\*\*\*) MAN repaid the loan fully on 28 November 2005.

(\*\*\*\*) Camp4Fun repaid the loans fully on 18 December 2003.

(\*\*\*\*\*) [...]: the information in brackets is covered by the obligation of professional secrecy.

Table 2

**Loans granted by NG to BWNB before its renaming**

| Date of contract | Amount of loan (EUR) | Interest rate (%) |
|------------------|----------------------|-------------------|
| 17.10.2003       | 300 000,00           | 6                 |
| 4.2.2004         | 100 000,00           | 6                 |
| 27.10.2004       | 100 000,00           | 6                 |
| Total            | 500 000,00           |                   |

Table 3

**Loans granted by NG to BWN1 before its merger with BWNB**

| Date of contract | Amount of loan (EUR) | Interest rate (%) |
|------------------|----------------------|-------------------|
| 4.2.2004         | 100 000,00           | 6                 |
| 12.3.2004        | 200 000,00           | 6                 |
| 27.4.2004        | 200 000,00           | 6                 |
| 24.11.2004       | 110 000,00           | 6                 |

| Date of contract | Amount of loan (EUR) | Interest rate (%) |
|------------------|----------------------|-------------------|
| 5.1.2005         | 200 000,00           | 6                 |
| 7.1.2005         | 150 000,00           | 6                 |
| 19.1.2005        | 100 000,00           | 6                 |
| 22.2.2005        | 75 000,00            | 6                 |
| 28.2.2005        | 75 000,00            | 6                 |
| 21.4.2005        | 150 000,00           | 6                 |
| 13.6.2005        | 100 000,00           | 6                 |
| 30.6.2005        | 50 000,00            | 6                 |
| 18.7.2005        | 50 000,00            | 6                 |
| 22.7.2005        | 100 000,00           | 6                 |
| Total            | 1 660 000,00         |                   |

Table 4

**Loans granted by NG to BWN2 after its merger with BWNB and BWNB's renaming**

| Date of contract | Amount of loan (EUR) | Interest rate (%) |
|------------------|----------------------|-------------------|
| 20.9.2005        | 200 000,00           | 6                 |
| 4.10.2005        | 50 000,00            | 6                 |
| 2.11.2005        | 100 000,00           | 6                 |
| 1.12.2005        | 50 000,00            | 6                 |
| 2.1.2006         | 200 000,00           | 6                 |
| 20.1.2006        | 200 000,00           | 6                 |
| 28.2.2006        | 50 000,00            | 6                 |
| 30.6.2006        | 20 000,00            | 6                 |
| 15.8.2006        | 100 000,00           | 6                 |
| 6.9.2006         | 130 000,00           | 6                 |
| 15.1.2007        | 150 000,00           | 6                 |
| 27.2.2007        | 100 000,00           | 6                 |
| 4.4.2007         | 250 000,00           | 6                 |
| Total            | 1 600 000,00         | 6                 |

- (23) Measure 3 (loans provided by the Land to NG via the liquidity pool): This measure consists of loans from a so-called liquidity pool <sup>(33)</sup> of the Land provided by the latter to NG. In connection with the Formula 1 races and the 'Nürburgring 2009' project <sup>(34)</sup>, NG had been included in the cash pooling of the Land since 2003 and 2008, respectively <sup>(35)</sup>. ISB is also included in that liquidity pool. The aim of the cash pooling is to optimise the use of liquidity within the different holdings, foundations and public undertakings of the Land. The participation of the different undertakings and foundations in the cash pooling is based on a memorandum of understanding between the undertaking/foundation concerned and the Ministry of Finance of the Land. In the event that within the cash pooling, the liquidity demand exceeds the available funds, the liquidity gap is financed on short term basis on the capital market. From 30 June 2003 to 11 May 2010, the Land granted to NG loans totalling EUR 399 805 370 (including the loans granted by the Land to NG of EUR 53 443 493 for Formula 1 racing from 30 June 2003 to 30 June 2009, and the loans of EUR 170 million given by the Land to NG for the 'Nürburgring 2009' project from 23 June 2008 to 30 June 2010) <sup>(36)</sup>. The aid beneficiary is NG. For details, see Table 5.

Table 5

**Loans paid out from the liquidity pool of the Land to NG (\*)**

| Date       | Amount paid out (EUR) | Purpose                         | Repayment of the loans (EUR) | Average interest rate/year (%) |
|------------|-----------------------|---------------------------------|------------------------------|--------------------------------|
| 30.6.2003  | 7 000 000             | Formula 1 fee                   |                              | 2,40                           |
| 4.8.2003   |                       |                                 | – 1 000 000                  |                                |
| 19.9.2003  |                       |                                 | – 1 000 000                  |                                |
| 28.10.2003 |                       |                                 | – 1 000 000                  |                                |
| 1.1.2004   | 1 361 877             | Interests for shareholder loans |                              | 2,06                           |
| 30.6.2004  | 6 016 931             | Formula 1 fee                   |                              |                                |
| 18.2.2005  |                       |                                 | – 1 400 000                  | 2,10                           |
| 27.5.2005  | 2 000 000             | Formula 1 fee                   |                              |                                |
| 8.5.2006   | 10 000 000            | Formula 1 fee                   |                              | 2,88                           |
| 9.5.2006   |                       |                                 | – 8 000 000                  |                                |
| 23.6.2006  |                       |                                 | – 2 000 000                  |                                |
| 23.7.2007  | 13 000 000            | Formula 1 fee                   |                              |                                |

<sup>(33)</sup> In the context of the 'Nürburgring 2009' project, the amounts of EUR 285 265 000 on 30 July 2010, EUR 5 million on 30 September 2010, EUR 5 million on 31 December 2010, EUR 5 million on 31 March 2011, EUR 5 million on 31 May 2011 and EUR 10 million on 31 July 2011 were put at the disposal of ISB by the Land. In total, between 31 July 2010 and 31 October 2011, ISB used an amount of EUR 315 265 000 from the liquidity pool of the Land for the refinancing of its loan to NG, MSR and CMHN of EUR 325 265 000 (measure 8). Until the full repayment of the loans in November 2011, the interest rate was set daily. The interests totalled EUR 2 326 680 and they were always repaid in time at the end of the following month.

<sup>(34)</sup> The 'Nürburgring 2009' project consisted of part I and part II: Part I includes *tribune*, *welcome center*, *ring arena* (for up to 5 100 visitors), *access facilities*, *ring boulevard* (shopping mall with the largest multitouch-video-wall in the world), the *Warsteiner event centre* (for up to 1 500 visitors), *Autoworld* ('Autowelten', sale spaces for car producers), *ringwerk* (indoor attractions such as a multi-media theatre, historical exhibition, interactive applications and *ringracer*, the fastest roller coaster in the world) as well as *ring kartbahn* (an indoor kart track). Part II includes two hotels (including one casino), 100 vacation houses, five restaurants, discotheque and merchandising shop.

<sup>(35)</sup> For problems in the management and financing of the liquidity pool, see the 2011 annual report of the Court of Auditors of the Land, part II, pages 7 to 15, available at <http://www.rechnungshof-rlp.de/jahresberichte/>

<sup>(36)</sup> The loans from the liquidity pool were fully repaid, see Table 6. The interest totalling EUR 5 059 174,46 was paid.

| Date       | Amount paid out (EUR) | Purpose                     | Repayment of the loans (EUR) | Average interest rate/ year (%) |
|------------|-----------------------|-----------------------------|------------------------------|---------------------------------|
| 23.6.2008  | 4 000 000             | Nürburgring 2009 project    |                              | 3,87                            |
| 21.7.2008  | 6 500 000             | Nürburgring 2009 project    |                              |                                 |
| 22.8.2008  | 2 500 000             | Nürburgring 2009 project    |                              |                                 |
| 26.8.2008  | 6 000 000             | Nürburgring 2009 project    |                              |                                 |
| 23.9.2008  | 80 000 000            | Establishment of 'Bardepot' |                              |                                 |
| 25.9.2008  | 6 000 000             | Nürburgring 2009 project    |                              |                                 |
| 13.10.2008 | 10 000 000            | Nürburgring 2009 project    |                              |                                 |
| 19.11.2008 | 10 000 000            | Nürburgring 2009 project    |                              |                                 |
| 8.12.2008  |                       |                             | – 80 000 000                 | 0,68                            |
| 19.1.2009  | 10 000 000            | Nürburgring 2009 project    |                              |                                 |
| 5.3.2009   | 95 000 000            | Establishment of 'Bardepot' |                              |                                 |
| 26.3.2009  | 15 000 000            | Nürburgring 2009 project    |                              |                                 |
| 16.4.2009  | 10 000 000            | Nürburgring 2009 project    |                              |                                 |
| 5.5.2009   | 15 000 000            | Nürburgring 2009 project    |                              |                                 |
| 22.5.2009  | 15 000 000            | Nürburgring 2009 project    |                              |                                 |
| 29.6.2009  | 10 000 000            | Nürburgring 2009 project    |                              |                                 |
| 30.6.2009  | 15 426 562            | Formula 1 fee               |                              |                                 |
| 13.7.2009  |                       |                             | – 95 000 000                 |                                 |
| 24.7.2009  | 20 000 000            | Nürburgring 2009 project    |                              |                                 |
| 2.10.2009  | 15 000 000            | Nürburgring 2009 project    |                              |                                 |

| Date      | Amount paid out (EUR) | Purpose                  | Repayment of the loans (EUR) | Average interest rate/year (%) |
|-----------|-----------------------|--------------------------|------------------------------|--------------------------------|
| 24.3.2010 | 6 000 000             | Nürburgring 2009 project |                              | 0,38                           |
| 11.5.2010 | 9 000 000             | Nürburgring 2009 project |                              |                                |
| 30.6.2010 |                       |                          | – 170 000 000                |                                |
| 11.1.2011 |                       |                          | – 40 405 000                 |                                |
| 13.1.2011 |                       |                          | – 370                        |                                |

(\*) Payments were based on a contractual agreement on the liquidity pool between the Land and NG of 20 February 2003. The interest for the respective loan was based on the daily rate provided to the Land on the market. The calculation of interests was carried out specifically for each day (actual/360).

- (24) Measure 4 (loan by NG to MSR): In the context of the 'Nürburgring 2009' project, NG granted a loan of EUR 300 000 to MSR with the interest rate of 7 % on 27 December 2007. No collaterals were provided.
- (25) Measure 5 (loans, letter of comfort and subordination of claims by NG to CST): From 27 August 2008 to 18 April 2011, NG provided to CST loans of the total amount of EUR 11 032 060 with an interest of 6 % <sup>(37)</sup>.

Table 6

#### Loans granted by NG to CST

| Beneficiary | Date of the loan | Amount (in EUR) | Interest rate (%) |
|-------------|------------------|-----------------|-------------------|
| CST         | 27.8.2008        | 50 000          | 6                 |
| CST         | 9.10.2008        | 100 000         | 6                 |
| CST         | 30.1.2009        | 1 000 000       | 6                 |
| CST         | 18.3.2009        | 1 000 000       | 6                 |
| CST         | 17.4.2009        | 1 476 830,88    | 6                 |
| CST         | 22.6.2009        | 1 000 000       | 6                 |
| CST         | 20.7.2009        | 1 000 000       | 6                 |
| CST         | 28.10.2009       | 2 250 000       | 6                 |
| CST         | 10.2.2010        | 1 723 169,12    | 6                 |

<sup>(37)</sup> The amount of EUR 3 589 297,04 was repaid on 31 December 2010. For problems in the management and financing of the CST, see the 2011 annual report of the Court of Auditors of the Land, part II, pages 16 to 21, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>

| Beneficiary  | Date of the loan | Amount (in EUR)   | Interest rate (%) |
|--------------|------------------|-------------------|-------------------|
| CST          | 12.10.2010       | 250 000           | 6                 |
| CST          | 13.10.2010       | 150 000           | 6                 |
| CST          | 5.11.2010        | 150 000           | 6                 |
| CST          | 30.10.2010       | 250 000           | 6                 |
| CST          | 9.2.2011         | 500 000           | 6                 |
| CST          | 18.4.2011        | 132 060           | 6                 |
| <b>Total</b> |                  | <b>11 032 060</b> |                   |

- (26) In order to prevent the insolvency of CST, on 23 December 2009, NG provided a letter of comfort (*'Patronatserklärung'*) to CST committing itself until 31 December 2011 to take measures that are necessary for preventing insolvency of CST. The letter of comfort was acted upon. On 13 December 2010, NG declared subordination of its claims in the amount of EUR 10,4 million (*'Rangrücktritt'*) against CST.
- (27) Measure 6 (service fee paid by NG to IPC, and loan to MSR through PNG as intermediary): Between 2006 and 2008, IPC received a total amount of EUR 640 000 from NG as consideration for its services consisting in searching for private investors. In addition, NG granted a loan of EUR 3 million to Pinebeck Nürburgring GmbH (*'PNG'*) with the interest rate of 6 % on 15 October 2008. On 15 October 2008, PNG used this loan for granting a loan of EUR 3 million to MSR with the interest rate of 6 % whereas PNG disbursed the loan only up to an amount of EUR 2 941 000 <sup>(38)</sup>. Both loans had collaterals in favour of NG in the value of EUR 3 million.
- (28) Measure 7 (cession of claims of MIB to NG): On 17 April 2009, MIB ceded its claims from loans taken by CST as borrower of EUR 1 476 830,88 <sup>(39)</sup> to NG. For these loans, NG paid to MIB the amount of EUR 1 476 830,88. This transaction allowed MIB to be fully repaid by NG who in turn became the creditor of CST <sup>(40)</sup>.
- (29) Measure 8 (ISB loan to NG, MSR and CMHN): In order to save financing costs and to safeguard a long-term financing, a full restructuring of funding arrangements took place on 28 July 2010. The liabilities regarding the liquidity pool of the Land (measure 3), a loan of EUR [...] granted by Bank für Tirol und Vorarlberg AG to CMHN <sup>(41)</sup>, a loan of EUR [...] granted by Kreissparkasse Ahrweiler to MSR <sup>(42)</sup> and the loans of RIM to MSR worth EUR 85 512 000, granted in the form of the silent participations of RIM in Mediinvest and subsequent loans of Mediinvest to MSR (measure 11) were restructured in one loan of EUR 325 265 000 given by ISB to NG, MSR and CMHN, upon an instruction by the Land <sup>(43)</sup>. The restructuring of the funding arrangements in question constitutes a separate measure, additional to the underlying loans. This results to a new loan in favour of NG, MSR and CMHN. The loan was given in four tranches: tranche 1 of EUR 96 574 200 to NG for infrastructure, tranche 2 of EUR 113 590 800 to NG for other investments <sup>(44)</sup>, tranche 3 of EUR 92 000 000 to MSR for other investments and tranche 4 of EUR 23 100 000 to CMHN for other investments. Tranche 1 relating to the facilities of the ring does not bear interest. Tranches 2 to 4 relate to the measures for promotion of tourism (for the interest rate see Table 7 below). Furthermore, the level of the collateralisation of the ISB loan in the form of mortgages equals EUR 93 658 000 EUR whereas the collateralisation of tranches 2 to 4 has priority over the collateralisation of tranche 1. Table 7 summarises the conditions of the ISB loan and the at that time applicable base lending rate.

<sup>(38)</sup> The loan was fully repaid on 22 January 2009, the interests of EUR 48 500 were paid. However, Germany stated that the loan was repaid to NG by Geisler & Trimmel, not by MSR to PNG and by PNG to NG.

<sup>(39)</sup> EUR 1 450 000 plus interests of EUR 26 830,88.

<sup>(40)</sup> In 2010, NG offset the loan with its liabilities towards CST in the amount of EUR 1 439 297,04. The remaining liability of CST towards NG in the amount of EUR 37 533,84 was eliminated in the context of the liquidation of CST and the transfer of its assets to NG.

<sup>(41)</sup> On 25 May 2008, Bank für Tirol und Vorarlberg AG granted a loan of EUR [...] to CMHN.

<sup>(42)</sup> On 18 January 2010, Kreissparkasse Ahrweiler provided a loan of EUR [...] to MSR.

<sup>(43)</sup> Based on the loan request by the Land, ISB did not carry out usual checks of the loan.

<sup>(44)</sup> As regards tranche 2, NG did not use an amount of EUR 4 735 000 of the loan contracted in the amount of EUR 118 325 800 and the Land paid to NG therefore an amount of EUR 113 590 800; in this context NG paid to ISB a compensation of EUR 141 835,54.

Table 7

**Financing conditions of the loan granted by ISB**

| Tranche No | Beneficiary | Amount paid out (EUR) | Date of contract | Interest rate <sup>(1)</sup>                                                              |
|------------|-------------|-----------------------|------------------|-------------------------------------------------------------------------------------------|
| 1          | NG          | 96 574 200            | 28.7.2010        | 0 %                                                                                       |
| 2          | NG          | 113 590 800           | 28.7.2010        | until 31.12.2012: EONIA plus 0,64 % = 1,121 %<br>from 1.1.2013: Commission reference rate |
| 3          | MSR         | 92 000 000            | 28.7.2010        | until 31.12.2012: EONIA plus 0,64 % = 1,121 %<br>from 1.1.2013: Commission reference rate |
| 4          | CMHN        | 23 100 000            | 28.7.2010        | until 31.12.2012: EONIA plus 0,64 % = 1,121 %<br>from 1.1.2013: Commission reference rate |

<sup>(1)</sup> For the average EONIA rate as of 28 July 2010, see <http://www.global-rates.com/interest-rates/eonia/2010.aspx>

- (30) Measure 9 (guarantee of the Land to ISB concerning measure 8: ISB loan granted to NG, MSR and CMHN): On 28 July 2010, the Land provided an unconditional and irrevocable guarantee and indemnification statement (100 % coverage of liabilities) towards ISB for the NG, MSR and CMHN's fulfilment of all the liabilities from the ISB loan (measure 8). NG, MSR or CMHN did not pay any fee for the guarantee. Similarly to the ISB loan (measure 8), the guarantee relates both to the facilities of the ring and the measures for promotion of tourism.
- (31) Measure 10 (business lease of the Nürburgring complex to NAG): As part of the 2010 restructuring process, from 1 May 2010, NG, EWN, Nürburgring Adventure GmbH <sup>(45)</sup>, Camp4Fun, MSR and CMHN let on the basis of a business lease contract the race circuit, the leisure park and other facilities to NAG <sup>(46)</sup> for the period of 20 years <sup>(47)</sup>, without organising an open selection procedure. The lease related to the facilities and operation of the ring and the measures for the promotion of tourism. However, the organisation of Formula 1 races was the subject of a separate concession agreement (measure 17) and it was thus excluded from the lease. The minimum annual rent was fixed at EUR 0 from 1 May 2010 to 30 April 2011, EUR 5 million from 1 May 2011 to 30 April 2012, EUR 11,5 million, if deficiencies in construction defects have been removed until 30 April 2012, or otherwise EUR 10 million from 1 May 2012 to 30 April 2013, and 15 million as from 1 May 2013 EUR <sup>(48)</sup>. For the lease from 1 May 2010 to 31 October 2012 NAG actually paid EUR [...] <sup>(49)</sup>. The lease contract was terminated retroactively as of 31 October 2012 by the settlement contract ('Vergleichsvertrag') concluded between NG, MSR, CMHN, CST, NBG and the insolvency administrator on the one side and NAG, Mediinvest and other companies on the other side on 27 November 2012.

<sup>(45)</sup> Nürburgring GmbH was the sole shareholder of Nürburgring Adventure GmbH on the date of the conclusion of the business lease contract concerned. On 25 October 2010, Nürburgring Adventure GmbH merged with NG.

<sup>(46)</sup> On 25 March 2010, when the business lease contract was concluded, NAG's name was GrundKapital Management GmbH.

<sup>(47)</sup> With a unilateral option of NAG to extend the duration of the lease contract twice by 5 years.

<sup>(48)</sup> The lease contract foresees: (a) a minimum rent; and (b) a rent dependent on the earnings before interest, taxes, depreciation, and amortisation (EBITDA) of the lessee (EBITDA rent): from 1 May 2010 to 30 April 2011 90 % of EBITDA of the lessee, from 1 May 2011 to 30 April 2012 90 % of EBITDA of the lessee, but at least EUR 5 million, from 1 May 2012 to 30 April 2013 85 % of EBITDA of the lessee, but at least EUR 11,5 million, if deficiencies in construction defects have been removed until 30 April 2012, or otherwise 90 % of EBITDA of the lessee, but at least EUR 10 million, and as from 1 May 2013 annually 85 % of EBITDA of the lessee, but at least EUR 15 million. For a critical analysis of the level of the rent, see the 2012 annual report of the Court of Auditors of the Land, pages 98 to 102, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>

<sup>(49)</sup> EUR [...] as rent, plus EUR [...] based on the settlement contract.

- (32) Measure 11 (loans granted by RIM to MSR through Mediinvest as intermediary and in case of one loan also through PNG as intermediary): Between 29 May 2008 and 7 July 2009, RIM granted to Mediinvest eleven loans in the total amount of EUR 85 512 000 in the form of silent participations (*‘stille Beteiligungen’*) to finance part II (hotels) of the ‘Nürburgring 2009’ project <sup>(50)</sup>. During the same period of time, Mediinvest, which acted as an intermediary between RIM (granting authority) and MSR (beneficiary), used these funds to provide loans to MSR with an increased interest (see below) <sup>(51)</sup>. The silent participations were provided with a fixed remuneration plus a variable remuneration of 2 % which would in principle depend either on the sale of Mediinvest’s share of MSR or on the profits made by Mediinvest in 2009. In addition, collaterals were provided. These silent partnerships are summarised in Table 8:

Table 8

**Silent participations of RIM in Mediinvest**

|              | Date of contract | Amount (EUR) | Interest rate (%) |
|--------------|------------------|--------------|-------------------|
| 1            | 29.5.2008        | [...]        | [...]             |
| 2            | 29.9.2008        | [...]        | [...]             |
| 3            | 12.11.2008       | [...]        | [...]             |
| 4            | 22.12.2008       | [...]        | [...]             |
| 5            | 30.4.2009        | [...]        | [...]             |
| 6            | 14.5.2009        | [...]        | [...]             |
| 7            | 26.5.2009        | [...]        | [...]             |
| 8            | 9.6.2009         | [...]        | [...]             |
| 9            | 23.6.2009        | [...]        | [...]             |
| 10           | 30.6.2009        | [...]        | [...]             |
| 11           | 7.7.2009         | [...]        | [...]             |
| <b>TOTAL</b> |                  | [...]        |                   |

- (33) Between 27 May 2008 and 7 July 2009, Mediinvest provided nine loans to MSR in the total amount of EUR 75 484 000; they contained the interest rate of 7 % (or 5,1 % backdated as from 1 November 2009) and no collaterals were provided. These loans are summarised in Table 9:

Table 9

**Loans granted by Mediinvest to MSR**

|   | Date of contract | Amount (EUR) | Interest rate                            |
|---|------------------|--------------|------------------------------------------|
| 1 | 27.5.2008        | [...]        | [...] p.a.; from 1.11.2009: [...] % p.a. |
| 2 | 22.12.2008       | [...]        | [...] p.a.; from 1.11.2009: [...] % p.a. |

<sup>(50)</sup> The loans from the silent participations were fully repaid by Mediinvest to RIM on 30 July 2010. In total, Mediinvest paid to RIM the interests of EUR [...]. Germany did not clarify whether MSR repaid the loans granted to it by Mediinvest.

<sup>(51)</sup> According to the Court of Auditors of the Land, the advantages from the increased interests in favour of Mediinvest equal EUR [...] (Opinion of the Court of Auditors of the Land of 15 June 2010, part II, page 20).

|              | Date of contract | Amount (EUR)      | Interest rate                            |
|--------------|------------------|-------------------|------------------------------------------|
| 3            | 30.4.2009        | [...]             | [...] p.a.; from 1.11.2009: [...] % p.a. |
| 4            | 15.5.2009        | [...]             | [...] p.a.; from 1.11.2009: [...] % p.a. |
| 5            | 26.5.2009        | [...]             | [...] p.a.; from 1.11.2009: [...] % p.a. |
| 6            | 9.6.2009         | [...]             | [...] p.a.; from 1.11.2009: [...] % p.a. |
| 7            | 23.6.2009        | [...]             | [...] p.a.; from 1.11.2009: [...] % p.a. |
| 8            | 30.6.2009        | [...]             | [...] p.a.; from 1.11.2009: [...] % p.a. |
| 9            | 7.7.2009         | [...]             | [...] p.a.; from 1.11.2009: [...] % p.a. |
| <b>TOTAL</b> |                  | <b>75 484 000</b> |                                          |

- (34) In addition, on 12 November 2008, Mediinvest granted one loan of EUR 10 million to PNG with the interest rate of 6 % (until 31 December 2009) whereas the latter company granted a loan of the same amount and same interest rate to MSR on the same date.
- (35) Measure 12 (guarantee of the Land to ISB concerning measure 11: silent participations of RIM in Mediinvest): In the context of loans granted by ISB to RIM, used for loans of RIM granted to Mediinvest (measure 11), the Land provided vis-à-vis ISB a guarantee for liabilities up to EUR 140 million (100 % coverage of liabilities) <sup>(52)</sup>. No guarantee fee was paid. The Commission considers that the beneficiary of the measure in question was MSR, as that company was the beneficiary of measure 11.
- (36) Measure 13 (revenues from tax on gambling provided by the Land to NG): In February 2009, an amendment to the Gambling Act of the Land was adopted, enabling the transfer of revenues from a tax on gambling to NG. The transferred tax proceeds were intended to be used to promote tourism. The amounts were EUR 1,6 million on 29 December 2009, EUR 3,2 million on 29 October 2010 and EUR 3,2 million on 29 March 2011, i.e. EUR 8 million in total.
- (37) Measure 14 (shareholder loans by the Land to NG and debt subordination for the 'Nürburgring 2009' project): For the preparation and implementation of the 'Nürburgring 2009' project, NG received from the Land interest-free loans with no fixed maturity of EUR 20 million on 21 August 2007, EUR 10 million on 22 December 2009, EUR 4,65 million on 28 December 2010 and EUR 3,2 million on 26 April 2011 <sup>(53)</sup>. In addition, on 9 December 2011, the Land provided to NG a loan of EUR 4,95 million. Moreover, the Land declared debt subordination ('Rangrücktritt') in relation to the afore-mentioned loan of EUR 20 million on 29 August 2007 in order to avoid insolvency of NG, ranking its claims against NG in the last position of all creditors' claims against NG.
- (38) Measure 15 (transfer of shares of MSR from Mediinvest and Geisler & Trimmel to NG and from Weber to RIM): With the share purchase agreement dated 25 March 2010, the shares of MSR held by Mediinvest (49,5 %) and Geisler & Trimmel (33,8 %) were transferred to NG which already held 10 % of these shares. The shares of MSR held by Weber (6,7 %) were transferred with the same agreement to RIM. The purchase price amounted to EUR 1 per transaction (i.e. EUR 3 in total) <sup>(54)</sup>.

<sup>(52)</sup> The guarantee of up to EUR 50 million of 28 August 2008 was increased to EUR 80 million on 17 December 2008 and subsequently, to EUR 140 million on 26 May 2009.

<sup>(53)</sup> The declared purpose of the loans of 28 December 2010 and 26 April 2011 is the coverage of negative cash flow for the mid-term planning of NG for the period of 2010 to 2030 as indicated in the report by Ernst & Young of 9 September 2010.

<sup>(54)</sup> NG and RIM therefore currently hold 93,3 % and 6,7 % of shares in the MSR, respectively. Through the sale contract, the sellers were not released from their liability, and neither NG nor RIM took over financial obligations.

- (39) Measure 16 (shareholder loan and grant by the Land to NG for Formula 1 races): Furthermore, an interest free loan with no fixed maturity of the Land to NG of EUR 40 405 000 for the offsetting of liabilities related to Formula 1 under the liquidity pool was provided on 11 January 2011. In addition, in July 2011, the Land provided to NG a grant of EUR 13,5 million for the organisation of Formula 1 races in 2011.
- (40) Measure 17 (Formula 1 concession): On 13 December 2010, a concession agreement regarding the organisation of Formula 1 race events was concluded between NG and NAG <sup>(55)</sup>. In this concession agreement, NG asked NAG to organise the Formula 1 races and committed itself to provide compensation <sup>(56)</sup>. Pursuant to Germany, on the basis of this agreement, NAG was supposed to receive financial means which would not be taken into account for the calculation of the rent under the business lease contract concluded between NG and NAG, but no payments were actually made between NG and NAG. On the basis of the settlement contract concluded between NG, MSR, CMHN, CST, NBG and the insolvency administrator on the one side and NAG, Mediinvest and other companies on the other side on 27 November 2012, the concession was terminated.

**(b) Measures covered by the decision of 7 August 2012**

- (41) Measure 18 (rescheduling of interest payments agreed by ISB in favour of NG, MSR and CMHN): On 15 May 2012, ISB made a deferral of interests due on 30 April 2012 until 15 November 2012 in the amount of EUR 2,98 million (including a deferral of compensation in the amount of EUR 48 913,78 for an unspent part of the loan). For the rescheduled amounts, an interest rate of 8,17 % per annum was charged. The exact distribution of the deferral of interests to the individual companies is EUR 1,473 million for NG, EUR 1,205 million for MSR and EUR 303 000 for CMHN.
- (42) Measure 19 (debt subordination and guarantee): On 15 May 2012, the Land declared debt subordination regarding loans amounting up to EUR 254 million granted by ISB to NG, MSR & CMHN as part of the loan of EUR 325 265 000 (measure 8). Furthermore, as regards repayment of those loans from 2014 on, in case NG, MSR and CMHN should not be able to pay, on 15 May 2012, the Land declared that these companies will be released from their obligation to pay and that the Land would honour its guarantee previously given to ISB (measure 9).

**2.4. GROUNDS FOR INITIATING AND EXTENDING THE FORMAL INVESTIGATION PROCEDURE**

- (43) In the decision of 21 March 2012 and the decision of 7 August 2012, the Commission reached the preliminary conclusion that all nineteen measures qualified as State aid, and it expressed doubts as regards their compatibility with the TFEU.

**2.5. THE TENDER PROCESS AND THE SALE OF ASSETS**

- (44) The tender process was announced on 14 May 2013 with a press release issued by the insolvency administrator. A call for tenders was published by KPMG in the Financial Times, Handelsblatt and on the Nürburgring website

<sup>(55)</sup> For a critical analysis of the level of the compensation, see the 2012 annual report of the Court of Auditors of the Land, pages 103 to 107, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>

<sup>(56)</sup> The contractually agreed compensation to NAG included a flat fee from the sold tickets of EUR [...] million, [...] % of revenues from the sale of those tickets which are sold after the first [...] thousand tickets, and the revenue from [...] tickets sold in 2011 or from [...] thousand tickets sold in the following years. For the Formula 1 races in 2011, the compensation was at least EUR [...]; if the ticket revenues were below EUR [...], the compensation was reduced by EUR [...] for each EUR [...] of decrease of the revenues below EUR [...] (e.g. if the ticket revenues were EUR [...] million, the compensation was EUR [...] million); however, the minimum compensation was EUR [...]. The fees to Formula 1 organisers and drivers as well as the maintenance of the track under the grade 1 licensing of Fédération Internationale de l'Automobile ('FIA') are paid fully by NG and they did not fall under the commitments of NAG.

on 15 May 2013. The process involved around 300 investor contacts that were handled by KPMG on behalf of the sellers. In the tender process, the interested parties were invited to submit an expression of interest (around 70 entities expressed their interest) and after being provided with various documentation on the Nürburgring they were requested to submit an indicative offer until 26 September 2013. With letter dated 19 July 2013, all interested investors were informed by the sellers that: 'All parties that intend to participate in next stage of the process are invited to submit an Indicative Offer by 5:00 pm (CET) on 12 September 2013. Offer handed in after the deadline will also be considered' <sup>(57)</sup>. The above deadline of 12 September 2013 for the submission of indicative offers was extended to 26 September 2013 by letter of 12 September 2013 by indicating that: 'The Vendors have decided to extend the deadline for Indicative Offers, in order to enable potential investors to complete their analysis of the provided material. The updated deadline now ends at 5 p.m. CET on 26 September 2013. Offers handed in after the deadline will also be considered' <sup>(58)</sup>. By letter dated 17 December 2013, the deadline for the submission of confirmatory bids was postponed by the sellers from 11 December 2013 to 17 February 2014 by indicating that: 'In order to enable potential investors to complete their analysis of the provided information material and to provide a final offer that fully reflects the value potential of the Nürburgring, the timeline which used to end at 5 p.m. CET on 11 December 2013 now ends at 5 p.m. CET on 17 February 2014. For the sake of clarity, offers handed in after that timeline will, in principle, also be considered provided that the terms of the offer qualify for the further process. Any disadvantage caused by the delay will not be compensated for and will have to be fully borne by the investor. Please note that the Vendors may choose the parties which will qualify for the further process shortly after the updated timeline ends' <sup>(59)</sup>.

- (45) The insolvency administrators decided and implemented the following sales structure for the sale of assets of NG, MSR and CMHN.
  
- (46) For the tender process, the assets of NG, MSR and CMHN were split in 11 individual asset clusters <sup>(60)</sup>. According to the published call for expression of interest: 'The Vendors intend to sell the assets to one or more investors ("Project RING"). Investors will have the opportunity to acquire all assets, defined asset clusters ("Proposed Asset Clusters") or individual assets. The Proposed Asset Clusters have been defined based on the separability of assets and related costs. It is intended that the transaction will be structured as an asset deal. All third party and financing liabilities will remain with the insolvent legal entities allowing a new start on a clean balance sheet' <sup>(61)</sup>. Also, according to the letter sent to the interested investors on 19 July 2013: 'Investors will have the opportunity to acquire the assets of the Vendors in either their entirety, or in defined asset clusters ("Proposed Asset Clusters"), or in individual assets. Proposed Asset Clusters have been defined based on the severability of assets of the Nürburgring and related costs' <sup>(62)</sup>.
  
- (47) The insolvency administrators did not establish any conditions as regards the future use of the assets. Any limitations of that use stem from existing national construction and environmental law and the public access to the Nürburgring which is guaranteed by the relevant act of the Land.
  
- (48) According to the tender's Selection Criteria, as defined in the letters sent to the interested investors on 19 July 2013 and 17 October 2013, the investors would be selected based on: (a) a maximisation of the total proceeds for all of the assets; and (b) the expected transaction security <sup>(63)</sup>. These criteria were described in detail as follows: 'Value for the assets in scope of the respective offer; Potential value implications for those assets that are not included in the respective offer, if any; Costs for further separation of the assets in scope of the respective offer, if any; Costs to fulfil key assumptions and conditions of the respective offer; Closing probability'. It was

<sup>(57)</sup> Letter of 19 July 2013 titled 'Project RING — information and procedures for the submission of an indicative offer', page 3, section 'Indicative Offer'.

<sup>(58)</sup> Letter of 12 September 2013 titled 'Project RING — Extension of the timeline for the submission of indicative offers', page 1, section 'Extension of the Deadline for the Indicative Offers'.

<sup>(59)</sup> Letter of 17 December 2013 titled 'Project RING — Extension of the timeline for the submission of final offers', page 1, section 'Extension of the timeline for the final offers'.

<sup>(60)</sup> 1A. Grand-Prix track; 1B. Northern track; 2. 4-star hotel; 3. Eiffel village 'Green Hell' with 3-star hotel; 4. Holiday parc Dreeses; 5. Right of construction on land Dorint; 6. Off-road park; 7. Personnel house Adenau; 8. Apartment building Balkhausen; 9. House Licht; 10. Other land.

<sup>(61)</sup> Section 'Disposal of the assets of the Nürburgring' of the call for expression of interest.

<sup>(62)</sup> Letter of 19 July 2013 titled 'Project RING — information and procedures for the submission of an indicative offer', page 1, section 'Proposed Transaction'.

<sup>(63)</sup> Selection Criteria set in page 4 of the letter of 19 July 2013 titled 'Project RING — information and procedures for the submission of an indicative offer', and in page 6 of the letter of 17 October 2013 titled 'Project RING — procedures for the submission of a final offer'.

further explained that: 'the closing probability will be assessed by taking into consideration the (i) outstanding due diligence requirements; (ii) secured financing for the transaction, supported by confirmation of financing partners; (iii) required steps for the regulatory clearance; (iv) required internal approval steps until the transaction could be consummated; and (v) strategic rationale for the acquisition or future plans for the assets of the NG, MSR and CMHN and the likelihood of their realisation'. It is noted that environmental considerations were not part of the criteria for selecting the final offer.

- (49) By letters of 17 October 2013 and 17 December 2013, the bidders that submitted qualified offers were informed that: (a) indicative or final, respectively, offers would be considered even if submitted after the expiry of the respective deadlines, provided that the terms of the offers qualify for the further process; (b) disadvantages caused by late submission would be fully borne by the bidder in question; and (c) the sellers could choose the qualified bidders shortly after the expiry of the deadline. According to the insolvency administrators, the bidders were informed by the sellers that they could improve an offer or submit a new offer between the deadline and the conclusion of the sales contract.
- (50) 24 candidates <sup>(64)</sup> sent an indicative bid until the beginning of February 2014. Of these candidates, 18 were allowed to proceed to the due diligence stage <sup>(65)</sup>, and 13 bidders submitted confirmatory offers for all or individual asset clusters or individual assets, including offers for all assets from four bidders: (1) Capricorn Automotive GmbH and Capricorn Holding GmbH ('Capricorn'); (2) [Bidder 2]; (3) [Bidder 3]; (4) [Bidder 4]. The bids were considered on the basis of: (a) maximisation of the total proceeds for all of the assets; and (b) the expected transaction security <sup>(66)</sup>. The bids which fulfilled these criteria were considered in the final stage of evaluation; those were bids for all asset clusters. Of those bidders, Capricorn and [Bidder 2] submitted confirmations of their access to the funding necessary for the purchase: on 7 March 2014, [Bidder 2] submitted a binding letter dated 24 February 2014, informing KPMG of its financial capabilities; and on 11 March 2014, Capricorn submitted to the sellers a binding letter by [...] dated 10 March 2014, addressed to Capricorn, informing the latter that [...] was willing to underwrite a loan of EUR 45 million to Capricorn for the purpose of the acquisition of the assets in question. On the basis of their offers, contracts were negotiated in parallel and notarised, with [Bidder 2] on 7 March 2014 and with Capricorn on 10 March 2014.
- (51) On 11 March 2014, the Creditors' Committee of the insolvent companies approved the sale to Capricorn (specifically to capricorn NÜRBURGRING Besitzgesellschaft GmbH), as the one with the highest offer including a proof of financing. In particular, the offer of Capricorn was at a price of EUR 77 million, whereas the offer of [Bidder 2] was at a price of EUR [47-52] million. The sales contract with Capricorn was signed by NG, MSR and CMHN on 11 March 2014 and by the insolvency administrator on 13 March 2014 <sup>(67)</sup>.
- (52) Following the tender process described above, the assets of NG, MSR and CMHN (all tangible and intangible assets including all land, buildings, trademarks and internet domain rights), but not any liabilities and financial assets, were bought by Capricorn. The shareholders of Capricorn are capricorn HOLDING GmbH <sup>(68)</sup> with 67 % of the shares and GetSpeed GmbH & Co KG <sup>(69)</sup> with 33 % of the shares.

<sup>(64)</sup> Nine offers related to all asset clusters, three concerned the race track and 11 offers related to other asset clusters or individual assets.

<sup>(65)</sup> The offer for all assets with the highest price scored 100 %. In total, there were 6 indicative offers for all assets that offered more than 25 % of the best offer. The offers for all assets that did not reach 25 % of the best offer, were not taken into account any further because of their price level. The same was valid for offers for the race track and the offers for other assets because they altogether did not reach 25 % of the best offer. 5 out of the 6 qualified offers for all assets did not clarify their financing at the moment of the submission of the indicative offer, and they were therefore asked to present their ability to finance the purchase of the assets.

<sup>(66)</sup> See footnote 60 above.

<sup>(67)</sup> According to Germany, the repartition of the sales price of EUR 77 million to the three insolvent companies will be made in line with the national insolvency and tax law.

<sup>(68)</sup> The Capricorn group is a German business group internationally active in manufacturing racing automotive assemblies, testing racing cars and maintaining historical racing cars. capricorn HOLDING GmbH's shares are all owned by Mr Robertino Wild.

<sup>(69)</sup> GetSpeed GmbH & Co KG is a German motor sport undertaking active in the maintenance of cars, the organisation of race events and the stress level monitoring of drivers. 99 % of the shares of this company are owned by Mr Axel Heinemann and the other 1 % by Mr Adam Osieka.

- (53) The transfer of the employment contracts associated with the tendered asset clusters follows from German law <sup>(70)</sup> and German labour courts jurisprudence <sup>(71)</sup>, which foresee that the employees are automatically transferred to the buyer of the assets, but that in an insolvency context the buyer can request from the insolvency administrator to terminate employment contracts. In the case at hand, the sales contract foresees that NBG (the current operator of the Nürburgring complex) would in 2014 terminate employment contracts upon request of Capricorn. Indeed, the latter concluded that, in order to achieve an economically viable operation of the acquired assets, it would need 253 of the total 297 employees (as of beginning of 2014), and thus requested NBG to terminate the employment contracts of 44 employees. As a result, 85 % of the total staff of the insolvent companies will be transferred to Capricorn on 1 January 2015 (date when Capricorn will start operating the acquired assets).
- (54) The parties to the sales contract are obliged to implement it only upon the existence of a Commission decision declaring that neither the buyer nor its operational company are beneficiaries of the aid under assessment subject to recovery, and: (a) either the delays to bring a legal challenge against the Commission decision have expired without an appeal; or (b) in case of an appeal, a not further challengeable court judgment has been rendered confirming the Commission decision. This condition aimed at covering the discrepancy between the assets' price of EUR 77 million and the financial risk they carried, stemming from the possible liability from a State aid recovery of EUR 456 million based on the Commission decisions of 21 May 2012 and 7 August 2012 to open and extent, respectively, the formal investigation procedure.
- (55) The business in the season 2014 will be run by NBG. Afterwards, a liquidation of this company is foreseen. The 2014 cash flow of NBG (EUR 6 million) is cashed in by the seller. It represents, in form of a flat-fee, a part of the sales price in order to facilitate the handling of the contract. As regards the beneficiaries NG, MSR and CMHN, in the context of their insolvency proceeding, they have definitely ceased all activities and do not employ any personnel. At the same time, the insolvency administrators are entrusted with legal proceedings under German bankruptcy law, aiming at the arrangement of all the claims and obligations of the companies in insolvency proceedings. Once those claims and obligations are settled, and the insolvency court approves the final liquidation, the companies can be erased from the company registries.
- (56) In order to run the business in the season of 2015, the buyer (Capricorn) will establish the operating company capricorn NÜRBURGRING GmbH ('OpCo') that will conclude contracts for the season 2015. With a view to ensuring that the aid beneficiaries will definitively disappear from the market, the Commission was informed of the following measures. If there is no non-challengeable Commission decision at the beginning of 2015, the sold assets will be transferred before 1 January 2015 to a new company ('NewCo') in which 95,1 % of the shares will be owned by the buyer and 4,9 % by an independent trustee. The trustee will be acting in the interests of the creditors and not of the insolvent beneficiaries of State aid, but will not be subject to instructions by the creditors. Furthermore, a lease contract will be concluded between NewCo and OpCo, terminating on the date of entry into force of the sales contract. The business of the OpCo will be run under its name, on the basis of its own business plan and with the workforce of its own choice (see recital 53 above). There will be a lease fee of totally EUR [4,6-5,1] per year to be paid to NewCo, which will serve the liquidation mass of the Nürburgring companies (all payments in favour of the insolvency estate are transferred to the trust accounts of the insolvency administrators, solely in order to be distributed to the creditors). When the decision of the Commission becomes effective, the trustee will transfer all his shares in NewCo to the buyer. On the other hand, if the buyer does not fulfil its contractual payment obligations, the trustee will be able to sell the assets. In addition, should an annulment of the Commission decision take place, the assets will return to the insolvency administrators in order to be sold immediately, since the liquidation obligation of German insolvency law continues to exist even in such case. There is no option of continuing the business of the Nürburgring companies by NewCo. The Commission notes that this arrangement does not change the basic conditions of the sale, including the sales price and payment terms, which remain the same <sup>(72)</sup>.

<sup>(70)</sup> § 613 a of the German Civil Code ('Bürgerliches Gesetzbuch').

<sup>(71)</sup> BAG, Judgement of 19 December 2013 — 6 AZR 790/12; BAG, Judgement of 20 March 2003 — 8 AZR 97/02.

<sup>(72)</sup> The insolvency administrators and the buyer agreed on 13 August 2014 that the second instalment of the purchase price is to be paid on 31 October 2014 instead of 31 July 2014, with interest of 8 % and pledges (replacing the cash collateral of EUR [4,6-5,1] million) on: (a) shares in Capricorn of Mr Robertino Wild, shareholder of Capricorn; (b) all claims between companies of the Capricorn group; (c) claims resulting from a sales contract regarding the 'Campus' project (to be concluded); and (d) the art collection of Mr Robertino Wild. The Land was not involved in the decision-making process for the above agreement.

### 3. COMMENTS FROM GERMANY

#### 3.1. FIRM IN DIFFICULTY

- (57) In their comments to the formal investigation procedure, Germany argued that NG was not a firm in difficulty as of 1 July 2008 <sup>(73)</sup> or at the moment of granting the ISB loan of EUR 325 265 000 on 28 July 2010 <sup>(74)</sup>. As regards the situation of NG, MSR and CMHN in the period from May 2012 to July 2012 and the extension of the formal investigation procedure, Germany claims that the Commission had not taken into account the insolvency of NG, MSR and CMHN as a non-reversible consequence of its decision not to approve the rescue aid in the preliminary proceedings <sup>(75)</sup> and it has thus breached the principle of proportionality <sup>(76)</sup>. Germany also argues that NG carried out the construction of the infrastructure and particularly the organisation of Formula 1 and Superbike race events on behalf of the public sector <sup>(77)</sup>, and that they therefore cannot be taken into account for analysis of its economic situation, the classification of an undertaking in difficulty and the application of the 'one-time' principle <sup>(78)</sup>.

#### 3.2. STATE RESOURCES AND IMPUTABILITY

- (58) For the measures carried out by NG, Germany acknowledges that the resources are imputable to the state <sup>(79)</sup>.

#### 3.3. ECONOMIC ACTIVITY

- (59) Pursuant to Germany, the construction of the tribune, the multifunctional halls, the access structures and the attractions offering education and entertainment (Part I <sup>(80)</sup> of the Nürburgring 2009 project) is no economic activity as the Leipzig/Halle judgment <sup>(81)</sup> cannot be applied to the construction of the general (regional and sport) infrastructure <sup>(82)</sup>, the construction concerns facilities for which the criteria of the 2007 White Book on

<sup>(73)</sup> The German scheme approved by Commission decision of 19 February 2009 in case C 38/2009 *Federal Framework for low interest loans* ('the Temporary Framework') applies to firms which were not in difficulty on 1 July 2008. Aid may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis.

<sup>(74)</sup> Germany claims that NG did not meet the hard criteria according to point 10 of the R&R guidelines, the development of soft criteria set in point 11 of the R&R guidelines was heterogeneous, and the general clause in point 9 of the R&R guidelines was also not met.

<sup>(75)</sup> Germany argues that the extension of the formal investigation procedure went against the objective of the concept of rescue aid, that the aid should have led to the avoidance of the imminent insolvency of the NG, MSR and CMHN to give them six months to prepare a restructuring plan, that the shareholders were ready to agree on concrete objectives of the restructuring plan, including the sale of the assets and the following liquidation of NG, MSR and CMHN, that no recovery decision was so far taken against NG and that the criteria of the Deggendorf jurisprudence were thus not fulfilled, and that in view of the unique constellation of the case, an approval of the rescue aid would not create a precedent for other cases.

<sup>(76)</sup> Germany refers to GC T-237/99, 2000, II-3849, point 37 — BP Netherlands and others; T-111/01, 2001, II-2335, point 26 — Saxonia Edelmetalle. CoJ, 56/89, 1989, 1693, point 39 — Publishers Association; GC, T-29/92 (R), 1992, II-2161, point 38 and following — SPO and others.

<sup>(77)</sup> Germany refers to CoJ T-20/03 KAHLA/Thüringen Porzellan GmbH, point 124 and following. Germany claims that from the State aid point of view, these measures should be regarded as special effects, not as a regular business of NG, that both the shareholders and business management saw NG as an vehicle to keep the sport infrastructure in public ownership and to organise non-profitable sport events which would not be offered without the coverage of losses by the public funding, that absent this understanding neither the shareholders nor the business management of NG would allow the development of liabilities, and that the costs of these special effects could not therefore be included in the financial assessment.

<sup>(78)</sup> For the meaning of the 'one-time' principle, see Section 3.3 of the R&R Guidelines.

<sup>(79)</sup> The measures concerned required an approval of the NG' supervisory board whose members were appointed only by public authorities.

<sup>(80)</sup> The investment volume of Part I equals EUR 215 million (EUR 185 million from the liquidity pool, EUR 30 million through a shareholder loan of the Land).

<sup>(81)</sup> Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen, Flughafen Leipzig/Halle et al v Commission* [2011] ECR II-1311, upheld on appeal, see Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* [2012] ECR I-0000.

<sup>(82)</sup> Germany argues that such change in Commission decisional practice goes against the 2007 White Book on sport of the Commission and the principles of legal certainty. Such change could apply only to future cases, not to the construction of the sport infrastructure at Nürburgring already completed in 2011. A State aid prohibition of financing the construction and operation of sport infrastructure would qualify as a change in the repartition of competences between the EU institutions and the Member States and it would not be in line with the subsidiarity principle.

sport of the Commission (multifunctional use, non-discriminatory access, etc.) are met, no private investor would carry out such project and racetracks are regularly not privately constructed for insufficient profitability <sup>(83)</sup>.

- (60) As regards the Formula 1 events, in the view of Germany, they are in principle structurally deficit making, these events cannot be considered as normal business of NG as they led even with the public support to a negative result for NG, this company would not organise these events without the expectation of public financing and the public authorities decided to finance the Formula 1 events through NG at arm's length for regional-policy grounds <sup>(84)</sup>. Therefore, Germany claims that the organisation of these events cannot be considered as an economic activity of NG. If it was aid, Germany claims that the SGEI criteria are met.

#### 3.4. SELECTIVITY

- (61) Germany argues that even if the financing of the measures was an economic activity, it is not selective because the criteria of the 2007 White Book on sport are met (no single user; non-discriminatory access; multifunctional use and lease under reasonable market-based prices; the infrastructure is not provided by the market because it would not be economical; responsibility of public authorities).

#### 3.5. ADVANTAGE

##### (a) Measures covered by the decision of 21 March 2012

- (62) Germany admits that it had not found a long-term private investor who would invest in the Nürburgring 2009 project.
- (63) **For measure 1** (payments in capital reserve and capital increases in August 2004, December 2004 and September 2007), Germany argues that the question of an advantage does not matter, because the target of the measure was not an economic activity.
- (64) As regards **measure 2**, Germany argues that the level of the interest of NG's loans granted to its subsidiaries (6 %) does not constitute an advantage to the subsidiaries as it is comparable to the interest of loans on the market.
- (65) Regarding **measure 3**, pursuant to Germany, the measures financed by the liquidity pool in the amount of EUR 170 million <sup>(85)</sup> were carried out on market-based terms, since: (a) the pool is used by the Land similarly to a market-based holding <sup>(86)</sup>; (b) NG paid the interests ordinarily; and (c) the funds were fully paid back in connection with measure 8. Germany also indicated that the loans granted by the liquidity pool of the Land to ISB served exclusively to the refinancing of ISB for its own loans to NG (see also recital 70) and that the market conditions of the Land from the transactions of the liquidity pool were not passed on to NG as debtor.
- (66) For **measure 4** (loan granted by NG to MSR), Germany states that the interest rate of 7 % seems to be market conform.
- (67) Concerning **measure 5** (support provided by NG to CST), Germany puts forward that it is market conform: after the initial financing of the project by NG and MIB under parity conditions, the MIB was later unable to provide the necessary shareholder loans in the same amount as NG. Since a withdrawal of NG from the project would

<sup>(83)</sup> Germany states that out of 11 racetracks, 8 were constructed with state monies worldwide between 1999 and 2011, referring to Communication & Network Consulting, Formula Money 2011, page 145.

<sup>(84)</sup> Germany claims that the Formula 1 has substantial macroeconomic effects in the countries of the organisers (ratio between subsidies and the said effects is allegedly 1:5).

<sup>(85)</sup> Germany states that the use of the liquidity pool for the project constitutes an exceptional case that does not correspond to the usual use of the liquidity pool and that the financing through the liquidity pool took place temporarily for the preliminary financing of the running project until the takeover through a long-term private investor would take place.

<sup>(86)</sup> Germany states that the aim of the liquidity pool is to optimise the cash flow between the Land and its subsidiaries in an economically reasonable manner, particularly to reduce the financing costs of the holding, that short-term needs are satisfied by the Land on the capital market, that the interest rates for the monies from the liquidity pool correspond to the daily rates of the Land on the market, that the Land does not incur any interest costs, that the market conditions are transferred 1:1 to the participants to the liquidity pool and that the Ministry of Finance of the Land is only an implementation platform.

compromise the timely provision of the ticket system, as well as make worthless in all probability the previous investment of NG, it was preferable for the NG to stick to the planned project under changed conditions, especially as the business plan allowed for expectations for a reasonable return and NG received collaterals from NG.

- (68) In respect of **measure 6** (consideration paid to IPC, and the loan to MSR through PNG as intermediary), Germany argues that the recipients received the respective payments as remuneration to services and as a loan to market equivalent conditions.
- (69) With regard to **measure 7** (cession of MIB's claims against CST to NG), Germany does not deal with questions concerning a potential advantage.
- (70) As regards **measure 8** (ISB loan to NG, MSR and CMHN), Germany indicates that ISB has not acted independently (at arm's length) as a (separate) undertaking, but as a support bank receiving explicit instruction from the administration of the Land and being part thereof <sup>(87)</sup>. Pursuant to Germany, the principles of the Agreement II are applicable to the refinancing of the ISB loan <sup>(88)</sup> through the participation of ISB in the liquidity pool and this participation constitutes therefore no aid in favour of ISB <sup>(89)</sup>.
- (71) Regarding **measure 9** (guarantee of the Land to ISB concerning measure 8), Germany states that the guarantee in question deals with the share of risk in an internal relationship between ISB and the Land and it provides no advantage to the beneficiaries of the loan (NG, MSR and CMHN), because it did not lead to improved terms of their loan <sup>(90)</sup>.
- (72) As regards **measure 10** (business lease contract concluded on 25 March 2010), Germany submitted an expert opinion of 29 September 2011, commissioned by the Land on the rent for the business lease of the Nürburgring, which established a range of minimum and maximum market conform annual rents. Germany claims that according to that expert opinion, the expected rent is 20 % above the maximum market level and it would cover the lessor's construction costs of EUR 330 million and a reasonable profit <sup>(91)</sup>.
- (73) As regards loans under **measure 11** (loans granted by RIM to MSR with Mediinvest and PNG as intermediaries), by which Part II of the 'Nürburgring 2009' project was financed, Germany argues that they are conform with the market economy investor principle and that they do not involve an advantage, since the interest rates applied are above the applicable reference rates (apart from two loans of 12 November 2008 and 22 December 2008).

<sup>(87)</sup> In view of point 137 of the decision of 21 March 2012, Germany states that in case of support banks ('Spezialkreditinstitute'), beneficiaries could be at two levels: (1) special banks; and (2) enterprises financed by special banks, that advantages of special banks are covered by Agreement II ('Verständigung II') from 2002 and that the decision of 21 March 2012 suggests that special banks can grant loans only in situations in which the debtor would not receive any loan under the same conditions on the market. Germany however argues that support banks can grant loans under market conditions (special credit institutes are not limited to granting aid) and that a state aid assessment must be made in each individual case.

<sup>(88)</sup> As regards specifically the ISB loan (measure 8), Germany suggests that the advantage encompasses at maximum the difference in the interest between the interest paid on the market and the interest actually paid, but not the total amount of the loan, and that an expert opinion should be commissioned if the Commission doubts this.

<sup>(89)</sup> Germany claims that in view of the Agreement II, the Commission agreed to advantages stemming from guarantees in favour of legally separate special credit institutes as long as their activity is limited to a precisely defined public task, and that under these conditions, for instance, the use of special types of guarantees such as *Gewährträgerhaftung*, *Anstaltslast* and *Refinanzierungsgarantien* is compatible with the State aid rules. Germany also states that the Commission acknowledged in its decision of 16 June 2004 in case N179/04 Finnish municipal guarantees that special credit institutes do not constitute undertakings as long as they benefit from public funding only in relation to their public task.

<sup>(90)</sup> Germany states that the terms of the loan are completely and independently stipulated for in the instruction of the Land to grant the loan; the ISB had therefore no room for manoeuvre; the decision on granting the loan and related risks remained with the Land and that on top of that, due to its loan instruction the Land stands security for the loan on the basis of the German Civil Code.

<sup>(91)</sup> Germany also states that it is not important whether or not the construction costs are covered by the rent because the investment costs constitute sunk costs which have no impact on future decisions of a rationally acting investor. In addition, Germany indicated that even if the rent had to amortise the investment costs, the basis would be the planned investments, without unforeseen cost increases, whereas the planned costs of the project were initially EUR 215 million (EUR 135 million for part I of the 'Nürburgring 2009' project and EUR 80 for part II of the 'Nürburgring 2009' project), but the actual costs were EUR 330 million (EUR 215 million for part I of the 'Nürburgring 2009' project and EUR 115 million for part II of the 'Nürburgring 2009' project), and that this being taken into account, even the minimum rent in the amount of around EUR 280 million would amortise the planned investments.

- (74) For **measure 12** (guarantee of the Land to the loans of RIM to MSR with Mediinvest as intermediary under measure 11), Germany states that the guarantee of the Land only leads to an advantage to the recipients of the loans, but not to an advantage to ISB or RIM, because that guarantee was a requirement for the granting of the loans.
- (75) As regards **measures 13 and 14** (grants from gaming tax for tourism promotion <sup>(92)</sup> and loans by the Land), Germany does not claim their compliance with the market economy investor principle. Concerning the gaming tax, Germany describes the measure as a compensation for infrastructural costs in connection with the promotion of tourism. Concerning the debt subordination, Germany argues that it has merely a declaratory effect as every shareholder loan is subordinated in the insolvency proceedings anyway, that that subordination led therefore only to a potential effect on the public budget and that it does not therefore constitute an advantage <sup>(93)</sup>.
- (76) As regards **measure 15** (takeover of MSR shares by NG and RIM), Germany claims that it does not constitute an economic advantage for Mediinvest, Geisler & Trimmel and Weber, because: (a) it was carried out at the symbolic price of EUR 1 per share; (b) it did not involve any other advantages such as the cancellation of shareholder loans or guarantees of the shareholder; (c) NG and RIM took over the shares in MSR as to compile the ownership of Part II with that of Part I of the 'Nürburgring 2009' project and to enable a united business concept; and d) the question whether MSR was in difficulty at the moment of the transfer has no impact on this assessment, as MSR is a company with limited liability, thus the liability of the shareholders is in any event limited to the capital of the company.
- (77) As far as **measure 16** (financing of the losses of NG from the Formula 1 races by the Land) is concerned, Germany states that it is not an economic activity and that the financing of Formula 1 events is generally not profitable.
- (78) For **measure 17** (Formula 1 concession contract), Germany claims that it is linked to the conditions of the business lease contract. Germany argues that in view of the rent being considerably ([...] %) over the market level, both contracts have to be considered balanced in their totality (including the benefits of the NAG from the concession contract) <sup>(94)</sup>.

**(b) Measures covered by the decision of 7 August 2012 <sup>(95)</sup>**

- (79) Regarding **measure 18** (debt rescheduling), Germany states that it was necessary to avoid the imminent insolvency and that it would have been implemented also by a private shareholder.
- (80) Concerning **measure 19** (debt subordination and guarantee), Germany argues that it does not constitute even a potential burden to the public budget, that it would be implemented also by a private shareholder, and that the debt subordination had no consequences for the shareholders because there were no further substantial creditors.

### 3.6. DISTORTION OF COMPETITION AND EFFECT ON TRADE

- (81) Germany claims that the measures in favour of hotels and restaurants have no potential effect on trade between Member States <sup>(96)</sup>.

<sup>(92)</sup> Germany points out that the subsidies should cover the losses of NG from the investments for the increase of the touristic attractiveness of the Nürburgring through the Nürburgring 2009 project, and that the aim was to increase the attractiveness of the Nürburgring over the whole year and by this to promote the structurally weak region through the strengthening of tourism.

<sup>(93)</sup> Germany refers to C-72/91 Sloman Neptun.

<sup>(94)</sup> Germany also argues that this system aimed to attract as many visitors as possible, to maximise the positive macroeconomic effects and to cover the substantial costs of NG (licence fee, FIA grade 1 licensing of the racetrack).

<sup>(95)</sup> Germany states that the assessment of the Commission of NG as an undertaking in difficulty as of 1 July 2008 was inappropriate, that in the context of the notified rescue aid the application of the 'one-time' principle was erroneous, that the extension of the formal investigation procedure was not proportional and that the measures are aid-free.

<sup>(96)</sup> Germany argues that the international guests are attracted by the racetrack, not by the accommodation facilities or restaurants. Germany thus concludes that the measures concerned have no impact on tourism flows.

## 3.7. COMPATIBILITY

**(a) Facilities of the race ring**

- (82) Germany claims that the Nürburgring is crucial for the economy and employment in the region, that it is an important facility dedicated predominantly to amateur sport, that it is part of the German motorsport history and German culture and thus also part of the cultural heritage of the Union, that it has an impact on traffic safety in the whole world, as cars tested on that track are exported worldwide, that its driving centre offers a safe driving training, and that the investigated measures do not relate to the racetrack as such, but rather to the sport and non-sport infrastructure other than the racetrack and to the organisation of Formula 1 races.

**(b) Compatibility of aid under 107(3)(c) TFEU**

## Objective of common interest

- (83) Germany argues that the construction of sport facilities can be regarded as a common interest in view of Article 165 TFEU <sup>(97)</sup> and that measures enabling access to sport could be supported <sup>(98)</sup>. The Nürburgring features not only few professional events but also amateur events and motorsport training of youth. Nürburgring is used also for other sport events such as cycling (Rad&Run), running (Fisherman's Friend StrongmanRun) and triathlon (Green Hell Triathlon).

## Necessity and proportionality of the measures

- (84) Germany states that the measures are necessary for the following reasons: Out of [...] event days, Nürburgring is used for professional sport only on [...] days, for amateur sport on [...] days and for both amateur and professional sport on [...] days. The amateur sportsmen represent more than [...] ([...] professionals versus [...] amateurs). Non-amateur events are Formula 1, German Touring Car Championship, Superbike World Championship, the music event Rock am Ring and the test driving of the car manufacturers. Amateurs can go for a ride with their own cars. At weekends, amateur competitions of large German motorsport associations (such as ADAC) are organised. During the week individual clubs use the tracks for training or amateur competitions. In motorsport, there is no separate infrastructure for professional and amateur sport. Moreover, the measures under investigation serve to the elimination of a market failure. A return on investment cannot be expected. In contrast to multifunctional arenas, only one or two series of a competition take place every year. No private investor would construct and finance such infrastructure. The participation of private enterprises in the financing of Part I of the 'Nürburgring 2009' project failed. Public engagement had thus also an incentive effect. Without the explicit political will of the Land government, NG would not implement the modernisation and expansion of the sport infrastructure in the same extent. In addition, Germany argues that the financing of the measures is proportional. The aims could not have been reached with a lower funding by the public sector. The installations were old and required modernisation. There was no duplication of infrastructures. In contrast to the Commission cases on multifunctional arenas <sup>(99)</sup>, the measures under investigation do not concern new infrastructure or substantial extension of capacity.

## Effects on trade and competition limited to necessary extent

- (85) According to Germany, effects on trade and competition are small and do not contradict the common interest. As stated by the Koblenz court <sup>(100)</sup>, the Nürburgring with the Nordschleife is unique. The location of international and national events has a long history, and the support to the sport infrastructure at the Nürburgring does not therefore lead to a transfer of events to the Nürburgring. There are only few international events at the Nürburgring.

<sup>(97)</sup> Germany refers to Commission decision in case SA.33728 Financing of new multi-arena in Copenhagen, point 33.

<sup>(98)</sup> Germany refers to Commission decisions in cases SA.31722 Supporting the Hungarian sport sector via tax benefit scheme, points 86 and following, and SA.33952 Kletteranlagen des Deutschen Alpenvereins, point 68.

<sup>(99)</sup> Germany refers to SA.33168 Uppsala arena and SA.33728 Financing of new multi-arena in Copenhagen.

<sup>(100)</sup> Judgment in case U 73/12 Kart of 13.12.2012, Oberlandesgericht Koblenz.

**(c) Compatibility of aid under 107(3)(d) TFEU**

- (86) Germany claims that the Nürburgring — as the longest permanent racetrack and the oldest pit lane worldwide — is part of the cultural heritage of the Union <sup>(101)</sup>. Parts of the ringwerk (mixture of museum and science centre) have a museum character. The measure for the support of the culture of the motorsport was necessary as it creates a common cultural identity in Germany and the Union, and the private financing of Part I of the 'Nürburgring 2009' project failed. The measure was also proportional because no overcompensation of that measure took place. The trade and competition conditions in the field of cultural facilities are not affected by the support to an extent contrary to the common interest. The cultural facilities at the Nürburgring are in competition with other regional or national cultural facilities, so that the market share of the former facilities is limited.

**(d) Compatibility of aid under 107(3)(b) TFEU**

- (87) Germany also claims that the drawing of loans of NG from the liquidity pool and the participation of ISB in the liquidity pool (measure 3) is compatible under 107(3)(b) TFEU as taking a loan from the real economy was almost impossible at the time because of the breakdown of the interbank market.

**(e) Compatibility of aid under 106(2) TFEU**

- (88) Germany claims that part of the investment measures for the promotion of tourism met the SGEI requirements that were in force at the time <sup>(102)</sup> and that no manifest error of appreciation is evident. More concretely, Germany indicates that parts of ringwerk (particularly motorsport exhibition, Green Hell multi-media theatre, ringmeister and testcentre) have a museum character and serve to the public interest of (cultural) education, Warsteiner Event Centre serves as a multifunctional congress, trade fair and conference facility and the parking house is not fully used at days without big events. Germany argues that an enterprise acting under normal market conditions would not make the investments in the above three facilities without public financing and that the failed private financing of Part I of the 'Nürburgring 2009' project shows that there is no market for the installation of such measures.
- (89) Germany claims that the organisation of Formula 1 events is considered a SGEI as they are publically funded also in other countries and they have an enormous prestige and macroeconomic and identity effects to the respective Member State as well as to the whole Union.

**(f) Temporary Framework**

- (90) Germany claims that tranches 2 to 4 of the ISB loan (measure 8) are compatible with the internal market under the Commission communication — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis <sup>(103)</sup>, and that even if the Commission concluded that NG was an undertaking in difficulty as of 1 July 2008 and the Temporary Framework could not be applied to tranches 2 to 4 of the ISB loan, the aid in favour of NG, MSR and CMHN would equal to the difference between the interest rate to be paid on the market and the interest rate actually paid, but not to the whole amount of the loan <sup>(104)</sup>.

<sup>(101)</sup> Germany refers to N 158/2010 Fussballmuseum Dortmund and N 164/2010 Leipziger Reit- und Rennverein Scheibenholtz. However, Germany does not demonstrate that the race ring is protected as a cultural monument under the German law.

<sup>(102)</sup> Germany claims that the public interest was in macroeconomic/regional-economic effects and the promotion of sport and culture, there was a market failure since the measures were not possible without State support, the turnover was below EUR 100 million during the three years preceding the measures, the aid was below EUR 30 million annually, the entrustment act was constituted by the statutes of NG and the approval by the supervisory board of NG covered by a decision of the government of the Land and the calculation parameters could be deduced from the updated business plans. Germany also argues that the SGEI package entered into force only at the end of 2006, that for the period before, there were therefore no additional provisions about the form of the entrustment act, and that for the period after, the qualification as existing aid is appropriate.

<sup>(103)</sup> OJ C 6, 11.1.2011, p. 6

<sup>(104)</sup> In this context, Germany refers to Commission decisions in cases C 38/2005 Biria Gruppe, point 93; C 51/06 Arcelor Huta Warszawa, point 111 and following; C 43/2001 Chemischen Werke Piesteritz, point 107 and following; and judgment of the General Court in case T-102/07 and T-120/07 Freistaat Sachsen/Commission, point 218.

## 3.8. SALE OF ASSETS

- (91) In its submissions, Germany maintains that the sales structure does not involve State aid to the buyer of the assets. In addition, Germany argues that the sales process interrupted the economic continuity of the NG, MSR and CMHN. Thus, in its view, if the formal investigation procedure concluded with a negative Commission decision requesting the recovery of incompatible aid, a recovery obligation imposed on NG, MSR and CMHN would not concern the buyer of the assets in question. Finally, with regards to the condition which foresees that the sale of the Nürburgring assets is final only upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets, Germany argues that this condition does not constitute an obstacle to the liquidation of the aid beneficiaries and that it is not a continuation of their business, or an advantage to the buyer.
- (92) As regards the interruption of economic continuity, Germany pointed to the following elements:
- (a) The sale was carried out through an open, transparent, non-discriminatory and non-conditional tender procedure to the bidder submitting the highest bid including a proof of its financing;
  - (b) The economic logic of the sale is determined by the insolvency proceedings, which serve to satisfy jointly the creditors by the sale of the assets of the Nürburgring and the distribution of the proceeds among them;
  - (c) The opening of the insolvency proceedings and the takeover of the business by NBG from NAG as well as the sale of the assets to Capricorn with the subsequent placing of the assets in the control of a separate trustee constituted economic breaks, as the business models of NAG, NBG and Capricorn vary in the use of the assets substantially;
  - (d) Neither Capricorn nor the new owner of the assets has any economic or corporate link to NG, MSR or CMHN as of January 2015;
  - (e) The buyer has acquired only the assets but not the shares or the obligations of the sellers. The shares of NBG are not transferred to the buyer, either;
  - (f) The significant contracts for the operational business will be terminated predominantly after the 2014 season. The new contracts for the period from 1 January 2015 will be negotiated and concluded by the operating company founded by the buyer. Any transfer of employment contracts associated with the tendered assets would be governed by the applicable provision of German law, i.e. the purchaser of the insolvent assets would be free to decide on engaging personnel;
  - (g) As regards timing, the assets were sold before any Commission decision;
  - (h) The date of the transfer is determined by the requirements set by insolvency law that are to be considered in the context of the best possible sale of the assets. Given the nature of the motorsport business and the tendered assets, Germany considered that any successful buyer(s) would be engaged in activities similar to NG, MSR and CMHN's. However, any new owner(s) would have the possibility to manage their activities under different operating conditions than NG, MSR and CMHN's and would apply their own business model. For the racetrack, Capricorn foresees a different utilisation concept based on a new business plan. Besides, the buyer will itself be more active as an event organiser at the Nürburgring in the future. Furthermore, the Nürburgring will convert from a tourism attraction to a technology site according to the plans of the buyer.
- (93) With regards to the condition which foresees that the sale of the Nürburgring assets is final only upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets, Germany argues the following:
- (a) no potential investor or financial partner would accept to acquire the assets without such a condition precedent;

- (b) according to the German insolvency law <sup>(105)</sup>, the insolvency administrators' obligation is to ensure that the debtor's assets are liquidated at the best possible rate or alternatively to reach an arrangement in an insolvency plan which however would result in further State aid to the Nürburgring companies;
  - (c) the lessee will operate the leased assets under its own name, on the basis of its own business plan and with the workforce of its own choice; and
  - (d) [Bidder 2] had a similar condition in its offer, which foresaw that its offered prices would only be payable upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets. [Bidder 3] had a condition stipulating that it could withdraw from the sale if there was no positive Commission decision in place until 31 December 2014.
  - (e) The structure by which, in case there is no non-challengeable Commission decision at the beginning of 2015 the sold assets will be transferred before 1 January 2015 to a new company, in which 95,1 % of the shares will be owned by the buyer and 4,9 % by an independent trustee (see recital 56 above), will not lead to a continuation of the beneficiaries' business but will ensure their definitive exit from the market.
- (94) In conclusion, Germany argues that through this process there is no economic continuity between NG, MSR and CMHN and the assets sold under the tender process. Thus, any potential incompatible State aid to NG, MSR and CMHN would have to be recovered from these companies, following a relevant Commission decision, and would not concern the buyer of the assets under sale. Germany also argues that the condition precedent of the sales contract between the sellers and the buyer does not put an obstacle to the liquidation of the Nürburgring companies and the recovery of the past aid from them. The aid beneficiaries will disappear from the market definitively. Should ever the sale with Capricorn be annulled, the assets will still be sold and the sellers liquidated.
- (95) Germany informed the Commission about the sales structure, in order to obtain legal certainty that the sale of the assets would not involve State aid and that any successful buyer(s) would not be held liable for recovery of incompatible State aid.
- (96) Germany also undertook the commitment to provide to the Commission reports regarding the implementation of the sales procedure. The reports were submitted on a regular basis. The reports confirmed that the sales process was executed following the principles discussed with the Commission. They also provided information to the Commission about the bidders, their tenders, the final sales price and other relevant issues.

#### 4. COMPLAINTS ON THE SALE OF ASSETS

##### 4.1. COMPLAINT FROM JA ZUM NÜRBURGRING e.V. (COMPLAINANT 1)

###### (a) Complaint

- (97) Complainant 1 claims that the design of the tender process for the sale of the assets of NG, MSR and CMHN (i.e. the sale of racetrack, accommodation facilities and leisure park altogether) was not suitable for remedying competition distortions in the relevant markets, because it aimed at an unchanged operation of the complex and a transfer of the majority of employees of NG, MSR and CMHN to the buyer of the assets. Complainant 1 further complains that in the insolvency proceedings in the own administration (*Eigenverwaltung*) the insolvent companies carry out the sale themselves, under the mere supervision of an insolvency administrator (*Sachwalter*) <sup>(106)</sup>, that the bidders are not required to submit separate offers for each asset cluster and that offers for the totality of assets are acceptable.
- (98) Complainant 1 also argues that aid would be transferred to the buyer of the assets because all the assets, around 300 employees and the operational business of NBG would be transferred to one bidder and there would thus be

<sup>(105)</sup> Section 1 of the German Insolvency Code.

<sup>(106)</sup> Complainant 1 submitted a letter of the competent local court of 29 January 2014, in which the said court stated that in case of the own administration, the insolvency court and the insolvency administrator do not carry out the sale of assets, but they only supervise that sale, and in which the court found thus no basis for an intervention in the sale of the assets.

economic continuity between the old and new owner/operator. Complainant 1 also alleges that in consequence of the criterion of the maximisation of value of all assets, offers for the totality of assets were preferred by the sellers, whereas offers for individual assets were discriminated.

- (99) Furthermore, complainant 1 alleges that there is a lack of transparency as regards the award criteria and the financial data about the profits of NG, and that there is discrimination among the bidders, in particular because the access to the virtual data room was limited to five bidders. Complainant 1 also states that the sellers communicated the extension of the deadline for the submission of binding offers until the mid of February 2014 only to the bidders for all the assets who qualified for the access to the virtual data room; the bidders that tendered only for individual asset clusters such as complainant 2 were not notified of the extension of the deadline. Furthermore, complainant 1 states that the Land and Capricorn were represented by the same law office.
- (100) Complainant 1 requests the suspension of the tender process and its re-launch with clear award criteria, the qualification of the racetrack as an SGEI and its separation from the sale of the accommodation facilities and the leisure park.
- (101) In addition, complainant 1 alleges that NBG has received new non-notified aid incompatible with the internal market because it was provided capital for the operation of the business at the Nürburgring from the insolvent NG of EUR 2 239 243 in the form of a transfer in the capital reserve (*'Kapitalrücklage'*), that the operation is based on a new lease contract between NG, MSR, CMHN and NBG that was not tendered out, that NBG does not pay any rent and that NBG does not aim at increasing turnover and saving costs, because it keeps all the personnel and has born the costs for the organisation of Formula 1. Complainant 1 also claims that a takeover by NBG of employment contracts of NAG employees, based on a contract concluded between NBG and the trade union ver.di on 26 July 2013, sets out that, through the takeover, no economic, social or legal disadvantages can be created to the employees, and it shows that a business model which was built up with unlawful aid has been maintained.

**(b) Comments from the insolvency administrators sent by Germany**

- (102) Pursuant to the insolvency administrators, the complaint should be refused because it does not make evident that the sale process deviated from a usual acquisition process.
- (103) In an open, unconditional and transparent bidding process, offers for all assets cannot be excluded from the outset. If such offer is higher than the sum of the combined offers for individual assets, an owner behaving in a market-conform manner would conclude the contract with the offer for all assets. Under these circumstances, only the latter offer is a market price <sup>(107)</sup>. The exclusion of such offers from purchases in insolvency proceedings would equal to a breach of the business freedom and the ownership right of the insolvency creditors guaranteed by the Charter of fundamental rights of the European Union.
- (104) A preferential treatment of offers for all assets did not take place. The non-qualification of complainant 2 for the access to the data room was caused only by the insufficient amount of its price offer.
- (105) The bidding process had been done in stages. The bidders qualify for a next stage only if there is a sufficient closing probability. The advantage of this approach is that sensible business data are not accessible to more bidders than necessary and that the cost of the due diligence can be reduced for both the seller and the bidders that offer an insufficient price. The bidders were provided sufficient information in each stage of the process.
- (106) The award criteria were defined unambiguously. The award criterion is the total proceeds weighted in view of the closing probability, which is further defined by sub-criteria.
- (107) The data room was not limited to five tenders for technical reasons. The number of accesses was the result of the evaluation of offers.

<sup>(107)</sup> The insolvency administrators refer to the judgment of the Court of 16 December 2010 in case C-239/09 Seydaland, recital 34.

- (108) According to the insolvency administrators, NBG was established by them as a vehicle for a temporary operation of the assets during the insolvency until the sale of assets. Previously, the operational business was carried out by NAG. Since the lease of the Nürburgring to NAG, the companies NG, MSR and CMHN were mere owner companies without operational business. Pursuant to the insolvency administrators, NG, MSR and CMHN could not be considered for the take-over of the operational business. First, a split of the operational business between the three companies would require separate concepts. Second, that split would not correspond to asset clusters that would lead to an economically meaningful use of the real property. Third, the conclusion of contracts with insolvent companies does not comply with internal compliance rules of many companies, and the operational business had thus to be continued via a non-insolvent subsidiary as an acceptable contractual partner to the customers of the Nürburgring. The employees could also not be required to change from NAG to insolvent companies. NBG was not established and equipped as a long-term solution. In contrast to the assets managed by NBG, the latter company was not for sale. Moreover, the insolvency administrators state that the provision of capital to NBG was carried out by the insolvency administrators in view of the sale (avoidance of lower revenues in case of non-operation) only according to economic considerations, that the assets of NG were increased by NBG, not decreased <sup>(108)</sup>, that the said provision of capital does not provide an advantage to NBG, and that the establishment and equipment of NBG is not imputable to the State, but to the insolvency administrators.
- (109) Pursuant to the insolvency administrators, also the contract between NBG and the trade union ver.di was concluded in order to allow the continuation of the operational business of NBG until the sale, and not to keep the Nürburgring as an economic entity thereafter. That contract was concluded by NBG, not the sellers. The employment contracts were transferred from NAG to NBG according to § 613a of the German Civil Code, and not on the basis of the said contract. In view of Article 7 and 9 TFEU and Council Directive 2001/23/EC <sup>(109)</sup>, competition related considerations cannot lead to the circumvention or decrease of the social standard. It was important for NBG as a temporary solution that the employees necessary for the operational business that were employed by NAG (predominantly) and NG (20 employees) are transferred to NBG. NBG had to avoid that the remaining qualified employees have to be replaced during the transitional period. Between the beginning of 2011 and the end of 2012 the personnel was reduced by 114 full-time equivalents (from 402 to 288 full-time equivalents). At the beginning of the 2013 season, 290 were employed. The bidders were informed that they have the possibility to adjust the scope of the transaction to their business concept. The transfer of employees is no indicator for the maintenance of a business model.
- (110) Germany considers as not required by the State aid rules and as not acceptable in view of the European social model that a buyer of assets of a company in insolvency should be required to avoid the transfer of employment contracts and to conclude new employment contracts under the threat of recovery of aid granted previously to that company.

#### 4.2. COMPLAINT FROM ADAC e.V. (COMPLAINANT 2)

##### (a) Complaint

- (111) According to complainant 2, he was notified by the sellers that his offer could not be taken into account in the next stage of the sale, as the price offered by him was substantially lower than the price included in other offers, and related only to part of the assets, while maximisation of value was sought through all assets.
- (112) Complainant 2 claims that the sale process aims at economic continuity of the activities and the market position of the Nürburgring in its current form, and it is therefore not suitable for the avoidance of a transfer of an advantage from the aid already granted to the buyer of the assets. He points out that only a sale to several bidders can breach the economic continuity, that offers for the totality of assets were preferred by the sellers compared to offers for individual assets, the latter being allowed but de facto without any chance, and that there are no criteria for the evaluation of offers for part of the assets in relation to offers for the totality of assets and that only the latter offers qualified for the second stage of the process.

<sup>(108)</sup> NBG closed the business year 2013 successfully and made EBITDA (before rent) in the amount of EUR 2 920 000. As a rent, NBG paid EUR 2 661 000 for 2013.

<sup>(109)</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

- (113) Complainant 2 also states that the sale process was carried out by the insolvency administrator in breach of the State aid rules, including a lack of transparency and non-discrimination, and it is therefore not suited to achieve a market price. Complainant 2 claims that data on the financial situation of NG relevant for the price offers were missing in the tender documentation, which led to excessive indicative offers, which would probably be decreased after the process stage allowing access to the data room. Complainant 2 states that the profits were substantially decreased compared to the expected profits for 2013 previously communicated to the bidders, without giving them a possibility for a new analysis of the financial data. Complainant 2 also alleges that the information about the financial situation of NBG and the necessary mid-term and long-term investments was not sufficiently disclosed and that the tender documentation implies long-term contractual relationships, although the contracts with complainant 2 were extended only by one year (2014). In addition, the criterion of a secure financing was not sufficiently taken into account, otherwise the bidder La Tene Capital Limited could not access the data room with an unrealistically high offer and without a confirmation of the financing.

**(b) Comments from the insolvency administrators sent by Germany**

- (114) Comments from the insolvency administrators contained in recitals 101 to 105 apply also to the complaint from complainant 2.

**4.3. COMPLAINT FROM [BIDDER 3] (COMPLAINANT 3)**

**(a) Complaint**

- (115) Complainant 3 claims that the sales contract was not awarded to the bidder with the highest offer, but to a preferred local bidder. Pursuant to complainant 3, non-economic considerations such as regional objectives or reasons of industrial policy that would not be accepted by an investor acting in accordance with market economy principles may not be taken into consideration for a lower price but point to a case of State aid<sup>(110)</sup>. Complainant 3 claims that it offered a purchase price in the amount of EUR 150 million<sup>(111)</sup>, and that Capricorn was thus awarded with the contract although complainant 3's offer was substantially higher. Complainant 3 further supports that an exceptional decision for the lower bid may only be made if it is obvious that the sale to the highest bidder is not possible (transaction security), i.e. if the purchaser is not able to pay the purchase price<sup>(112)</sup>. According to complainant 3, this was not the case, because: (1) complainant 3 submitted a binding financing commitment by a private equity fund in the amount of EUR 30 million; and (2) it was not possible to receive the binding commitment for the further tranches of the purchase price due to a delay and lack of documentation by the sellers. Complainant 3 claims to have informed the sellers that the pending financing commitments could be submitted by 31 March 2014. Complainant 3 also supports that as of the date of the complaint (10 April 2014), it could provide a financing commitment over EUR 110 million, whereas complainant 3 submitted to the Commission a Letter of Intent addressed by Jupiter Financing Group, Inc. ('Jupiter Financial Group') to complainant 3, dated 26 March 2014, informing complainant 3 of a binding proposal by Jupiter Financial Group for the financing of the acquisition of the Nürburgring assets (for the financial components of this proposal, see footnote 105). The financing proposal was subject, among other conditions, to the completion of due diligence satisfactory to Jupiter Financial Group.
- (116) Complainant 3 also claims that, of the total of EUR 77 million that Capricorn offered as a purchase price for Nürburgring, EUR 6 million would be paid from the 2014 season and a further EUR 11 million only during the years 2015 to 2018, and that this results in an actual cash purchase price in the amount of EUR 60 million and thus in a difference of EUR 50 million compared to the cash purchase price of EUR 110 million offered by complainant 3. According to complainant 3, if one takes further future cash payments into account, the difference between the offers of Capricorn and complainant 3 is EUR 73 million. Finally, complainant 3 alleges

<sup>(110)</sup> Complainant 3 refers to Commission decision of 30 April 2008 in case *Bank Burgenland* and to the judgment of the Court of 24 October 2013 in case C-214/12P, C-215/12, C-223/12P (not yet published in the ECR)

<sup>(111)</sup> According to complainant 3, the claimed offer consisted of: (1) EUR 90 million to be paid as cash payment upon closing; (2) EUR 20 million payable by 31 March 2014; and (3) the maximum amount of EUR 40 million to be paid as earn-out in the amount of 20 % of the respective annual EBITDA of the Nürburgring complex after the acquisition by complainant 3. On top of that, complainant 3 claims to have committed to set up a development fund of EUR 200 million for the local communities surrounding the Nürburgring.

<sup>(112)</sup> Complainant 3 refers to Commission decision of 30 April 2008 in case *Bank Burgenland*.

that there is aid in favour of Capricorn which amounts to at least EUR 73 million, i.e. the difference between the purchase price offered by complainant 3 as the bidder with the highest bid and the price offered by the successful bidder. In this regard, according to complainant 3, when taking into account the support in favour of the local communities, the aid amount is raised by EUR 200 million, to an overall EUR 273 million.

- (117) Complainant 3 also claims that Capricorn's offer was not unconditional, since it was subject to a non-contestable decision by the Commission making clear that there is no extension of the recovery order. According to complainant 3, this constitutes a deviation from the announced principles of the sales procedure, which caused a violation of the tender procedure since other parties like complainant 3 were not informed about the adjustments.
- (118) Furthermore, complainant 3 argues that the sale of assets has not been made in the course of an open, transparent and unconditional selection process. Specifically, complainant 3 alleges that:
- (a) The fact books provided by the sellers were materially incorrect and misleading; particularly the suggested 'clean balance sheet' transaction structure was unrealisable. Immediately after the due diligence process began, complainant 3 found out that the transaction structure proposed by the sellers did not accommodate the factual circumstances resulting from the operation of the Nürburgring and could thus not be implemented <sup>(113)</sup>.
  - (b) Throughout the process, the sellers delayed the finalisation of the asset purchase agreement.
  - (c) The sellers failed to communicate an unambiguous time limit for ending the bidding process and indicated that the process ends at the end March 2014. Complainant 3's exchange of communication with the sellers and a press release by the sellers implied that the submission of complainant 3's bid until the end of March is possible. Moreover, Capricorn was allegedly given a preferential treatment since it was allowed to provide its binding financing commitment after 17 February 2014 <sup>(114)</sup>.
  - (d) Material contracts such as the third party operational contracts of NBG were not provided at all or only with substantial delay. Furthermore, the bidders were allegedly provided with decisive information on the key financial figures of NBG in the data room only in German only one working day before the expiry of the deadline for the submission of the final offer or even on that day. In particular, material information such as the audited annual accounts of NBG as at 31 December 2012 was allegedly only provided on the evening of the last working day before the date set for the submission of the final offer.
  - (e) The sellers discriminated the other bidders by allegedly granting Capricorn preferential access to major third party suppliers. In particular, complainant 3 claims that there must have been negotiations between Capricorn, the sellers as well as the brewery Bitburger already weeks before the winning bidder was announced on 11 March 2014 <sup>(115)</sup>.

<sup>(113)</sup> Complainant 3 claims that based on the information provided by the sellers in the process, he assumed that the acquisition of the assets and the start of the business would be possible on the basis of 'a clean balance sheet', i.e. without any past and ongoing liabilities or obligations arising from existing contractual relationships, that he aimed at negotiating new agreements with customers and sponsors on new terms in order to partly refinance his investment, that it then turned out that all material agreements for the operation of Nürburgring were concluded by a third party (i.e. NBG) on the basis of a business lease contract with the sellers, that this meant in essence that the complainant — after being awarded with the assets — would have been forced to take over the business lease contract as well as some agreements concluded between NBG and third parties, that other agreements entered into by NBG did not transfer automatically but had to be effectively honoured by complainant 3, particularly since allegedly the sellers wanted to force complainant 3 to assume full financial responsibility for damage claims (resulting from NBG's failure to provide the ring facilities), and that consequently, complainant 3 allegedly had to change his initial business concept: whereas initially — partly — complainant 3 planned to secure the interim financing of the Nürburgring acquisition by concluding adjusted agreements with the customers and sponsors of Nürburgring, now it was forced to take the existing agreements into account or at least to economically honour them.

<sup>(114)</sup> Complainant 3 claims that on the one hand, there is reasonable doubt that Capricorn was able to provide a binding financing commitment for the entire purchase price on the date of the expiry of the deadline on 17 February 2014 and the decision on the successful bidder was held back just until Capricorn had fulfilled all formal requirements, whereas on the other hand complainant 3 was, as announced in the final offer, able to provide a binding financing commitment over EUR 90 million.

<sup>(115)</sup> Complainant 3 adds that other bidders like complainant 3 were provided with false information, that complainant 3 intended to start negotiations with its own favourite suppliers in spring 2014 in order to fine-tune its financial offer for the ring assets, and that however, complainant 3 was told by the sellers that for example the beer supply could not be changed in 2014 since otherwise complainant 3 would be forced to take over liability for any damage claims resulting from NBG's failure to fulfil its contractual obligations to the existing beer supplier anymore. Pursuant to complainant 3, the change of the beer supplier from Warsteiner to Bitburger proves that the information provided to complainant 3 was false and that complainant 3 as a bidder was deliberately misled.

- (f) The notarisation of the asset purchase agreement between the sellers and Capricorn must have taken place before 11 March 2014. The award of the contract was already communicated to Capricorn before a decision by the committee of creditors was made, and a press release by Capricorn dates from 9 March 2014 and was thus made 2 days before the decision of the committee of creditors on 11 March 2014.
  - (g) Without informing the other bidders the sellers deviated from the process letter of 17 October 2013 by waiving the requirement to provide a financing guarantee for the entire purchase price to the sole benefit of Capricorn <sup>(116)</sup>.
  - (h) The sellers violated the conditions of the process letter by not providing individual bidders with an agreed and internally approved mark-up of the asset purchase agreement prior to the submission date of the final offer thus rendering the finalisation of the financing significantly more difficult.
  - (i) The sellers based the award of the assets also on environmental criteria and assumed — without further liaising with complainant 3 — that the company would not be able to meet such criteria, although no explicit environmental conditions were introduced by the sellers <sup>(117)</sup>.
  - (j) Capricorn was given preferential treatment as the company sought State aid advice from the law firm McDermott, who had already advised the sellers and the Land on the same matter prior to advising Capricorn.
- (119) Complainant 3 claims that the sale represents resources imputable to the State <sup>(118)</sup>, that new State aid in favour of Capricorn is present, and that any recovery order with respect to State aid granted to the sellers of the assets must be extended to Capricorn <sup>(119)</sup>. Finally, complainant 3 claims that the sales contract is invalid due to the violation of the standstill obligation of Article 108(3) TFEU.
- (120) Finally, complainant 3 claims that Capricorn failed to pay the second instalment of the purchase price that was due at the end of July, which according to complainant 3 provides an indication that Capricorn did not provide a fully financed offer. Complainant 3 further claims that, subsequently to the above, the financing conditions for the acquisition of the Nürburgring assets were changed to the benefit of Capricorn and in clear deviation from the rules set by the sellers and the process letter given to the bidders, which may constitute further aid to the benefit of Capricorn.

**(b) Comments from the insolvency administrators sent by Germany**

- (121) Pursuant to the insolvency administrators, complainant 3 had not submitted any binding financing commitment for EUR 30 million neither along with its confirmatory bid of 17 February 2014 (that referred to a binding financing commitment of [...] in the amount of EUR 30 million) nor along with the complaint, and the complainant 3's claim that the evidence of financing could be submitted at a later stage was even not demonstrated by non-binding statements of third parties. In contrast to the confirmatory offers of Capricorn and [Bidder 2], the confirmatory offer of complainant 3 did not meet the financing requirements set in the process letter of 17 October 2013. On 11 March 2014, the sellers had therefore no ground to award the contract to complainant 3. For the sellers, the risk that waiting for complainant 3's evidence of financing may lead to the reduction of the bidders to one or zero was not acceptable, since: (a) [Bidder 2] consortium insisted on the implementation of the transfer of ownership as of 3 April 2014; and (b) there was lack of progress in the substantiation of complainant 3's offer, despite the fact that the latter had handed in its expression of interest on 17 May 2013 and its indicative offer already on 30 September 2013, therefore the likelihood of closing the

<sup>(116)</sup> Complainant 3 claims that the process letter of 17 June 2013 requires a guarantee for the payment of the purchase price payable upon first demand and issued by a reputable European Bank, that Capricorn was not able to provide a full guarantee which covers the entire purchase price, and that the sellers must have altered its own payment conditions in order to bring the award in line with its announced process terms.

<sup>(117)</sup> Complainant 3 claims that he had submitted its bid in full awareness and compliance with noise emission regulations under statutory law.

<sup>(118)</sup> Complainant 3 refers to the judgment of the Court in case C-482/99 *Stardust Marine*, recitals 54-55, and to Commission decisions in case *Gerogsmarienhütte* (OJ C 199, 14.7.2001, p. 4) recital 27, in case *Flughafen Dortmund* (OJ C 217, 15.9.2007, p. 25), recitals 54-55, and in case N 510/2008 *Alitalia*.

<sup>(119)</sup> Complainant 3 refers to Commission decisions in case CDA of 16 December 2000, recital 117, and in case *Biria Group* of 14 December 2010, recitals 79-80, to the judgments of the Court in case T-415/05 *Olympic Airways*, recital 157, and in case T-123/09 *Alitalia*, recital 135.

transaction with complainant 3 was reduced. The alleged financing commitment of Jupiter Financial Group dated 26 March 2014 was not submitted to the sellers, while a later non-signed letter of investment bank and advisory firm [...], dated 31 March 2014, is conditional on the satisfactory conclusion of the due diligence. The development fund for the municipalities surrounding Nürburgring, in the amount of EUR 200 million, was to no benefit of the sellers.

- (122) According to the insolvency administrators, the bidders were informed that the selection of the successful tenderer maybe carried out shortly after the deadline for the submission of offers on 17 February 2014. The information provided by the sellers could not give an expectation that the process would be extended. The press release quoted by complainant 3 states that the insolvent administrators intend to conclude the contract in the first quarter of 2014. The insolvency administrator states that it is not true that he had publically stated that it is aimed to take a decision at the end of March, that Capricorn was informed already before the meeting of the creditors' committee about the award of the contract and that a press release was published by Capricorn on 9 March 2014.
- (123) The insolvency administrators state that the transaction structure (sale of individual assets, asset clusters or all assets, without transfer of shares or liabilities) had not changed during the bidding process. The term 'clean balance sheet' stands for nothing else than the exclusion of the transfer of liabilities with the sale. The fact that the sellers are owner companies and that the operation business is carried out by NBG, was communicated to all interested parties already in the teaser that was sent to complainant 3 on 17 May 2013. According to the insolvency administrators, if complainant 3 became aware of the activity of NBG indeed only during the due diligence, as alleged, it can be concluded that complainant 3 dealt unsatisfactorily with the extensive information put at the disposal before the submission of indicative offers. At no moment in time, the sellers had required that the buyer takes over the contracts of NBG. A take-over of the lease contract between the sellers and NBG by the buyer was not considered by the insolvency administrators, because of the special situation of NBG in view of the transfer of assets sought from the outset. The insolvency administrators claim that complainant 3 had realised very late that in case of a take-over of the assets as of 1 January 2014, it would have a predominantly 'empty' Nürburgring, and the new contracts with customers and sponsors would lead to (increased) revenues only in the 2015 season due to the planning time of (racing) events. Moreover, the sellers had repetitively stressed that the bidders could define the subject of the purchase.
- (124) As regards the claims for damages of third parties, the sellers informed complainant 3 that it would be hardly possible for it to conclude new contracts with the customers of NBG under terms for the customer worse than the running contract, insofar as the issue of a compensation of damages for the non-fulfilment of the contracts with NBG is not clarified. It was necessary to address the risk that the buyer and the contractual partners conclude a new contract that leads to a situation where the contractual partner pays a high consideration, asks for a compensation of the difference with the old amount of consideration and pays in the later years, for which there was no contract with NBG, a substantial lower consideration. The requirement of the sellers for such exclusion is not unusual for asset deals that lead to business close-down and allows to guarantee the best sale in the interest of the creditors.
- (125) Pursuant to the insolvency administrators, the deadline for the submission of the confirmatory offers was extended by letter of 17 December 2013 because also other bidders had not yet submitted a satisfactory offer. It was repetitively made clear to the bidders that NBG took over the operative business only after the 2012 season, that it had therefore to fulfil largely the contracts of NAG and that a reliable accounting for the operational business did thus not (yet) exist. According to the insolvency administrators, it is up to the potential buyers to take account of the related risks.
- (126) The insolvency administrators indicate that on 6 March 2014, complainant 3 submitted a mark-up to the asset sale agreement to its confirmatory offer. The draft asset purchase agreement negotiated on 13 February was from the sellers; it was therefore clear that the next draft would be produced by complainant 3.
- (127) According to the insolvency administrators, all the bidders that qualified to the respective phase of the selection process had the same documents at their disposal in the data room. The documents identified in the complaint were not available to the sellers and particularly to other bidders earlier, all tenderers had the same chance to view the documents in the data room, and other tenderers concluded the due diligence with the same documents.

All the bidders were informed early enough that the accounting of the companies had deficiencies. Almost all documents of the sellers and NBG were put in German in the data room, and the sellers were not obliged to provide all documents in English.

- (128) In addition, the insolvency administrators bring forward that the deadline for the submission of offers and evidence of financing was satisfactory. Complainant 3 had 10 months (8 April 2013, as the date of the first contact between [Bidder 3] and the sellers, until 17 February 2014) for the submission of evidence of financing and almost four months (23 October 2013 until 17 February 2014) for the due diligence. The insolvency administrators state that they exceeded the requirements that can be deduced from the decisional practice of the Commission <sup>(120)</sup>.
- (129) The negotiations for the new contract on the supply of beer and with 'Rock am Ring' were not negotiated by Capricorn but by NBG, and the corresponding documents were put in the data room. There is no link to Capricorn claimed by complainant 3.
- (130) The sellers had not introduced any environmental criteria in the tender process for selecting the final offer. The only criteria of the tender process for selecting the final offer were: (a) the maximisation of the total proceeds for all of the assets; and (b) the expected transaction security. Complainant 3's offer could not be selected because it was missing the latter criterion, i.e. it did not have transaction security, because complainant 3 had not submitted a proof of financing with its confirmatory offer. At the same time, the sellers carried out discussions with [Bidder 2] and the final stage of the purchase agreement's negotiation with [Bidder 2] and Capricorn, in view of [Bidder 2]'s offer of EUR [32-39] million (see Table 10 below) and the negotiation between Capricorn and [...] resulting in the latter bank's financial commitment dated 10 March 2014. Therefore, based on the absence of proof of financing with the confirmatory offer of complainant 3, there was a high risk of non-conclusion of the contract with complainant 3. Furthermore, the insolvency administrators tried to estimate the chances of complainant 3 to secure the financing by assessing further indicators of complainant 3's business model that could speak for the implementation of the transaction. The business model of complainant 3 was based on [...] and on the [...]. As the noise requirements valid for Nürburgring do not allow for [...] and a [...] does not exist, the implementation of the concept in a short term could not be expected. The concept of complainant 3 was therefore evaluated as an indicator for a substantial risk in view of the conclusion of the contract or at least for a substantial time and negotiation requirements. The compliance of the concept with the noise requirements at Nürburgring was not an award criterion.
- (131) With regards to complainant 3's claim that Capricorn's offer was not unconditional, since it was subject to a non-contestable decision by the Commission making clear that there is no extension of the recovery order, the insolvency administrators and Germany argue that complainant 3 had conditions in its mark-up contract with a similar effect. According to the provisions included in the relevant parts of those mark-up contracts, as submitted by the insolvency administrators and Germany, the purchaser and/or the seller had the right to withdraw from the contract if no positive decision of the Commission had been issued by 15 July 2014 (as stipulated in draft contract of 14 January 2014) or 31 December 2014 (as stipulated in draft mark-up contract of 14 February 2014).
- (132) According to the insolvency administrators, the fact that none of the two bidders that submitted a qualified confirmatory offer met fully the requirement of a secured financing (guarantee regarding the price amount or payment of that amount to an escrow account), and that the sellers had therefore allegedly waived that requirement *de facto*, without having informed complainant 3, is no proof of an non-transparent process. Complainant 3 was not affected because it did not submit any confirmatory offer with proof of financing. Informing all bidders about the alleged waiver would not influence the tender process. Moreover, the waiver is not a causal for the non-submission of financing confirmations by complainant 3, and it corresponds to the behaviour of a hypothetical private seller.
- (133) The insolvency administrators argue that the measures taken by the insolvency administrators or the committee of creditors are not imputable to the State, and that no advantage to Capricorn is evident as the sellers implemented the selection process according to the standard of an operator acting on market conditions.

<sup>(120)</sup> The insolvency administrators refer to Commission decision of 30 April 2008 in case C 56/06 *Privatisation of Bank Burgenland*, to Commission decision of 19 June 2013 in case SA.36197 *Privatisation of ANA — Aeroportos de Portugal* as well as to the Commission's communication on land sales.

- (134) Finally, as regards the claim that Capricorn did not provide a fully financed offer because it failed to pay the second instalment of the purchase price, and that there may be further aid to Capricorn because, subsequently to the above, the financing conditions for the acquisition of the Nürburgring assets were changed to the benefit of Capricorn, the German authorities argue: (a) there was no benefit for Capricorn, since the second instalment was rescheduled with interest of 8 % and pledges (see footnote 72); (b) there is no State aid involved in the second payment's rescheduling since the decision for the latter is not imputable to the State, because the second payment's rescheduling was decided solely by the insolvency administrator, without the involvement of the Land; and (c) there was no deviation from the rules set by the sellers and the process letter given to the bidders, because in the bidding procedure the sellers made no fixed requirements to the bidders regarding purchase price instalments before closing, therefore also a possible request of a bidder to replace cash collaterals by other valuable collaterals to secure the purchase price would have had no impact on the evaluation of the bids.
- (135) According to the insolvency administrators, the complaint should be refused as unjustified. The unsubstantiated hints of complainant 3 regarding financing are not compatible with the behaviour of a prudent market player or insolvency administrator.

#### 4.4. COMPLAINT FROM MR MEYRICK COX (COMPLAINANT 4)

##### (a) Complaint

- (136) Complainant 4 claims that Capricorn was awarded the contract not for the most economically advantageous offer, but because it is a German undertaking and the sellers did not want to sell to a private equity led consortium. It further alleges that the offer from Capricorn was lower than the offer from [Bidder 2] across multiple criteria. Specifically, complainant 4 claims that:

- (a) The financing of the offer from Capricorn was less secure than that of [Bidder 2] <sup>(121)</sup>.
- (b) [Bidder 2]'s offer foresaw higher up-front payments <sup>(122)</sup>.
- (c) The execution risk was higher in case of Capricorn than in case [Bidder 2]'s offer would be accepted <sup>(123)</sup>.
- (d) [Bidder 2] has more experience and capability than Capricorn <sup>(124)</sup>.
- (e) [Bidder 2] will invest further EUR 25 million in the Nürburgring with a higher probability than Capricorn.

<sup>(121)</sup> Complainant 4 mentions that several entities were allegedly contacted by Capricorn in the process to seek help with financing its bid, that Capricorn has misrepresented its financing support to the sellers at an early stage of the process, that the ownership structure of GetSpeed, one-third shareholder of Capricorn consortium, is not entirely clear, that the creditors' committee was not fully-informed about [...] financing of the Capricorn's bid, and that Capricorn had admitted publicly that they do not have the financing for their announced EUR 25 million of investment in the Nürburgring assets. Moreover, the creditors' committee had not sufficient time to verify the conditions of the confirmation of [...] about the provision of financing to Capricorn.

<sup>(122)</sup> Complainant 4 states that [Bidder 2]'s bid contained an upfront payment of EUR 32,5 million in early April 2014, whereas Capricorn's bid contained only the upfront payments of EUR 5 million in March 2014, EUR 5 million in July 2014 and EUR 5 million in December 2014.

<sup>(123)</sup> Complainant 4 claims that its offer foresaw a closing already in April 2014, that [Bidder 2]'s payments are guaranteed or based on the profitability of the business, that [Bidder 2]'s members are substantial, well-funded entities, with a significant track record in the field of mergers and acquisitions, whereas Capricorn's bid has an effective date no earlier than 1 January 2015, that further payments from Capricorn are not due until, inter alia, Commission review of existing State aid is completed and any EU Court process is completed, that the sellers accepted that if the Commission review is not completed by 1 January 2015, that Capricorn would have the option to lease the Nürburgring assets from then until such review is completed, that Capricorn is a small company with little in the way of capital and that Capricorn has little history in the field of mergers and acquisitions and a recent history of uncompleted projects.

<sup>(124)</sup> Complainant 4 indicates that [Bidder 2] has experience of owning and operating several major circuits, operating of hotel and leisure facilities, operating festivals, and that [Bidder 2] is the largest investor in Formula One and an investor in major auto manufacturers and leisure businesses, whereas Capricorn have no experience in circuit operations, hotel operations, festival management, race promotion or managing product launches.

- (f) The bidders were treated differently in the tender process and that Capricorn was given better treatment in the process <sup>(125)</sup>.
- (137) Complainant 4 also claims that Capricorn failed to pay the second instalment of the purchase price that was due at the end of July and that the EUR 25 million as well as the 8 % interest rate penalty for late payment were waived in favour of Capricorn, resulting in further State aid in favour of Capricorn. According to complainant 4, the above also raise questions around the information provided by KPMG and the insolvency administrators to the Creditors Committee in the context of the tender procedure, and demonstrate that Capricorn's financial ability was not properly presented.
- (138) Furthermore, complainant 4 supports that there was never a signed agreement between [...] and Capricorn for the latter's financing, but only a term sheet, therefore at the time of the creditors' committee, Capricorn had no funding agreed.
- (139) Finally, complainant 4 concludes that the information put forward by him makes it clear that an advantage was granted to Capricorn in the sale of the Nürburgring assets, that that advantage stems from a decision that is inconsistent with the manner in which a commercial seller would have run the process and have assessed the bids against the award criteria, that such a commercial seller could not have concluded that the Capricorn bid was overall more economically advantageous than [Bidder 2]'s bid and that a new process needs to be run in which a consistent set of criteria are applied in order to provide for an open, fair and unconditional tender, a clear timetable is set out and adhered to, and the identity of the bidders is shielded from the creditors' committee.

**(b) Comments from the insolvency administrators sent by Germany**

- (140) The insolvency administrators state that complainant 4 as member of the [Bidder 2] consortium is affected only indirectly. Moreover, they propose to refute the complaint, because the tender process was open, transparent and unconditional, and the assets were sold to the bidder submitting an offer that leads to the highest proceeds.
- (141) The insolvency administrators reject that the members of the creditors' committee agreed to the sale to Capricorn because the latter company is a German company and it is not a private equity led consortium.
- (142) According to the insolvency administrators, the bid from Capricorn leads to a substantially higher revenue from the sale in comparison to the bid from [Bidder 2], and there are no decisive differences in the transaction security of both bids that would justify the award to the substantially lower bid (for both bids the transaction security was satisfactory, but not the highest possible). [Bidder 2] was also not ready to provide a bank guarantee for the price amount, or transfer the price amount to an escrow account, required by the process letter of 17 October 2013. In spite of several requests, [...] ([Bidder 2] consortium's member that should have facilitated the provision of external capital) or any other member of [Bidder 2] had provided no legally binding declaration by which they would be obliged to provide the necessary funding. In contrast, Mr Robertino Wild, shareholder of Capricorn, has provided significant securities, and the Capricorn's external financing was demonstrated by a business-usual financing confirmation of Deutsche Bank. That financial confirmation was verified by the insolvency administrators, and they reported to the creditors' committee about the result of that verification, namely that the financial confirmation contains no unusual disclaimers or conditions. The own financing of EUR [14-17] million as well as the external financing of EUR [41-49] million are secured by a contractual penalty in the amount of EUR [22-27] million, which the buyer must pay, if the sellers withdraw from the contract for outstanding payments. That contractual penalty is also secured. The creditors' committee followed the assessment of the insolvent administrators.
- (143) As regards the up-front payments, the insolvent administrators state that [Bidder 2]'s offer had advantages (by 31 March 2014, payment of EUR [30-33] million in case of [Bidder 2] against EUR [4,6-5,4] million in case of Capricorn) and disadvantages: apart from an amount of EUR [7,1-7,6] million, the money provided by [Bidder 2] would be kept in a blocked account and transferred to the sellers either upon the existence of a non-challengeable Commission decision or if the buyer did not withdraw from the contract despite there being no such enforceable

<sup>(125)</sup> Complainant 4 points out that [Bidder 2] was afforded a poorer level of engagement with the sellers than it was made available to Capricorn, that the final bid deadline was extended firstly from 11 December 2013 to 17 February 2014 and then cut off on 11 March 2014, hours after Capricorn's bid arrived, and that [Bidder 2] had not been given the chance to increase or modify its bid.

Commission decision by 31 March 2015 (the possibility to extend the period for the withdrawal right was not excluded). In any case, if a non-challengeable Commission decision exists in 2014, the sellers would have access to EUR [30-33] million in case of [Bidder 2] or EUR [58-63] million (plus around EUR 6 million of cash flow of NBG) in case of Capricorn.

- (144) A comparison of the offers from Capricorn and [Bidder 2] shows that the offer from Capricorn is the highest nominal purchase price and it leads to the best economic result:

Table 10

### Comparison of offers from Capricorn and [Bidder 2]

| Offer Capricorn                                                                                                                                                                                                                                                                                                                     |                | Offer [Bidder 2]                     |                |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|--------------------------------------|----------------|
| Amounts in million EUR                                                                                                                                                                                                                                                                                                              |                |                                      |                |
| 1st sales price instalment 31.3.2014                                                                                                                                                                                                                                                                                                | [4,6-5,1]      | 1st sales price instalment 31.3.2014 | [7,1-7,6]      |
| 2nd sales price instalment 31.7.2014                                                                                                                                                                                                                                                                                                | [4,6-5,1]      | 2nd sales price instalment 31.3.2014 | [22-27]        |
| 3rd sales price instalment 20.12.2014                                                                                                                                                                                                                                                                                               | [4,6-5,1]      | 3rd sales price instalment in 2016   | [2,3-2,6]      |
| Cash flow NBG 2014 (*)                                                                                                                                                                                                                                                                                                              | 6,0            | 'earn-out' for 2015 in 2016 (*)      | [2,3-2,6]      |
| 4th sales price instalment at closing                                                                                                                                                                                                                                                                                               | [41-49]        | 'earn-out' for 2016 in 2017 (*)      | [4,6-5,1]      |
| Remaining sales price                                                                                                                                                                                                                                                                                                               | [10,5-11,5]    | 'earn-out' for 2017 in 2018 (*)      | [7,1-7,6]      |
| Total sales price                                                                                                                                                                                                                                                                                                                   | 77,0           |                                      | [47-52]        |
| Decrease of personnel/Restructuring                                                                                                                                                                                                                                                                                                 | - 2,5          |                                      | - 3,0          |
| Termination of management contracts Lindner                                                                                                                                                                                                                                                                                         | - 1,0          |                                      | - 1,0          |
|                                                                                                                                                                                                                                                                                                                                     |                | neg. cash flow NBG 1st Q 2014        | - 1,6          |
|                                                                                                                                                                                                                                                                                                                                     |                | Balance payments                     | - 1,3          |
| <b>Economic result</b>                                                                                                                                                                                                                                                                                                              | <b>[70-77]</b> |                                      | <b>[41-45]</b> |
| (*) The Capricorn cash flow of the NBG for the year 2014 (EUR 6 million) and [Bidder 2] the 'earn-out' — payments for the years 2015-2017 (EUR 15 million) depend on the success of the respective operational business. In case of [Bidder 2], the sellers cannot, differently than in the case of Capricorn, affect this business |                |                                      |                |

- (145) The good track record of the [Bidder 2] members and their larger experience with transactions in the field of mergers and acquisitions could not justify an award to an offer for a substantially lower sales price. The competence of the [Bidder 2] members was not disputed by the sellers, but it was not an award criterion. The amount of investments into the Nürburgring after the sale was not an award criterion, either.
- (146) The insolvency administrators claim that they had not discriminated any bidder, and that it is not clear from the complaint which of their actions would lead to a price offer by [Bidder 2] lower than the price offer by Capricorn. The insolvency administrators refute the complainant's arguments about the unavailability of the persons involved and the protraction of the sale process in order to allow Capricorn the submission of a bid. [Bidder 2] was explicitly informed that further negotiations with other bidders would take place until the meeting of the creditors' committee on 11 March 2014.

- (147) Furthermore, the insolvency administrators point out that their measures or the agreement of the creditors' committee cannot be imputable to the State, and that there is no advantage in the sale process, because it corresponds to the market-based behaviour.
- (148) As regards complainant 4's allegation that there was never an agreement between [...] and Capricorn for the latter's agreement, the German authorities submitted that [...] guaranteed its financing after an extensive legal and financial due diligence and never cancelled its financing guarantee.
- (149) Finally, regarding complainant 4's claims on Capricorn's alleged failure to pay the second instalment of the purchase price, the German authorities argue the same as presented in paragraph (134) above.

## 5. ASSESSMENT OF THE MEASURES

- (150) This decision addresses as a preliminary point the issue of whether NG and its subsidiaries MSR and CMHN were firms in difficulty in the sense of the *Community guidelines on State aid for rescuing and restructuring firms in difficulty* <sup>(126)</sup> ('R&R Guidelines') at the time of granting measures 1 to 19. Subsequently, the Commission will assess whether the measures under scrutiny constitute State aid to the beneficiaries in the meaning of Article 107(1) TFEU and finally whether such aid might be compatible with the TFEU.

### 5.1. DIFFICULTIES OF NG, MSR AND CMHN

- (151) If measures 1 to 19 constitute State aid and if NG, MSR and CMHN were firms in difficulty at the time of aid granting, these measures should be assessed with regard to their compatibility under Article 107(3)(c) TFEU and in particular under the R&R Guidelines. One of the main questions is therefore whether NG, MSR and CMHN were firms in difficulty. The Commission's conclusion is that they were in economic difficulties at the time of aid granting and so would have not been able to have access to the private credit market.
- (152) The following assessment is based on points 9-11 of the R&R Guidelines. The Commission recalls its assessment in recitals 202-206 of the decision of 21 March 2012, where it was not excluded on a preliminary basis that NG could be considered a firm in difficulty within the meaning of the R&R Guidelines on 1 July 2008 (see also recitals 46-47 of the decision of 7 August 2012). In addition, in recitals 6-13 of the decision of 7 August 2012, the Commission found that NG, MSR, and CMHN are undertakings in difficulty.
- (153) The Commission considers that it must assess each company as a whole, without leaving out any part of its business. It is not acceptable that Germany eliminates the loss making Formula 1 activities or the 'Nürburgring 2009' project from the assessment of financial data. It is also clear that the companies did not have access to external financing.
- (154) NG's key financial data during the period 2001-2011 were as follows:

Table 11

#### NG's key financial data 2001-2011 (EUR million)

|          | 2001 | 2002  | 2003 | 2004  | 2005  | 2006        | 2007  | 2008  | 2009  | 2010 | 2011   |
|----------|------|-------|------|-------|-------|-------------|-------|-------|-------|------|--------|
| Turnover | 34,3 | 38,3  | 34,2 | 28,7  | 27,1  | 27,8        | 29,9  | 22,0  | 33,3  | 5,1  | 7,0    |
| EBT (*)  | 0,6  | - 0,5 | 0,6  | - 9,9 | - 9,6 | - 40,1 (**) | - 2,4 | - 0,8 | - 9,9 | 4,6  | - 16,2 |

<sup>(126)</sup> OJ C 244, 1.10.2004, p. 2.

|                           | 2001 | 2002 | 2003 | 2004 | 2005 | 2006   | 2007   | 2008    | 2009    | 2010    | 2011    |
|---------------------------|------|------|------|------|------|--------|--------|---------|---------|---------|---------|
| Registered capital        | 5,1  | 5,1  | 5,1  | 10,0 | 10,0 | 10,0   | 13,3   | 16,7    | 20,0    | 20,0    | 20,0    |
| Own equity                | 15,2 | 18,6 | 19,1 | 37,3 | 27,6 | - 12,6 | - 10,2 | - 9,9   | - 15,8  | - 10,9  | - 27,4  |
| Total Debt                | —    | 45,6 | 43,4 | 19,7 | 19,5 | 27,8   | 46,8   | 99,1    | 234,2   | 263,2   | 290,4   |
| Debt/Equity (ratio) (%)   | —    | 250  | 230  | 50   | 70   | - 270  | - 460  | - 1 000 | - 1 480 | - 2 410 | - 1 060 |
| Debt/Turnover (ratio) (%) | —    | 119  | 127  | 69   | 72   | 100    | 156    | 450     | 703     | 5 160   | 4 150   |

(\*) Earnings before taxes ('EBT')

(\*\*) Increase of losses mainly due to significant increase of expenses for events ('Aufwendungen für Veranstaltungen') from EUR 21,2 million in 2005 to EUR 44,0 million in 2006.

- (155) Point 10(a) of the R&R Guidelines stipulates that a company is in difficulty in the case of a limited liability company when 'more than half of registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'. This provision reflects the assumption that a company experiencing a massive loss in its registered capital will be unable to stem losses that will almost certainly condemn it to go out of business in the short or medium term (as stipulated in point 9 of the R&R Guidelines).
- (156) The Commission also notes that in accordance with point 11 of the R&R 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, 'the existence of negative own capital [...] may be considered to be an important indicator that an undertaking is in a difficult financial situation [...]' <sup>(127)</sup>.
- (157) According to the financial statements of NG for the years 2001-2011, the registered capital of the company was not lost by more than half. However, in the period 2006-2011 the company's own equity was negative. In previous cases the Commission has considered that where a company has negative equity, this implies in fact that the entire registered capital of that company has been lost and there is an *a priori* assumption that the criteria of point 10(a) of the R&R Guidelines are met <sup>(128)</sup>.
- (158) In the case of NG, the Commission considers that the only reason why the registered capital does not appear to have been lost by more than half is that the company did not adopt appropriate measures. Such appropriate measures would aim at turning the company's own equity from negative to positive and, at the same time, at increasing it to an adequate level. Such appropriate measures could be either the capitalisation of losses or a capital increase or both.
- (159) In this respect, the Commission considers that a capitalisation of losses would have resulted in the loss of the entire registered capital of the company, since the accumulated losses were higher than the registered capital. For this reason the Commission considers that the criteria of point 10(a) of the R&R Guidelines are met in this case since 2006.

<sup>(127)</sup> Joined Cases T-102/07 *Freistaat Sachsen v Commission* and T-120/07 *MB Immobilien and MB System v Commission* [2010] ECR II-585, para. 106.

<sup>(128)</sup> Commission Decision in case C 38/2007 *Arbel Fauvet Rail* (OJ L 238, 5.9.2008, p. 27), as upheld by the General Court, see joint cases T-267/08 and T-179/08, ECR 2011 II-1999, point 141; Commission Decision in case C 27/2010 *United Textiles* (OJ L 279, 12.10.2012, p. 30).

- (160) In addition, on the basis of point 11 of the R&R Guidelines, the Commission considers NG to have been in difficulty already since 2002, because: (a) NG's annual turnover decreased by 80 % in that period, at a total amount of EUR 89,4 million, and the company had annual losses for most part of the same period; (b) during the whole period NG had excessive debt, which increased from 119 % of turnover in 2002 to 4 150 % of turnover in 2011; (c) even in 2004 and 2005, when the company's debt fell below 100 % of its turnover, that debt remained at significantly high levels of around 70 % of turnover, and also during the same years the company had reduced sales and annual losses; and (d) NG had negative equity for the most part of the same period (2006-2011).
- (161) MSR's key financial data during the period 2007-2011 were as follows:

Table 12

**MSR's key financial data 2007-2011 (EUR million)**

|                           | 2007  | 2008  | 2009  | 2010  | 2011   |
|---------------------------|-------|-------|-------|-------|--------|
| Turnover                  | 0,0   | 4,4   | 3,4   | 2,2   | 0,9    |
| EBT                       | - 0,1 | - 0,5 | - 4,0 | - 4,8 | - 8,6  |
| Registered capital        | 0,05  | 0,05  | 0,05  | 0,05  | 0,05   |
| Own equity                | 0,08  | 0,6   | 4,6   | 3,3   | 11,9   |
| Total Debt                | 2,5   | 28,3  | 95,6  | 96,5  | 103,8  |
| Debt/Equity (ratio) (%)   | 3 130 | 4 720 | 2 080 | 2 920 | 870    |
| Debt/Turnover (ratio) (%) | —     | 643   | 2 810 | 4 380 | 11 500 |

- (162) CMHN's key financial data during the period 2008-2011 were as follows:

Table 13

**CMHN's key financial data 2008-2011 (EUR million)**

|                           | 2008  | 2009  | 2010  | 2011   |
|---------------------------|-------|-------|-------|--------|
| Turnover                  | 0,0   | 2,6   | 1,2   | 0,2    |
| EBT                       | - 0,8 | - 2,5 | - 3,6 | 0,0    |
| Registered capital        | 0,03  | 0,03  | 0,03  | 0,03   |
| Own equity                | 0,8   | 3,3   | 6,9   | 6,9    |
| Total Debt                | 6,5   | 13,3  | 36,9  | 35,3   |
| Debt/Equity (ratio) (%)   | 810   | 400   | 530   | 510    |
| Debt/Turnover (ratio) (%) | —     | 510   | 3 070 | 17 650 |

- (163) The Commission notes that it has not received any document of MSR or CMHN which would demonstrate their prospects for viability.
- (164) On the basis of point 11 of the R&R Guidelines, the Commission considers MSR and CMHN to have been in difficulty already since 2007 and 2008, respectively, because they had minimal revenue, significant annual losses and mounting debt, which exceeded significantly their annual turnover.
- (165) The Commission does not agree to the argument of Germany that NG, MSR and CMHN were not in difficulty, because the construction of infrastructure and the organisation of Formula 1 and Superbike race events were carried out on behalf of the public sector and they cannot be therefore taken into account for analysis of their financial situation.
- (166) Firstly, the Commission finds that the construction of infrastructure for motorsport, leisure activities, accommodation and dining and the organisation of motorsport events are not special effects outside the regular business of NG, MSR and CMHN. These were the core activities within the business remit of these companies. Even if both their shareholders and business management saw NG, MSR and CMHN as vehicles to keep the sport infrastructure in public ownership and to organise non-profitable sport events which would not be offered without the coverage of losses by the public funding, these shareholders and business management should not allow the development of liabilities in the non-efficient and loss-making manner demonstrated by the above financial data of these companies without a sound and realistic business plan. The above activities shall be therefore included in the financial assessment.
- (167) Secondly, the Commission considers that the fact that the construction of infrastructure for the said purpose and the organisation of motorsport events may well have contributed to NG, MSR and CMHN's difficulties does not in itself mitigate the finding that NG showed the usual signs of a firm being in difficulty already before the 'Nürburgring 2009' project was launched. A healthy firm would need to adapt its costs to such activities in order to survive. In the years 2008 and 2009, NG, MSR and CMHN had losses and increasing debt (increase by 537 % between 2002-2011, 4 052 % between 2007-2011 and 443 % between 2008-2011, respectively). Although the Nürburgring 2009 project was implemented in 2010, the subsequent financial results of NG, MSR and CMHN indicate that their difficulties persisted.
- (168) In light of the above, the Commission has reached the conclusion that NG, MSR and CMHN were firms in difficulty within the meaning of the R&R Guidelines at the time when measures 1 to 19 were provided, and that their difficulty was so severe that they would not find any financing in the market.

## 5.2. EXISTENCE OF STATE AID

- (169) Article 107(1) TFEU 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.

### (a) State resources and imputability

- (170) Part of measure 1 (increases of own capital) taken by the Land and the district of Ahrweiler as well as another part of measure 1 (transfers to the capital reserve), measures 3, 9, 16 and 19 taken by the Land alone amount manifestly to State resources imputable to the State.
- (171) For the measures carried out by NG (measures 2, 4, 5, 6, 7, 10, 12, 13, 14, 15 as regards the transfer of shares of MSR to NG, 17), Germany accepts explicitly that the resources are imputable to the State. It is also noted that NG's supervisory board represented the Land and the district of Ahrweiler as NG's shareholders. In this context,

in the meeting of the supervisory board of 28 August 2005, its vice-president declared that the award of the project to private investors can take place only if the risk for the Land is small <sup>(129)</sup>. Also, in a workshop of the supervisory board on 20 December 2005, its vice-president stated that a decision about an investment of NG must be taken in the new cabinet after the elections in the parliament of the Land <sup>(130)</sup>. Moreover, the government of the Land informed about the investment *Erlebnisregion Nürburgring* in the government declaration of 30 May 2006 and the Council of Ministers took note on 19 September 2006 of the intention of the supervisory board of NG to implement the project under substantial participation of a private third party <sup>(131)</sup>. In addition, the Ministry of Economy, Transport, Agriculture and Wine as well as the Finance Ministry of the Land provided on a continuous basis opinions, comments or instructions regarding the 'Nürburgring 2009' project <sup>(132)</sup>, which was presented by the Land to the public on 2 December 2009. The Commission considers that also the loan granted by NG to MSR through PNG as an intermediary (measure 6) is a measure carried out by NG and thus imputable to the State.

- (172) As regards the ISB loan (measure 8) and the rescheduling of interests (measure 18), Germany has acknowledged that the Land instructed ISB to grant the loan. Concerning the loans granted by RIM to MSR through Mediinvest and PNG as an intermediaries (measure 11) and the transfer of shares of MSR to RIM (part of measure 15), the Commission notes that RIM is a public institution with the mission of supporting the Land's policy in economic and structural development <sup>(133)</sup>. Therefore, for the purpose of the above-mentioned measures, ISB and RIM constitute instruments of the State in the application of its policy, which demonstrates the imputability of ISB and RIM's actions to the State insofar as these measures are concerned. Resources imputable to the State are therefore involved in all the measures.

#### (b) Economic activity

- (173) By analogy with the Leipzig/Halle judgment <sup>(134)</sup>, the construction of infrastructure can be considered an economic activity if it is intrinsically linked to a commercial exploitation of the infrastructure, which is the case here.
- (174) The operation of sport facilities (including race tracks and off-road parks), leisure parks <sup>(135)</sup>, accommodation facilities, restaurants, safety driving centres, driving schools, multifunctional halls, and cash free payment systems, and their lease to professional or non-professional users <sup>(136)</sup>, are an economic activity for both the owner and operator. Consequently, the construction or renovation of infrastructure which is indissolubly linked to these activities is also an economic activity. By contrast, non-economic activities include the use of a sport facility at the level of non-professional users <sup>(137)</sup> and the training of youngsters by professional sport clubs if accounts are separated from the accounts for the economic activities <sup>(138)</sup>. In view of the indissoluble link between the infrastructure and the economic activity for which it is used the construction, upgrade or operation of Nürburgring sport and tourism infrastructure are thus economic activities for the investors and operators, even if the revenues from the operation of the infrastructure do not cover the costs of its construction and if more than 90 % of sport activities at Nürburgring qualify as amateur sport. The latter fact plays a role only at the level of users: non-professional users are not undertakings. Indeed, the Nürburgring sport and tourism infrastructure is not general infrastructure, such as a public road which is made available for public use. The financing of the construction of the infrastructure at stake (through the loans from the liquidity pool and shareholders' loans, or later through the ISB loan) is thus subject to the State aid rules.
- (175) The organisation of Formula 1 or other motorsport races is a provision of services on the market of professional sport which considerably benefits from broadcasting rights. Financing of Formula 1 or other motorsport events

<sup>(129)</sup> Opinion of the Court of Auditors of the Land of 15 June 2010, part I, page 14.

<sup>(130)</sup> See footnote above.

<sup>(131)</sup> Opinion of the Court of Auditors of the Land of 15 June 2010, part I, page 15.

<sup>(132)</sup> Opinion of the Court of Auditors of the Land of 15 June 2010, parts I and II.

<sup>(133)</sup> See the description of RIM at: <http://test.isb.rlp.de/de/die-isb/beteiligungen/rheinland-pfaelzische-gesellschaft-fuer-immobilien-und-projektmanagement/>

<sup>(134)</sup> Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen, Flughafen Leipzig/Halle et al v Commission* [2011] ECR II-1311, upheld on appeal, see Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* (not yet published in the ECR).

<sup>(135)</sup> C53/2002 *Space Park Development*.

<sup>(136)</sup> SA.35440 *Arena Jena*. For professional sport infrastructure see SA.31722 *Hungarian tax benefit scheme*. For the operation of sport centres for general public against a fee see SA.33952 *German Alpine Association*.

<sup>(137)</sup> SA.33618 *Uppsala arena*, SA.35135 *Arena Erfurt*, SA.35440 *Arena Jena*.

<sup>(138)</sup> N118/2000 *Support to professional sport clubs*.

is not exempt from the remit of State aid law for the mere reason that they are run with a structural deficit or implement the objectives of regional policy. The Commission thus considers that Formula 1 and other motorsport racing is an economic activity.

- (176) Promotion of tourism, project development, the construction of real property, business management and trade with cars or motor bikes also qualify as economic activities.

**(c) Selectivity**

- (177) The Commission considers that the measures have a selective character at the level of the operator (NG for measures 1, 3, 8, 9, 13, 14, 16, 18 and 19; EWN, FSZ, MAN, TTI, BWN, BWNB, Camp4Fun for measure 2; MSR for measures 4, 5, 8, 9, 11, 12, 18 and 19; CST for measure 5; MIB for measure 7; CMHN for measures 8, 9, 18 and 19; NAG for measures 10 and 17; Mediinvest, Geisler & Trimmel and Weber for measure 15), as they reserve favourable treatment for that operator. Furthermore, the entrustment to construct and operate the infrastructure was not transparent, non-discriminatory and in line with procurement rules. However, the measures are not selective at the level of the user, since transparent and non-discriminatory access for amateur sport clubs and the general public is guaranteed.

**(d) Distortion of competition and effect on trade**

- (178) With regard to measures 1 to 19, there is a distortion of competition in the markets of the operation of race tracks, off-road parks, leisure parks, accommodation facilities, restaurants, safety driving centres, driving schools, multifunctional halls, cash free payment systems, promotion of tourism, project development, the construction of real property, business management and trade with cars or motor bikes, since the aid to the Nürburgring infrastructure and the Formula 1 activities promotes the use of this infrastructure. The organisation of Formula 1 racing and other motorsport events promotes the access of customers to those events.
- (179) The measures in question enabled NG, MSR and CMHN to continue operating so that they did not have to face, as other competitors having financial difficulties, the consequences normally deriving from their difficult financial results. This distorts competition as other companies active in the same markets need to operate without such State support.
- (180) As regards the effect on trade between Member States, Nürburgring with its Formula 1 and the German Touring Car Championship competes with other race tracks in the Union organising top motorsport competitions and it cannot be excluded that the Nürburgring leisure park could attract visitors from Belgium (its border with Germany is around 50 km far from the Nürburgring). It has to be recalled that a complaint has been received from the competing leisure park operator Eifelpark (cf. recital 2). It can also not be excluded that there is an effect on trade between Member States in respect of the operation of off-road parks, accommodation facilities, restaurants, safety driving centres, driving schools, multifunctional halls, cash free payment systems, as well as in respect of promotion of tourism, project development, the construction of real property, business management and trade with cars or motor bikes.

**(e) Advantage**

- (181) According to the settled practice of the Commission and as confirmed by the case law, the criterion for assessing whether a transaction between a public body and an undertaking amounts to State aid is the market economy investor principle<sup>(139)</sup>. It follows from this principle that, when the State acts in a market as a commercial operator, it must do so in a way comparable to a private operator. If the State does not do so, State aid could be involved. In other words, when the market economy investor principle is applicable, the benchmark for

<sup>(139)</sup> See, e.g. 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.

appreciating whether a transaction involves State aid is whether a private operator placed in a similar situation would have behaved in the same way. In applying this principle, non-economic considerations cannot be taken into account as reasons for granting support measures. As established by relevant jurisprudence, the provision of the measures by the State cannot be seen in isolation, but will have to be considered in the context of other aid measures <sup>(140)</sup>

- (182) In order to assess whether an advantage was conferred to the owners or the operators (NG, MSR and CMHN until 30 April 2010, and also NAG from 1 May 2010 to 31 October 2012), the market economy investor principle shall therefore be applied. First of all, measures 1 to 19 are not *pari passu* transactions <sup>(141)</sup> because Germany had not found a private investor who would invest under comparable conditions (for instance, in Part I of the 'Nürburgring 2009' project). There were two loans provided by private operators, but their amounts were small taking account of the amounts of public investment, these loans related only to Part II of the 'Nürburgring 2009' project (i.e. mainly to hotels) <sup>(142)</sup>, and they were granted only to CMHN or MSR, but not to NG or another aid beneficiary:

Table 14

#### Loans granted by private financial institutions to CMHN/MSR

| Financial institution         | Year | Beneficiary | Amount (EUR million) | Interest rate            | Collaterals (EUR million)                  |
|-------------------------------|------|-------------|----------------------|--------------------------|--------------------------------------------|
| Bank for Tirol and Vorarlberg | 2008 | CMHN        | [...]                | [...] %<br>+ [...] % fee | [...] (mortgage)<br>pledging shares of MSR |
| Kreissparkasse Ahrweiler      | 2010 | MSR         | [...]                | [...]                    |                                            |

- (183) In any case, Germany acknowledges that also for Part II no long-term private investor was found.
- (184) Furthermore, for the period from 2006 to 2010, the Commission received business plans for the 'Nürburgring 2009' project and for NG as such:

Table 15

#### Business plans for the Nürburgring 2009 project (EUR million)

| Relevant entity/activity | Date    | Costs   | Turnover (2009-2020) | Result EBT (2009-2020) |
|--------------------------|---------|---------|----------------------|------------------------|
| Nürburgring 2009 project | 12/2005 | 113 (*) | 281                  | 22                     |
| Nürburgring 2009 project | 3/2006  | 113 (*) | 181                  | - 59                   |
| Nürburgring 2009 project | 3/2006  | 113 (*) | 281                  | 22                     |
| Nürburgring 2009 project | 8/2006  | 113 (*) | 281                  | 22                     |

<sup>(140)</sup> Joined Cases C-399/10 P and C-401/10 P *Bouygues SA, Bouygues Télécom SA v Commission* (not yet published in the ECR) and *BP Chemicals v Commission*, judgment in case T-11/95 [1998], para. 171.

<sup>(141)</sup> A '*pari passu*' transaction is a transaction that is carried out under the same terms and conditions (and therefore with the same level of risk and rewards) by public bodies and private operators who are in a comparable situation.

<sup>(142)</sup> The loans of the two minority shareholders of MSR (Geisler & Trimmel: EUR [...] million; Weber: EUR [...] million; both with an interest rate of [...] % with no collaterals) to MSR are not relevant because they carried out the construction of the infrastructure and as parties with own interests in the project; they cannot be taken into consideration.

| Relevant entity/activity         | Date    | Costs | Turnover (2009-2020) | Result EBT (2009-2020) |
|----------------------------------|---------|-------|----------------------|------------------------|
| Nürburgring 2009 project         | 11/2007 | 135   | 279                  | 45                     |
| Nürburgring 2009 project         | 12/2008 | 140   | 283                  | 40                     |
| Nürburgring 2009 project         | 3/2009  | 159   | 287                  | 28                     |
| Nürburgring 2009 project         | 8/2009  | 195   | 331 (**)             | 67 (**)                |
| Nürburgring 2009 project         | 10/2009 | 200   | 260 (**)             | – 17 (**)              |
| Nürburgring 2009 project         | 12/2009 | 200   | 254 (**)             | – 35 (**)              |
| NG, MSR, CHMN consolidated (***) | 7/2010  | —     | 283                  | – 769 (****)           |
| NG, MSR, CHMN consolidated (***) | 9/2010  | —     | 283                  | – 269 (****)           |
| NG, MSR, CHMN consolidated (***) | 9/2010  | —     | —                    | 59 (****)              |

(\*) The project was called 'Erlebnisregion Nürburgring' and it included a hotel.

(\*\*) Base case (not worst or best case).

(\*\*\*) Results for the period 2010-2030.

(\*\*\*\*) Worst case

(185) From Table 15, it is obvious that the estimated costs were increasing constantly during the preparation of the 'Nürburgring 2009' project while the latter's profits (EBT) were decreasing significantly, from profits of EUR 22 million in December 2005 to losses of EUR — 35 million in December 2009. A private investor would not accept such a sharp increase of the costs and a significant decrease of profits during the preparation of the project between December 2005 and December 2009 (based on available information, the main financing of the construction had been granted from May 2008 to June 2010).

(186) In any case, when considering the business plans in question, which the Commission has taken into account while carrying out the market economy investor test, the Commission notes the following:

(a) Part of measures 1, 2 and 3 were applied before the first plan of December 2005. Therefore those measures cannot be considered as having been decided on the basis of the business plans in question.

(b) Also as regards the first business plan (December 2005), part of measures 2 and 3 were granted at the same time with it. In this regard, the Commission notes that those measures were granted in a context of continuous public support, which had started already earlier (in 2002 or earlier), without any private support and in favour of a firm in a worsening financial situation. Thus, the part of measures 2 and 3 in question cannot be taken in isolation from the ones granted prior to them (part of measures 1, 2 and 3), but they form a continuity of the latter and therefore the part of measures 2 and 3 at hand has to be considered as granting a further advantage.

(c) Part of measures 2 and 3 was applied at a time when already the first three business plans, of December 2005, March 2006 and August 2006, had been issued. However, the Commission notes that those plans' forecasts for NG's future sales and profits remained identical, despite the significant worsening of NG's actual results in the same period (negative equity, significant increase of debt, reduction of sales, annual losses). On

this basis, the business plans in question cannot be considered as realistic and acceptable, since they disregarded the company's bad recent historic data and kept the same forecasts as before.

- (d) The first six business plans (December 2005, March 2006, August 2006, November 2007 and December 2008) did not concern the future operations of NG as a whole but only partially, because they did not take into account the Formula 1 activity. On this basis, the business plans in question cannot be considered as a reliable basis for deciding financial support to NG.
  - (e) The business plans of March 2009-December 2009 included forecasts also for the Formula 1 activity. However, for the whole period 2009-2020, the Formula 1 activity was forecasted to bring losses, with sales which were forecasted to remain stable and at the same level as before 2009, therefore it appears that the Formula 1 activity was not foreseen to be restructured. In the same vein, the Commission notes that those plans forecasted earnings which were significantly lower than the ones foreseen by the previous business plans (EUR 7-9 million, by contrast to EUR 22-40 million). The above facts would reduce the validity of the business model presented in the plans of the period March 2009-December 2009.
  - (f) Two business plans from July 2010 and September 2010 foresaw losses until 2030, under the worst case scenario, therefore, the activity was not foreseen to be viable.
  - (g) Finally, one plan of September 2010 foresaw earnings between 2016 and 2030, however, that plan did not include sensitivity analysis (i.e. worst case scenario results). In any case, that plan's forecasts ignored the significant worsening of NG's actual results in the same period (negative equity, significant increase of debt, reduction of sales, annual losses). On this basis, the business plan in question cannot be considered as realistic and acceptable, since it disregarded the company's bad recent historic data.
- (187) On the basis of the above, the Commission cannot consider that any public support to NG as a firm in difficulty (see Section 5.1 above), which aimed at financing its operations at the time (operation of race ring) or in the future (operation of race ring together with new hotels), would be deemed as market conform on the basis of the business plans in question.
- (188) As for the market economy investor principle, the following can be stated for the individual measures:

#### Measures covered by the decision of 21 March 2012

- (189) For **measure 1** (provision of capital by the Land and the district of Ahrweiler to NG in the form of payments in capital reserve and capital increases), the Commission notes that the analysis presented above for the submitted business plans is relevant. No private investor would have provided capital to NG in 2004 and in the following years. Therefore, the capital provided by the Land to NG on 1 May 2002 (amounting to EUR 2 179 000) and on 21 December 2004 (amounting to EUR 22 839 241), as well as the capital provided by the Land and the district of Ahrweiler on 31 August 2004 (amounting to EUR 4 887 000) and 4 September 2007 (amounting to EUR 10 000 000) involve aid which is equal to the full amount of capital provided.
- (190) As regards **measure 2** (shareholder loans by NG before the 'Nürburgring 2009' project), on the basis of the financial data submitted by the German authorities, the Commission notes that EWN, Camp 4 Fun and TTI had annual losses and negative equity when each of them received its part of measure 2 (see Tables 1-4 above). At the same time BWN1, BWNB and BWN2, which received loans in the period 2004-2007, had annual losses during that whole period and also negative equity in 2005, 2006 and 2007. Finally, MAN had both accumulated and annual losses when it received its part of measure 2. Therefore, on the basis of point 11 of the R&R Guidelines, the Commission considers that those companies were in difficulty at the time of measure 2. On the other hand, on the basis of the financial data submitted by the German authorities, the Commission notes that FSZ was not in difficulty when it received its part of measure 2, because its financial data did not demonstrate any of the signs of point 11 of the R&R Guidelines. The provision of loans to companies in such difficulties that no private investor would have financed at any rate, especially since those companies belonged to a company which itself was in severe financial difficulty (NG), involves an advantage to these companies, which is equal to the amount of the loans. Therefore, the loans granted by NG to its subsidiaries, namely EWN (EUR 6 195 170,02), BWN/BWNB (EUR 3 760 000), Camp4Fun (EUR 450 000), MAN (EUR 100 000) and TTI (EUR 25 000) are not compliant with the market economy investor principle. In this context, it is noted that the loans granted to MAN and TTI

are below the *de minimis* threshold, but Germany has neither argued nor provided that all the conditions of the Commission Regulation (EC) No 1998/2006 <sup>(143)</sup> were fulfilled; that Regulation could be applied in the recovery phase if Germany demonstrates that all the conditions of the Regulation are met. Furthermore, the Commission notes that the loans granted to FSZ (EUR 646 738,12) did not confer an advantage to the latter, since they were granted at the interest rate of 6 % which is at market level because it corresponds to the sum of Germany's base rate at the time of the granting of the loans (5,06 % in April 2002, 4,8 % in March 2003 and 5,19 % in March 2008) <sup>(144)</sup> and the basis points to be added for FSZ's financial condition (100 basis points) taking into account that it did not present any of the signs of point 11 of the R&R Guidelines when it received those loans <sup>(145)</sup>. On this basis, the above loans granted to FSZ do not constitute State aid.

- (191) Regarding **measure 3** (loans granted to NG from the liquidity pool of the Land), Germany does not put forward any evidence to demonstrate that NG did not benefit from interest rates that were more advantageous compared with the conditions of its competitors. In addition, it is difficult to accept that there would be any financing available in the market for a company in NG's financial difficulties, at any interest rate. Finally, the eventual repayment of the funds and the corresponding interest is an *ex post* event, unknown at the time of the granting of the measures; therefore it cannot be taken into account for the market economy investor test. Therefore, the measures financed by the liquidity pool were not performed on market terms. The provision of loans to a company in such difficulties that no private investor would have financed it at any rate involves an advantage to the company which is equal to the amount of the loans. In sum, the granting of loans by the Land to NG between 30 June 2003 and 11 May 2010 (see the list of loans in Table 5) involves aid of EUR 399 805 370.
- (192) Under the same test as above, the Commission concludes the same for **measure 4** (loan granted by NG to MSR). Indeed, it cannot be accepted that at the time of the measure (December 2007), there would be any financing available in the market for a company in MSR's financial difficulties (see Table 12 and recital 155), at any interest rate. The provision of a loan to a company in such difficulties that no private investor would have financed it at any rate involves an advantage to the company, which is equal to the amount of the loan. Therefore, the advantage granted by NG to MSR through the loan of EUR 300 000 on 27 December 2007 is equal to EUR 300 000.
- (193) The support provided by NG to CST (**measure 5**) does not comply with the market economy investor principle. Indeed, on the basis of the financial data submitted by the German authorities, the Commission notes that CST had annual losses and negative equity in the period 2008-2011, and also entered into liquidation in 2009. Therefore, on the basis of point 11 of the R&R Guidelines, the Commission considers that CST was in difficulty when it received each loan of measure 5 (in years 2008-2011, see Table 6 above). The provision of loans to a company in such difficulties that no private investor would have financed at any rate, especially since CST belonged to a company which itself was in severe financial difficulty (NG), involves an advantage to the company, which is equal to the amount of the loan. Therefore the advantage granted by NG to CST through the loans of a total amount of EUR 11 032 060 provided to it between the 27 August 2008 and the 18 April 2011 is equal to the amount of the loans.
- (194) As regards the letter of comfort, the Commission notes that it was granted by NG to CST on 23 December 2009 and constituted a commitment of NG, by which it would fund the repayment of financial obligations of CST, which CST itself was unable to repay. The funding of such financial obligations would take place through loans by NG to CST, with an interest rate of 6 %. The commitment also included a subordination of the claims of NG stemming from those loans, funded by NG on the basis of the comfort letter of 23 December 2009, which foresaw that NG's relevant claims against CST would rank in the last position of all creditors' claims against CST. In this context, the Commission considers that a market economy creditor would not commit to fund unpaid loans of a firm in severe difficulty or to subordinate materialised claims against a firm in severe difficulty, since such measure would amount to the actual loss of the claims. On this basis, the Commission finds that the letter of comfort, which included the above commitment for the funding of unpaid loans and subordination of subsequent claims, constitutes an advantage. The Commission also considers that the letter of comfort constitutes a measure additional to the loans of 2008-2011 (see recital 182 above), since: (a) it was not granted at the same moment with those loans; (b) it was not foreseen or imposed by the underlying loans' contracts; and (c) it was discretionally decided by NG in order to avoid the insolvency of CST. As regards the amount of the measure, it

<sup>(143)</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

<sup>(144)</sup> See [http://ec.europa.eu/competition/state\\_aid/legislation/reference\\_rates.html](http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html)

<sup>(145)</sup> See the communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

is equal to the total amount of loans funded by NG on the basis of the comfort letter of 23 December 2009, however the Commission is not in possession of the relevant amount.

- (195) Finally, as regards the subordination of claims, the Commission notes that it was agreed between NG and CST on 13 December 2010 and contractually referred to the loans granted until 30 November 2010 totalling EUR 10,4 million (i.e. the 13 first loans of Table 6 above, out of the total 15). The Commission further notes that the subordination in question resulted in the ranking of NG's claims against CST in the last position of all creditors' claims against CST. In this context, the Commission considers that a market economy creditor would not accept such a subordination of materialised claims against a firm in severe difficulty, since such measure would amount to the actual loss of the claims. On this basis, the Commission finds that the subordination constitutes an advantage. The Commission also considers that the subordination of 2010 constitutes a measure additional to the underlying loans, since: (a) it was not decided at the same moment with those loans; (b) it was not foreseen or imposed by the underlying loans' contracts; and (c) it was discretionally decided by NG in order to avoid the insolvency of CST. As regards the amount of the measure, it is equal to the total amount of the subordinated loans, i.e. EUR 10,4 million.
- (196) Concerning the consideration paid by NG to IPC (**measure 6**), the Commission notes that the Land's Court of Auditors found that a prudent entrepreneur would not choose those particular companies for the provision of services, and that NG did not check with the necessary prudence the previous work of those companies, in order to assess their appropriateness and to examine whether the conditions for the financing of the Nürburgring 2009 project offered by them were realistic <sup>(146)</sup>. In this context, the Commission considers that the choice of IPC for the provision of those particular services conferred an advantage to those companies. Thus, the measure constitutes State aid to IPC, in the amount of the total payment to those companies, i.e. EUR 640 000.
- (197) In addition, as regards the EUR 3 million loan granted by NG to PNG and the EUR 2 941 000 loan granted by PNG to MSR, the Commission considers that the two loans constitute one measure, where PNG was only an intermediary, who received a fee of EUR [...]. The beneficiary of the measure was MSR, who ultimately received the loan, at the time when it was in such a financial difficulty that it would not be able to find any financing in the market. The provision of a loan to a company in such difficulties that no private investor would have financed it at any rate involves an advantage to the company, which is equal to the amount of the loan. Therefore, the advantage granted by NG to MSR through the loan of 15 October 2008 is equal to EUR 2 941 000.
- (198) Under **measure 7**, MIB ceded to NG its claims against CST, who was the borrower of the loans concerned, and NG paid a nominal price plus interest to MIB. As CST was in difficulty (see recital 184), the Commission notes that it is not probable that MIB would receive its claims against CST. On this basis, this measure benefitted MIB who received its claims and was replaced by NG who became the creditor of a firm in difficulty. In the absence of a viability plan of CST, which would demonstrate its return to viability and therefore its prospects for repaying its debts, this measure does not comply with the market economy investor principle. Therefore, the cession by MIB to NG of claims amounting to EUR 1 476 830,88 involves aid equal to the amount of the sales price EUR 1 476 830,88.
- (199) As regards **measure 8** (loan of EUR 325 265 000 granted by ISB to NG, MSR and CMHN), without a related guarantee (measure 9), the provision of a loan to companies in such difficulties that no private investor would have financed them at any rate could involve an advantage to the companies, which would be equal to the amount of the loans. In this particular case, however, the aid consists only in the guarantee (measure 9) and not in the loan (measure 8), as the Commission cannot exclude that a private creditor could grant to NG, MSR and CMHN loans under comparable terms because of the guarantee provided by the Land (measure 9).
- (200) Regarding **measure 9**, i.e. the guarantee for the ISB loan of EUR 325 265 000 (measure 8), the measure in question was not conform with the market economy investor principle. Indeed, policy of regional development is pursued by public authorities, whereas market economy investors would not undertake relevant measures in favour of firms in difficulty, to the substantial detriment of their own financial interests. In addition, the

<sup>(146)</sup> See the 2009 annual report of the Court of Auditors of the Land, pages 3 and 4, available at <http://www.landtag.rlp.de/landtag/drucksachen/4741-15.pdf>

Commission notes that policy of regional development does not aim at bringing firms in difficulty back to viability. Moreover, the Commission considers that the conditions that would rule out the existence of State aid, as described in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees <sup>(147)</sup> ('Guarantee Notice'), are not fulfilled. Indeed, the beneficiaries were firms in difficulty, the guarantee covered 100 % of the loan and there was no guarantee premium for the State reflecting the risk of default for the guaranteed loan. Given the severe financial difficulties of the beneficiaries (NG, MSR and CMHN) at the time of the granting of the guarantee in question (see Tables 11-13), the Commission considers that no market creditor would have provided the beneficiaries with a guarantee under those conditions. The Commission does not have any information indicating that the guarantee has been triggered. On this basis, the Commission considers that measure 9 qualifies as State aid. The aid amounts granted by the guarantee to NG, MSR and CMHN by the Land are equal to the amounts of the respective loans (measure 8), i.e. EUR 96 574 200 and EUR 113 590 800 to NG, EUR 92 000 000 to MSR and of EUR 23 100 000 to CMHN.

- (201) As regards **measure 10** (the business lease of the Nürburgring complex to NAG), the Commission notes that a tender procedure can in general rule out an advantage granted to a lessee. However, in the present case, no tender procedure was organised for the selection of the operator of the upgraded complex. Nevertheless, apart from the first three years of the lease (i.e. from 1 May 2010 to 30 April 2013), the minimum rent under the lease contract is within the range of minimum and maximum market-conform annual rents identified in the expert opinion of 29 September 2011. The EBITDA rent is even higher than the maximum annual market-conform rent identified in that expert opinion, apart from the second year of the lease. The Commission therefore notes that the expert opinion of 29 September 2011 demonstrates that the minimum rent of EUR 15 million as from 1 May 2013 could have been market-conform, since it was within the range representing market-level rents, and therefore would have not involve a selective advantage to NG. Nonetheless, the actual duration of the lease was only between 1 May 2010 and 31 October 2012. The minimum rent set by the expert opinion and by the lease contract for the first three years of the lease is included in Table 16:

Table 16

#### Minimum rent for the lease of the Nürburgring

|                | 1.5.2010-30.4.2011 | 1.5.2011-30.4.2012 | 1.5.2012-30.4.2013 |
|----------------|--------------------|--------------------|--------------------|
| expert opinion | EUR 1,6 million    | EUR 12 million     | EUR 12,3 million   |
| lease contract | EUR 0              | EUR 5 million      | EUR 11,5 million   |

In view of the above, the Commission considers that the annual rent applied in the period from 1 May 2010 to 31 October 2012 involved a selective advantage to NAG, equal to the difference between: (a) the rent which should have been charged, in view of the expert opinion; and (b) the rent which was set in the lease contract. The Commission concludes that there is aid of an amount of EUR 9 million, i.e. the difference between points (a) and (b) above (for the third year only half of that difference is calculated, as the lease terminated on 31 October 2012, i.e. in the middle of the third year) <sup>(148)</sup>.

- (202) As regards **measure 11** (loans granted by RIM to MSR through Mediinvest and in case of one loan also through PNG as intermediaries), by which part II of the 'Nürburgring 2009' project was financed, Germany itself states that it was not possible to find private investors financing for Part II of the project. In addition, the opinion of the Land's Court of Auditors implied that the potential investors did not see the project as viable under market terms. Indeed, several private operators of leisure parks rejected their engagement in the project. Without a related guarantee (measure 12), the provision of a loan to companies in such difficulties that no private investor

<sup>(147)</sup> OJ C 155, 20.6.2008, p. 10.

<sup>(148)</sup> The aid amount is equal to (in EUR million):  $1,6 + 12 + (12,3/2) - [0 + 5 + (11,5/2)] = 9$ .

would have financed them at any rate could involve an advantage to the companies, which would be equal to the amount of the loans. In this particular case, however, the aid consists only in the guarantee (measure 12) and not in the loans (measure 11), as the Commission cannot exclude that a private creditor could grant to MSR loans under comparable terms because of the guarantee provided by the Land (measure 12). The Commission notes that Mediinvest and PNG were not the actual receivers of the aid but only provided their services as intermediaries, in order for the loans of RIM to reach MSR. Also, for the provision of the above service, only Mediinvest realised a profit, corresponding at most to an interest rate difference of 4,3 % (between the loans that it received from RIM and the loans that it granted to MSR), whereas PNG did not profit from any difference of interest rates (PNG had the same interest rate in the loan that it received from Mediinvest and the loan that it granted to MSR). In addition, the Commission cannot conclude in view of the data included in recitals 32-34 and Table 14 above that Mediinvest and PNG charged market non-conform interest rates for their services, or that the difference of interest rates that they received (at most 4,3 % for Mediinvest, 0 % for PNG) went beyond market levels. On the basis of the above, the Commission considers that Mediinvest and PNG were not beneficiaries of measure 11.

- (203) Concerning **measure 12**, i.e. the guarantee by the Land to ISB for the silent participations of RIM in Mediinvest (measure 11), the Commission considers that the set-up aimed at allowing MSR getting the loans described as measure 11. Moreover, at the time of the loans, MSR was in a very bad financial situation. No private investor would have provided a guarantee to a company in such a bad financial situation. The Commission does not have any information indicating that the guarantee has been triggered. On this basis, the Commission considers that measure 12 qualifies as State aid. The aid amount granted by the guarantee to MSR by the Land is equal to the amount of the loans concerned (measure 11), i.e. EUR 85 484 000.
- (204) As regards **measure 13** (grants from gaming tax for tourism promotion granted by the Land to NG), the Commission considers that tourism policy is an objective pursued by public authorities, whereas market economy investors would not undertake relevant measures in favour of firms in difficulty, to the substantial detriment of their own financial interests. In addition, the Commission notes that tourism policy does not aim at bringing firms in difficulty back to viability. Thus, taking into account NG's bad financial situation, the Commission considers the whole amount of the measures at hand to constitute an advantage to NG. In sum, the tax proceeds amounting to EUR 1,6 million in 2009 and EUR 3,2 million per year in 2010 and 2011 transferred from the Land to NG constitute aid in favour of NG.
- (205) As regards **measure 14** (loans by the Land to NG and debt subordination), the explanations given for measure 13 regarding tourism policy also apply. In addition, the provision of a loan to companies in such difficulties that no private investor would have financed them at any rate involves an advantage to the companies, which is equal to the amount of the loan. Therefore, the loans of EUR 20 million on 21 August 2007, EUR 10 million on 22 December 2009, EUR 4,65 million on 28 December 2010 and EUR 3,2 million on 26 April 2011 and a further loan of EUR 4,95 million on 9 December 2011 granted to NG by the Land involve aid, which is equal to the amount of the loans.
- (206) Concerning the debt subordination, the Land declared it in relation to the afore-mentioned loan of EUR 20 million on 29 August 2007 in order to avoid insolvency of NG, ranking its claims against NG in the last position of all creditors' claims against NG. On this basis, the Commission finds that the subordination (part of measure 14) constitutes a separate advantage to the loan of EUR 20 million of measure 14, since it significantly reduced the possibility of collection of its claims against NG. As regards the amount of the measure, it is equal to the amount of the subordinated loan, since it allowed NG to avoid repaying the amount of the subordinated loan, i.e. EUR 20 million.
- (207) As regards **measure 15** (takeover of MSR shares by NG and RIM), MSR was in difficulty at the time of the measure, which means that it had loss making operations. In turn, this means that the amount resulting from its operations and put at the disposal of its shareholders was negative. In this sense, the value reflected by MSR's operations in each of its shares was negative. In other words, a potential investor in MSR would actually require to be paid an amount corresponding to MSR's losses, stemming from its operations and reflected in each of its shares. By buying MSR, NG and RIM clearly intended to support it. However, the change of owner, as such, does not involve aid to MSR. It is the measures that might follow the change of ownership (e.g. loans from NG to MSR) which would involve aid to MSR. The legal form of the company MSR is such that the shareholders are not liable for the company's liabilities, and the sale of MSR by its previous owners to NG and RIM, as such, only involves a symbolic price paid to the sellers equal to the amount of the sales price, i.e. EUR 3. On this basis, the Commission considers that the price of EUR 1 per share does not constitute an economic advantage to the sellers of MSR's shares, i.e. Mediinvest, Geisler & Trimmel and Weber.

- (208) **Measure 16** involves a shareholder loan and a subsidy by the Land to NG for Formula 1 races. Through the liquidity pool, the Land provided to NG EUR 24 978 808 between 2003 and 2007 and EUR 15 426 562 in 2009 (measure 3). To refinance these amounts, the Land granted an interest-free loan of EUR 40 405 000 to NG in 2011. NG also received a subsidy from the budget of the Land in the amount of EUR 13,5 million in July 2011. As far as these public subsidies are concerned, the advantage in favour of NG is obvious, as NG is relieved from a burden which it should normally bear. For the loan, the market economy investor test is not met. The provision of a loan to a company in such difficulties that no private investor would have financed it at any rate involves an advantage to the company, which is equal to the amount of the loan. Therefore, the advantage granted by the Land to NG through the loan of EUR 40 405 000 on 11 January 2011 is equal to EUR 40 405 000. The advantage granted by the Land to NG through the subsidy of EUR 13,5 million in July 2011 is equal to EUR 13,5 million.
- (209) For the Formula 1 concession contract (**measure 17**), Germany has claimed that the organisation of Formula 1 racing constitutes an aid measure that is compatible under the SGEI rules. However, Germany does not claim that the measure was aid-free compensation as meeting all requirements set out in the Altmark jurisprudence. Finally, Germany has not provided evidence demonstrating that the concession fee was set at market level on the basis of any expert opinion or market report, or that it tendered out the concession. Therefore, in the absence of the elements that would demonstrate that the measure is market-conform, the Commission considers that the concession contract grants an advantage to NAG. For this measure, the aid amount would in principle equal to the difference between the concession fee and the market value of the concession. However, the Commission notes that, since no payments were made under the contract, as stated by Germany, the State aid involved was not materialised, therefore no aid amount can be established.

#### Measures covered by the decision of 7 August 2012

- (210) In contrast to the opinion of Germany, the Commission considers that the rescheduling of interest payments (**measure 18**) is not conform with the market economy investor principle and therefore constitutes an economic advantage, particularly in view of NG's, MSR's and CMHN's financial situation. Indeed, NG, MSR and CMHN were in a very bad financial position at the moment of the measure, as outlined above. The rescheduling of interest payments relating to a loan to a company in such difficulties, that no private investor would have granted at any rate, involves an advantage to the company, which is equal to the amount of the outstanding amount of the rescheduled loan. Therefore, the rescheduling agreed by ISB on 15 May 2012, amounting to EUR 1,473 million for NG, EUR 1,205 million for MSR and EUR 303 000 for CMHN, involves aid to these companies which is equal to the amount of the rescheduled outstanding loans.
- (211) As regards the State guarantee and the debt subordination (**measure 19**): (a) for the State guarantee of 2012 covering claims of up to EUR 254 million (for a loan of EUR 325 265 000), the Commission notes that it was granted, by declaration of the Land, in order to avoid insolvency of NG, MSR and CMHN, while the latter were in severe difficulty. On this basis, the Commission considers that the measure did not fulfil the conditions of the Guarantee Notice, therefore provided an advantage to the beneficiaries, and thus constituted State aid; (b) the 2012 subordination of the Land's claims, stemming from the above guarantee, resulted in the ranking of the Land's claims in the last position of all creditors' claims against NG, MSR and CMHN. In this context, the Commission notes that a market economy creditor would not accept such a subordination of materialised claims against firms in severe difficulty, since such measure would amount to the actual loss of the claims. On this basis, the Commission finds that the subordination constitutes an advantage. The Commission also considers that the guarantee and subordination of 2012 constitute a measure additional to the guarantee of 2010. Indeed, the adoption of the 2012 guarantee and subordination was not foreseen or imposed by the 2010 guarantee, but discretionally decided by the authorities, in order to avoid the insolvency of NG, MSR and CMHN in 2012. As regards the amount of the measure, it is equal to the amount of the debt linked to it, i.e. EUR 254 million which was covered by the 2012 guarantee and subordination.
- (212) The Commission considers that the above measures relate to the operation of a complex which does not classify as general infrastructure, and that the measures were not triggered by expectations that the state contribution would yield a market-conform return. The Commission thus considers that there is State aid for the construction and operation of the above facilities, which benefits their operator, i.e. NG in particular.

- (213) The Commission also considers that the State aid element is the difference between the appropriate market price of the loan or guarantee and the actual price paid for that measure, whereas the aid beneficiaries were in so severe difficulties that they would not find any financing in the market and hence the advantage from the aid is equal to the full amount of the measures in question.

**(f) Conclusion on existence of State aid**

- (214) In light of the above, the Commission considers that part of measure 2 (loans granted by NG to FSZ), as well as measures 8, 11 and 15 do not constitute State aid, whereas measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 to 10, 12 to 14, and 16 to 19 constitute State aid within the meaning of Article 107(1) TFEU.

**5.3. UNLAWFUL AID**

- (215) Measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 to 10, 12 to 14, and 16 to 19 constituting aid have been granted in breach of the notification and stand-still obligations established in Article 108(3) TFEU. Thus, the Commission considers that these measures qualify as unlawful State aid.

**5.4. COMPATIBILITY OF THE AID**

- (216) Inasmuch as certain measures constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in light of the exceptions laid down in paragraphs 2 and 3 of that Article.
- (217) 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 <sup>(149)</sup>.
- (218) Given that the measures constitute State aid, and since NG, MSR and CMHN have been firms in difficulty since 2002, 2007 and 2008, respectively, the Commission observes that the measures in question should be assessed with regards to their compatibility only under Article 107(3)(c) TFEU and in particular under the R&R Guidelines. Indeed, according to point 20 of the R&R 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.' Contrary to what Germany claims, the exception laid down in Article 106(2) TFEU is not applicable in the case at hand, because the supported operations cannot be considered as services of general economic interest, since they manifestly constitute operations of commercial nature offered in sectors which are subject to competition. The exception laid down in Article 107(3)(b) TFEU is not applicable either, since the project and the companies supported through the measures under scrutiny cannot be considered as an important project of common European interest, and Germany was not facing a serious disturbance in its economy. Finally, the exception laid down in Article 107(3)(d) TFEU is not applicable either, because the aided activities are obviously not related to culture or heritage conservation.
- (219) In the case at hand, the relevant conditions of the R&R Guidelines (Sections 3.1 and 3.2) for rescue and/or restructuring aid are not fulfilled. Indeed, the measures were not terminated after 6 months and Germany did not notify a restructuring plan within the meaning of the R&R Guidelines. Finally, there is no evidence that the aid was limited to the minimum necessary, notably through a significant own contribution of the aid beneficiary. The authorities did not provide a liquidation plan either.
- (220) The Commission has not identified any other possible compatibility grounds for the measures <sup>(150)</sup>. Indeed, in the case at hand, the beneficiaries were in difficulty at the time of the granting of the measures, and therefore they are excluded from the application of any compatibility basis other than the R&R Guidelines.

<sup>(149)</sup> Case C-364/90, *Italy v Commission* [1993] ECR I-2097, para.20.

<sup>(150)</sup> In this context, Landkreis Ahrweiler is also not an assisted area according to the EU aid map 2007-2013.

- (221) In light of the above, the Commission considers measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 to 10, 12 to 14, and 16 to 19 as incompatible with the TFEU.

#### 5.5. RECOVERY

- (222) According to the TFEU 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 <sup>(151)</sup>. 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 <sup>(152)</sup>. 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 <sup>(153)</sup>.
- (223) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 <sup>(154)</sup> laid down 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 [...].'
- (224) Thus, given that the measures at hand were not notified to the Commission in violation of Article 108 TFEU and are, therefore, to be considered as unlawful and incompatible aids, 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 aids were put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery.
- (225) The Commission notes that certain aid beneficiaries (NG, MSR, CMHN, CST <sup>(155)</sup>, IPC) are in insolvency proceedings <sup>(156)</sup>. In line with a well-established case-law, the fact that a beneficiary is insolvent or subject to bankruptcy proceedings has no effect on its obligation to repay unlawful and incompatible aid <sup>(157)</sup>. At the same time, in the majority of cases involving an insolvent aid beneficiary, it is not possible to recover the full amount of unlawful and incompatible aid (including interests), as the beneficiary's assets are insufficient to satisfy all creditors' claims. Consequently, it is often not possible to fully re-establish the *ex ante* situation in the traditional manner. Since the ultimate objective of recovery is to end the distortion of competition, the European Court of Justice has stated that the liquidation of the beneficiary can be regarded as an acceptable option to recovery in such cases <sup>(158)</sup>. The Commission is therefore of the view that a decision ordering the Member State to recover unlawful and incompatible aid from an insolvent beneficiary may be considered to be properly executed either when full recovery is completed or, in case of partial recovery, when there is an appropriate registration of the liability relating to the payment of the aid in the schedule of liabilities and the company is liquidated and its assets are sold under market conditions, which implies a definitive cessation of its activities. More in general it should be ensured that no operator will benefit from the illegal and incompatible aid after the disappearance of the beneficiary.
- (226) Recovery shall also concern beneficiaries not in the insolvency procedure (NAG, and BikeWorld GmbH for BWN1, BWNB and BWN2, since BWN1 merged with BWNB, subsequently the name of the acquiring company BWNB was changed into BWN2, and the latter company was subsequently renamed to BikeWorld GmbH.
- (227) The Commission notes that certain aid beneficiaries no longer exist at the moment of this decision (EWN, MAN, TTI, Camp4Fun, MIB).

<sup>(151)</sup> See Case C-70/72 *Commission v Germany* [1973] ECR 00813, paragraph 13.

<sup>(152)</sup> See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

<sup>(153)</sup> See Case C-75/97 *Belgium v Commission* [1999] ECR I-030671 paragraphs 64-65.

<sup>(154)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

<sup>(155)</sup> Pursuant to Germany, the elimination of the company from the trade register was filed on 22 May 2014.

<sup>(156)</sup> NG, MSR and CMHN are in the liquidation/insolvency procedure since 1 November 2012. Under German law, at the moment of the launch of the liquidation/insolvency procedure, the business objective of the company changes from a full activity in a pure implementing company, which is eliminated on the basis of German law, but as long as the insolvency/insolvency proceedings have not been completed, the company as an implementing company must use the total assets in compliance with the principle of sound financial management.

<sup>(157)</sup> Case C-42-93, *Spain v Commission* ('Merco') [1994] ECR I-4175.

<sup>(158)</sup> Case C-52/84, *Commission v Belgium* [1986] ECR p. 89.

- (228) EWN, MAN, and Camp4Fun were dissolved on 6 September 2011, 29 August 2013 on 1 March 2010, respectively. There was no formal liquidation. For those three aid beneficiaries, there is economic continuity, between them as aid beneficiaries and their remaining shareholder, i.e. NG. Indeed, since NG is the remaining shareholder of these aid beneficiaries, it is responsible for their debts, including the debts resulting from State aid. Since NG is in liquidation, then it should be ensured that there is an appropriate registration of the liability relating to the payment of the aid in the schedule of NG's liabilities, and that there is a definitive cessation of NG's activities. It should also be ensured that no operator will benefit from the incompatible aid after the disappearance of NG. Thus, the Commission concludes that NG as the economic successor of the beneficiaries has to be subject to the recovery of the State aid granted to them. Since NG is the aid grantor as well as the economic successor of the aid beneficiaries, recovery must be implemented in such circumstances by the State.
- (229) MIB was not liquidated, but merged with NAG on 6 September 2013, and therefore also no longer exists as a legal entity. In consequence, NAG is the economic successor of MIB, on the basis of § 2 paragraph 1 of the German Transformation Act ('*Umwandlungsgesetz*'), as indicated in the German trade register. Therefore, NAG as the economic successor of MIB must pay back the aid.
- (230) TTI was liquidated under German Limited Liability Companies Act on 4 December 2007. TTI was a limited liability company ('*Gesellschaft mit beschränkter Haftung*'). By a resolution of the shareholders about liquidation, the company was dissolved. The only remaining purpose of TTI was the implementation of liquidation. Pursuant to § 70 of the Limited Liability Companies Act, the liquidator had 'to quit the current business, to fulfil liabilities of the dissolved company, to collect the claims of the same company and to convert the company's assets in money ...'. The remaining cash assets were then distributed to the shareholders. At that moment in time, the company was dissolved. Pursuant to Germany, there was no legal succession in the sense of economic continuity, because at most, cash went to the shareholders, there was no economic activity anymore, and a transfer of the business or a take-over of liability by the shareholders was not carried out. Germany also indicated that the assets of TTI were not sold in a tender process, since on 12 March 2004 as the date of the opening of the liquidation of TTI, these assets were only the account balance of EUR 19 777,39, tax refund claims of EUR 1 222,01 and interests from a bank account of EUR 30,69. As TTI was liquidated as mentioned above, it had no economic successor, especially since there was no economic activity run by anybody after liquidation, and the shareholders did not receive assets or any operational elements of TTI but only a very limited amount of cash. In this context, since there was no transfer of the business of TTI to anybody, the Commission considers that the State aid stemming from the measure at hand was not passed to anybody else. In such case, the company has already been fully liquidated, and recovery becomes without object because the aid beneficiary no longer exists and has no economic successor.

## 6. ASSESSMENT OF ECONOMIC CONTINUITY BETWEEN THE INSOLVENT COMPANIES AND THE BUYER OF THE ASSETS

### 6.1. EXISTENCE OF STATE AID BENEFITING THE BUYER OF THE ASSETS

- (231) In the event of a negative Commission decision regarding the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 TFEU, the Member State in question is required to recover the incompatible aid. The recovery obligation may be extended to a new company, to which the company in question has transferred or sold part of its assets, where that transfer or sale structure will trigger the conclusion that there is economic continuity between the two companies. State aid for the buyer could also result from the sale of the assets under their market value (even in the absence of economic continuity).
- (232) In order to decide on whether there is State aid benefiting the buyer(s) of the assets, the Commission needs to confirm: (a) that the sale of any assets takes place at their market price; and (b) other criteria addressed below.
- (233) According to the Court decision on *Italy and SIM 2 v Commission* <sup>(159)</sup>, on which the Commission founded its decisions on *Olympic Airlines*, *Alitalia* and *SERNAM* <sup>(160)</sup>, the assessment of economic continuity between the 'old'

<sup>(159)</sup> Judgment of the Court of 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA v Commission of the European Communities*, Joined cases C-328/99 and C-399/00, ECR 2003 I-4035.

<sup>(160)</sup> Commission Decision of 17 September 2008, State aid N 321/2008, N 322/2008 and N 323/2008 — Greece — *Vente de certains actifs d'Olympic Airlines/Olympic Airways Services*; Commission decision 12 November 2008 State aid N 510/2008 — Italy — *Sale of assets of Alitalia*; Commission decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*.

entity and the new structures is established based on a set of indicators. The following factors may be taken into consideration: the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), the sale price, the identity of the buyer(s), the moment of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision) and the economic logic of the operation. This set of indicators was confirmed by the Court in its decision of 28 March 2012 *Ryanair v Commission* <sup>(161)</sup>, which confirmed the *Alitalia* decision.

#### 6.1.1. Scope of assets sold

- (234) The Commission observes that the assets taken over by Capricorn represent all of the assets of the insolvent NG, MSR and CMHN, and they relate to the main activities of these companies. However, the Commission notes that, in the context of the tender process, the assets of NG, MSR and CMHN were split in 11 individual asset clusters and all bidders were allowed to bid for individual assets, as well as for one, several or all asset clusters (see point 2.5). Those clusters were formed with a view on the expected economic use of the assets, the expected investors' interest as well as the costs of separating the assets. Furthermore, the insolvency administrators did not establish any conditions as regards the future use of the assets. The Commission notes that the decision that all the assets were sold to one single company was made by the market, i.e. the economic operators bidding for the assets, not by the insolvency administrators or Germany. Indeed, all the bidders had the possibility to bid for one of the 11 individual clusters of assets, their totality, or specific assets. For market driven reasons, the value of the bids for individual assets or clusters of assets did not reach the value of the highest bid for the totality of assets. This seems to be the consequence of the economic interdependence of the various clusters of assets: without the race track, the hotels would not be viable; without the hotels, a profitable exploitation of the race track with professional races, rock concerts and other activities with a large catchment area would be more difficult.
- (235) As regards the employees, the tender specifications or the sales contract do not include any specific obligation, e.g. an employment guarantee, to transfer employment contracts to the new owner, apart from what is required by relevant national legislation. Under German law, the employees are automatically transferred to the buyer of the assets. However, under German labour courts jurisprudence <sup>(162)</sup>, in an insolvency context the buyer can request from the insolvency administrator to terminate employment contracts. Hence in principle the buyer could take a fresh decision on which personnel it wished to offer new employment. In the case at hand, in order to achieve an economically viable operation of the acquired assets, Capricorn assessed its needs, in order to achieve viability of its operations, and chose not to receive the entirety of the employees of the sellers but 85 % of them, i.e. 253 of the total 297 employees, on 1 January 2015 (date when Capricorn will start operating the acquired assets). It is maintained however, that since Capricorn could take an independent decision to engage or not existing personnel, the confirmed hiring of existing personnel does not lead to continuity of operations. In addition, the management structure and staff is planned to be completely reorganised in 2014.
- (236) Furthermore, the Commission notes that the vast majority of the contracts on the organisation of events significant for the operational business will be terminated after the season 2014. New contracts for the period as from 1 January 2015 will be negotiated and concluded with the customers and suppliers by the operational company established by the buyer. In this respect, also new contractual partners will be approached. Capricorn itself plans to organise a number of events instead of renting out the race ring to external organisers.
- (237) Finally, the Commission notes that the scope of activities to be carried out by Capricorn will be to a considerable extent different in comparison with the activities of the Nürburgring group, as demonstrated below (see in particular point 6.1.5).

#### 6.1.2. The sale price

- (238) In order to avoid economic continuity, the assets under the tender process have to be sold at their market price.
- (239) The market price is the price, which could be set by a private investor acting under market conditions <sup>(163)</sup>.

<sup>(161)</sup> Judgment of the General Court of 28 March 2012 in Case T-123/09, *Ryanair Ltd v Commission*, ECLI:EU:T:2012:164.

<sup>(162)</sup> BAG, Judgement of 19 December 2013 ù 6 AZR 790/12; BAG, Judgement of 20 March 2003 — 8 AZR 97/02.

<sup>(163)</sup> Judgment of the Court of 16 December 2010 in Case C-239/09 *Seydaland*, paragraph 34.

- (240) Germany has sold the assets through an open, transparent, non-discriminatory and non-conditional tender process to the bidder submitting the highest bid with secured financing.
- (241) Firstly, the invitation to submit an expression of interest for the Nürburgring assets did not present any limitation as to the parties that could submit offers, therefore any entity could submit an offer in the tender process.
- (242) Secondly, as regards the principle of transparency, the sellers provided all bidders with enough time and all the necessary and detailed information, in order to allow them to carry out a proper valuation of the assets. According to the letter of KPMG titled 'Project RING — procedures for the submission of a final offer', sent to the interested investors on 17 October 2013, the tenderers providing proof of secured financing for the price included in their indicative offers would be granted full access to an electronic data room, they could participate in a meeting with the management of NBG, and they would receive the opportunity to participate in a structured question and answers process. On the other hand, tenderers who would not submit the above assurance and proof of necessary financing would only be granted limited access to the electronic data room and to the financial fact book of the sellers, and would be able to meet with the members of the team that prepared the financial fact book, take part in a site visit and meet for the pre-discussion of the draft purchase agreement for the assets.
- (243) Furthermore, there was constant communication throughout the tender process between the sellers (KPMG) and all bidders who qualified for the respective step of the tender process, for the purpose of providing those bidders with all relevant information and clarifications, with letters and e-mails exchanged in the period July 2013-April 2014. In this context, those bidders were provided with the answers to their questions or allegations, and with all information regarding the tender's further steps. For example, in the above context, the following letters and e-mails were sent by KPMG to the bidders: (a) letter of 19 July 2013 informing the bidders of the procedures for the submission of an indicative offer; (b) letter of 12 September 2013 informing the bidders of the extension of the deadline for the submission of indicative offers; (c) e-mail of 19 September 2013 providing one of the bidders (ADAC) with an update on the financial performance of the Nürburgring; (d) letter of 17 October 2013 informing one of the bidders ([Bidder 3]) of the procedures for the submission of a final offer; (e) e-mail of 28 October 2013 informing one of the bidders ([Bidder 2]) of the preliminary timings for the meetings with stakeholders; (f) letter of 3 December 2013 informing one of the bidders (...) that its Indicative Offer was no longer considered due to the fact that parties who supported that offer had withdrawn and there had been no presentation of alternative financing partners, therefore the offer's financing was considered as not secured and its closing probability was evaluated as insufficient; (g) letter of 11 December 2013 providing one of the bidders ([Bidder 3]) with comprehensive and clear explanations to the concerns and allegations that that bidder had raised in a letter of 9 December 2013 (two days earlier); (h) letter of 18 December 2013 providing one of the bidders ([Bidder 3]) with comprehensive and clear explanations to concerns and allegations that that bidder had raised in a letter of 11 December 2013 (seven days earlier); (i) e-mail of 18 February 2014 requesting one of the bidders ([Bidder 3]) for specific clarifications and confirmations regarding the latter's final offer as provided with an e-mail of 17 February 2014 (one day earlier), in particular requesting that bidder, among other things, to submit proof and evidence of its binding financing commitment e.g. in the form of a binding financing commitment letter, to provide more detail on the specific timing envisaged by that bidder for obtaining the outstanding financing commitments, and to submit an estimation on the time required to finalise the submitted offer with regard to its commercial terms; and j) e-mail of 9 April 2014 informing one of the bidders ([Bidder 3]) that KPMG had not yet received details on that bidder's envisaged financing structure or written confirmation from third party financing sources to support that bidder's offer, as an answer to that bidder's e-mail of 2 April 2014 (seven days earlier).
- (244) Thirdly, the evidence submitted by Germany shows that there was no discrimination between the tenderers at any stage of the tender process. Indeed, as is also obvious from the above in recital 235, all bidders received information and clarifications on the tender's selection criteria, rules and procedures, on the deadlines for the submission of indicative and final offers, on the extension of such deadlines, on the financial situation of the Nürburgring, on elements missing from the bidders' indicative or final offers, and on possible queries of the bidders. At the same time, bidders who fulfilled the tender's selection criteria, in particular the submission of confirmation of the financing of their offers from third party financial partners, were not excluded from the negotiations. The Commission also notes that no bidders were offered exclusivity in the negotiations, but the latter were kept, to the reasonable extent in time, also with bidders who had not submitted the above financial confirmation in their final offers, in view of future submission of such financial confirmation.
- (245) Furthermore, as described in recital 54 above, the sales contract includes a clause according to which its parties are obliged to implement it only if: (1) the Commission takes a non-challengeable decision implying that neither

the buyer nor its operational company are beneficiaries of the aid under assessment subject to recovery; and (2a) either the delays to bring a legal challenge against the Commission decision have expired without an appeal; or (2b) in case of an appeal, a not further challengeable court judgment has been rendered confirming the Commission decision. Germany has explained that this clause was the result of the bidders' unwillingness to take the risk of being liable for a claw-back of State aid, that the sellers accepted that clause in order to be able to sell the assets, and that from the beginning of the tender process, as also stated in the first asset purchase agreement, the sellers advised the bidders that they were willing to discuss the implications of the State aid procedure with the bidders <sup>(164)</sup>. In addition, Germany has stated that a Commission decision on the State aid to the Nürburgring was a condition in the asset purchase agreements mark ups provided by Capricorn, [Bidder 2] and [Bidder 3].

- (246) Fourthly, apart from limitations stemming from the legal framework, no conditions were set upon the tenderers, as clearly demonstrated in the tender's invitation to submit an expression of interest and the various letters sent to the bidders by KPMG.
- (247) It results that this selection process as such is sufficient for safeguarding that the price of the assets sold to the buyer corresponds to the market price. Thus, the Commission concludes that the sale of the assets through an open, transparent, non-discriminatory and non-conditional tender process to the bidder submitting the highest bid including a guaranteed financing leads to the market price.

#### 6.1.3. *The identity of the buyer*

- (248) The Commission has to establish that the new owner of the assets will not have any link with NG, MSR and CMHN, in order to avoid that the new owner will be liable for any recovery of incompatible State aid.
- (249) Capricorn is not an entity having a corporate law or personal direct or indirect link with NG, MSR, CMHN or their shareholders, or the previous lessees of the Nürburgring. There is therefore no link between the Nürburgring group and its shareholders on the one hand and the new owner and its shareholders on the other hand.
- (250) Thus, the Commission concludes that the buyer is an independent entity from NG, MSR and CMHN.

#### 6.1.4. *The moment of the sale*

- (251) The Commission needs to assess whether the moment of the tender process may lead to a circumvention of a decision by the Commission to recover incompatible State aid.
- (252) In this case, the Commission observes that following the extension of the main investigation to the measures notified to the Commission as rescue aid, the insolvency procedure was launched and the insolvency administrators were appointed by the competent local court in 2012. The sale of the assets was launched by the insolvency administrators in May 2013, prior to any Commission decision regarding the conclusion of the formal investigation procedure. As the buyer insists on its transfer being made only once a final Commission decision cannot be challenged in court, the sales contract will enter into effect and the insolvency procedure will be closed only after the adoption of the present decision ordering recovery. The payment of the first instalment of the price took place before the adoption of the present decision. Pursuant to the sales contract, the transfer of the assets is effective as of the date on which the present decision becomes non-challengeable.
- (253) In the present case, the Commission considers that the fact that the sale was launched by the insolvency administrators appointed by the competent local court and that the decision about the transfer of the assets has taken place before the adoption of the present decision is less conclusive in terms of economic continuity than a

<sup>(164)</sup> The relevant text of the first draft of the asset purchase agreement states: 'the bidder is aware of the fact that currently an investigation procedure is pending at the European Commission, the subject-matter of which is the admissibility of State aid which has been granted to the Nürburgring and the possible recovery of aid. The Sellers are in regular contact with the relevant service of the European Commission and strive to achieve a formal decision which indicates that the European Commission shall not order any recovery of the granted aid from the purchaser. They are open to a constructive discussion with the bidder as to how the parties shall proceed with regard to these circumstances in connection with the sale of any or all assets of the Nürburgring and of a possible transition period until a final decision has been rendered by the Commission.'

situation where the decision to sell would be taken by the aid beneficiaries themselves or where the sale process would be launched only after the adoption of the present decision.

#### 6.1.5. *The economic logic of the operation*

- (254) The criterion of economic logic aims at assessing whether the buyer of the assets will employ them in the same way as the previous owner or whether it will use them to establish a different activity or strategy.
- (255) The Commission considers that the new owner will have the possibility to manage its activities under different operating conditions than NG, MSR and CMHN's and will apply its own business model.
- (256) The business concept of the sellers will not be taken over by the acquirer. The two existing race tracks (Grand-Prix track, Northern track) shall be used [...] in the future, allowing [...]. To this end, Capricorn intends to construct additional facilities and to equip the [...]. Part of facilities build under Part II of the Nürburgring 2009 project will be turned down (e.g. [...]). The ring racer will be sold. The ring card as payment system will be dropped. In the ring boulevard, the [...].
- (257) Furthermore, according to the plans of the acquirer, Nürburgring will be transformed from a touristic attraction to a technology cluster and industry pool. [...] should become one of the core activities at the race tracks. Through [...] should be established. [...] should be [...] at Nürburgring. The acquirer itself will be more active as [...].
- (258) The buyer of the assets will thus not use the assets in the same way as the insolvent companies. On the contrary, Capricorn will integrate the acquired assets in its own business strategy, realising synergies, which justify its interest in buying the assets. In comparison with the current operation model, Capricorn has developed a new concept of the exploitation of the assets. Moreover, the operation of some of the assets has been structurally deficit making and it could therefore require further restructuring and optimisation.
- (259) The afore-mentioned elements demonstrate that the economic logic of the Capricorn's offer does not consist in a continuation of an economic activity of the Nürburgring group, but in an integration of certain assets and a part of the workforce of the Nürburgring group in a group which pursues its own economic logic.
- (260) Thus, the Commission concludes that the economic logic of the operation is to allow the new owner to use the assets of NG, MSR and CMHN under different conditions and not to continue the strategy of these companies.

#### 6.1.6. *Conclusion on the economic continuity of NG, MSR and CMHN through the sale of assets*

- (261) The assets have been sold at their market price, as established through an open, transparent, non-discriminatory and non-conditional tender process, to the bidder submitting the highest bid including its guaranteed financing. Germany has informed the Commission that the buyer has not an economic or corporate link to NG, MSR or CMHN. The decision on the sale was taken prior to any potential negative Commission decision regarding the formal investigation procedure. Finally, the new owner will use the assets under different conditions and according to a different business model than NG, MSR and CMHN, and the scope of the buyer's activities will be to a considerable extent different in comparison with the activities of the Nürburgring group
- (262) In light of the above, the Commission concludes that there is no economic continuity between NG, MSR and CMHN and Capricorn, the buyer of the assets, or its operating company, which are therefore not liable for any State aid to be recovered from the beneficiaries.

#### 6.1.7. *The conditionality of the sale finalisation upon a Commission decision*

- (263) The sales contract between the sellers and Capricorn includes a condition that foresees that the sale of the Nürburgring assets is final only upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets. As already described in recital 56 above, if there is

no non-challengeable Commission decision at the beginning of 2015, the sold assets will be sold before 1 January 2015 to NewCo, in which 95,1 % of the shares will be owned by the buyer and 4,9 % by an independent trustee. The trustee will be acting in the interests of the creditors and not of the insolvent beneficiaries of State aid, but will not be subject to instructions by the creditors. Furthermore, a lease contract will be concluded between NewCo and OpCo, terminating on the date of entry into force of the sales contract. The business of the OpCo will be run under its name, on the basis of its own business plan and with the workforce of its own choice. There will be a lease fee of totally EUR [4,6-5,1] per year to be paid by OpCo to NewCo, which will serve the liquidation mass of the Nürburgring companies (all payments in favour of the insolvency estate are transferred to the trust accounts of the insolvency administrators, solely in order to be distributed to the creditors). When the decision of the Commission becomes final, the trustee will transfer all his shares in NewCo to the buyer. On the other hand, if the buyer does not fulfil its contractual payment obligations, the trustee will be able to sell the assets. In addition, should an annulment of the Commission decision take place, the assets will return to the insolvency administrators in order to be sold immediately, since the liquidation obligation of German insolvency law continues to exist even in such case. There is no option of continuing the business of the Nürburgring companies by NewCo.

(264) The Commission notes that with this construction:

- (a) a real sale of the assets of the beneficiaries will take place within four months after the adoption of the present Decision;
- (b) even if the closing of the operation takes place later, in the meantime, the buyer already controls the society which will own the assets by an overwhelming majority and the remaining part of the assets is owned by a trustee, which is independent from the beneficiaries of the aid and does not receive instructions from their creditors;
- (c) recovery is not suspended; and
- (d) the beneficiaries irreversibly exit the market and will not have any activity or receive any stream of money. They will be liquidated as soon as their claims and obligations are settled and the necessary formalities are performed (see recital 55).

(265) Also, the Commission notes that other bidders who reached the final stage of the tender procedure or close to it had similar conditions in their offers <sup>(165)</sup>. On the basis of the above, the Commission concludes that there is no purpose or risk of circumvention of recovery and that the construction in question merely exists with the purpose of an orderly liquidation of the business.

## 6.2. COMPLAINTS ON THE SALE OF ASSETS

### 6.2.1. *Complaints from complainant 1 and 2*

- (266) Based on the information provided by the insolvency administrators and complainants 1 to 4, the Commission does not consider the claims raised by complainant 1 and complainant 2 to be justified. The Nürburgring assets were split in eleven individual assets. Based on the evidence submitted by the insolvency administrators and complainants 1 to 4, the Commission has found that in an open, transparent and non-discriminatory selection process, the bidders could make offers for one, more or all assets. Even the fact that all of the assets were eventually awarded to Capricorn as the buyer submitting the highest bid including its secure financing, this does not as such demonstrate economic continuity (see also Section 6.2.7 above). The Commission also assumes that the underlying aim of complainants 1 and 2 was to avoid a transfer of the racetrack to a private investor.
- (267) The bidders that tendered only for individual asset clusters such as complainant 2 were not notified of the extension of the deadline for the submission of binding offers until 17 February 2014, because their indicative bids did not qualify to the second stage of the selection process in view of their low price offers; however, the Commission does not consider this to be a breach of the principle of transparency, since such bidders had been informed that they could increase their indicative offer any time before the award of the contract, and if they

<sup>(165)</sup> In particular, [Bidder 2]'s offer foresaw that its offered price would only be payable upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets. [Bidder 3]'s offer foresaw that the buyer could withdraw from the sale, in spite the existence of a Commission decision, to its own discretion.

went for such a price increase, it can be presumed that the insolvency administrators would notify them of the extension of the deadline concerned in compliance with the principle of equal treatment.

- (268) The Commission finds it reasonable and efficient that only the bidders that made a sufficiently high price bid were allowed access to the detailed information about the assets (on the basis of which among others the need for future investment could be assessed by the bidders). In view of the information given to them in the various stages, the Commission also considers that the bidders were provided with information sufficient for making their offers. On top of this, complainants 1 and 2 have identified no concrete piece of information that would hinder them from bidding.
- (269) As regards the long-term contractual relationships allegedly implied in the tender documentation, the Commission notes that in the present case of an asset deal, the employment and lease contracts are transferred only in the cases foreseen by law, that the contracts for the organisation of events can in principle be maintained only if both contractual parties agree so, and that the latter contracts do not necessarily have a major economic significance for the asset deal. As regards the question whether new aid was granted by the operation of NBG, the Commission notes that NBG was established by the insolvency administrators on a temporary basis, until the end of 2014, as a vehicle for the operation of the assets only during the insolvency and the tender process. Running the operational business through a temporary subsidiary of an insolvent company during the insolvency proceedings is allowed by national law and cannot be forbidden to insolvency administrators. In the present case, the insolvency administrators also justified the economic rationale of the existence of NBG for NG, MSR and CMHN, since, according to them, the creation of NBG increased the value of the assets of NG, MSR and CMHN, thus increasing the liquidation subject-matter. However, the Commission notes the circumstances of NBG's establishment, i.e. that NBG is a subsidiary of the aid beneficiaries NG, MSR and CMHN, is their economic successor since it has received their full assets and liabilities, it has received those assets and liabilities without consideration and outside the scope of any tender or valuation report, employs the exact same personnel as they did and carries on their own business. On this basis, the Commission concludes that there is economic continuity between NBG and the beneficiaries NG, MSR and CMHN, therefore any incompatible State aid in favour of NG, MSR and CMHN is to be recovered also from NBG.
- (270) The Commission considers that also the contract between NBG and the trade union ver.di was concluded in order to enable the operational business of NBG until the sale of assets, and not to maintain the economic continuity of the Nürburgring after that sale. The employment contracts are transferred from NBG to Capricorn by force of German labour law, and not due to the contract with the trade union. For the lack of economic continuity between the sellers and Capricorn, the Commission considers only relevant that Capricorn itself has the full discretion to decide which of the employment contracts of NBG it will not take over, and that Capricorn plans not to take over around 20 % of these employment contracts.
- (271) The Commission therefore rejects the complaints from complainants 1 and 2 as unjustified because the assets in question have been sold to the bidder who submitted the highest bid including a proof of its financing, following an open transparent, non-discriminatory and unconditional tender process.

#### 6.2.2. *Complaint from complainant 3*

- (272) The Commission notes that the indicative and the final offers from complainant 3 were not supported by evidence of its financing; this was communicated by the sellers to complainant 3 by letters dated 17 October 2013, 11, 17 and 18 December 2013 and by e-mails dated 18 February 2014 and 9 April 2014. Indeed, until the award of the sales contract by the committee of creditors on 11 March 2014, and even after that date, complainant 3 did not provide evidence for the financing of its offer, which could justify that the sellers do not award the contract to either of both bids for which there was evidence of their financing, but that they wait for the submission of evidence for the offer from complainant 3. In particular: (a) in its e-mail of 21 February 2014, complainant 3 stated its confidence to have all binding financial commitments within the next two to five weeks; (b) in its letter dated 11 March 2014, complainant 3 indicated that it would be able to submit all binding financial commitments until 31 March 2014; and (c) in a non-signed letter dated 31 March 2014 by the investment bank and advisory firm [...], submitted by complainant 3 to KPMG on 2 April 2014, it is stated that one prospective investor will provide financing of EUR [...] million to complainant 3 for the purchase of the Nürburgring assets; however that alleged financing was subject to completion of satisfactory due diligence by all parties and execution and delivery of definitive documentation, and did not name the prospective buyer in

question. On the basis of the above, the Commission notes that, even after the award of the Nürburgring assets to Capricorn, complainant 3 did not provide the sellers with a first-hand commitment by a specific financial partner for the financing of the purchase of the Nürburgring assets. Instead, complainant 3 only provided the sellers with: (a) a final offer which made reference to a commitment for EUR 30 million but did not contain the proof of that commitment e.g. in the form of a binding financing commitment letter by the particular financial partner, and did not include details on the specific timing envisaged by complainant 3 for obtaining the outstanding financing commitments and for finalising the offer with regards to its commercial terms; (b) a non-signed letter, referring to financing by an unnamed investor, still conditional on the satisfactory conclusion of the due diligence execution and the delivery of definitive documentation (letter of [...] dated 31 March 2014). The Commission also notes that there is no demonstration that the alleged financing commitment of Jupiter Financial Group dated 26 March 2014 was ever submitted to the sellers. The Commission further notes that the sellers did not extend the deadline for the submission of a proof of the financing of the complainant 3's bid, because there was a high chance that [Bidder 2] would withdraw its bid in case of such extension. For example, with an e-mail of 13 January 2014, sent by the representative of [Bidder 2] to KPMG, [Bidder 2] declared that all requirements for the sale to be concluded should be fulfilled before 3 April 2014, otherwise [Bidder 2] would withdraw from the tender. In addition, it was considered by the sellers that the value of the assets could drop later in time also in view of a decreasing buyer's influence on the business in the upcoming 2014 season and of the necessity to start the booking of contracts for 2015. The Commission points out that complainant 3 was not hindered to submit the proof of the financing of his confirmatory bid in the final stage in the process, as long as no definite asset purchase agreement had been signed. In view of the above, the Commission considers the behaviour of the sellers as corresponding to the behaviour of a market economy vendor. The evaluation of the bid of complainant 3 is therefore market-conform.

(273) At the same time, the Commission notes that the sellers carried out discussions with [Bidder 2] and the final stage of the purchase agreement's negotiation with [Bidder 2] and Capricorn, in view of [Bidder 2]'s offer of EUR [32-39] million (see Table 10) and a confirmed negotiation between Capricorn and [...] resulting in the latter bank's financial commitment dated 10 March 2014. Regarding the evaluation of the offer of Capricorn, the Commission notes that Capricorn submitted a commitment by its financial partner, [...], for a loan in the amount of EUR [41-49] million. This commitment, dated 10 March 2014, was submitted to the sellers on 11 March 2014, i.e. on the date scheduled for the meeting of the Creditors' Committee, in which the latter intended to decide on the award of the Nürburgring assets. The commitment offered by Capricorn was higher than the one of [Bidder 2], since the latter amounted to EUR [32-39] million. The Commission also notes that Capricorn's total offer was equal to EUR 77 million, therefore higher than the one of [Bidder 2] which equalled to EUR [47-52] million. EUR [30-33] million of [Bidder 2]'s total offer was foreseen to be paid in 2014, however with EUR [22-27] million foreseen to remain in a blocked account until March 2015 and the rest EUR [16,5-18] million foreseen to be paid in 2016, 2017 and 2018.

(274) Furthermore, as regards the condition in the sales contract between the sellers and Capricorn which foresees that the sale of the Nürburgring assets is final only upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets, the Commission notes that, according to the provisions included in the relevant parts of complainant 3's mark-up contracts, as submitted by the insolvency administrators and Germany, the purchaser and/or the seller had the right to withdraw from the contract if no positive decision of the Commission had been issued by 15 July 2014 (as stipulated in draft contract of 14 January 2014) or 31 December 2014 (as stipulated in draft mark-up contract of 14 February 2014). It is also noted that there was no time limit as to exercising such withdrawal right.

(275) As regards further allegations made by complainant 3, the Commission notes the following:

(a) The Commission does not consider that complainant 3 was required to assume the existing contracts or obligations of NBG (with the exception of contracts that transfer automatically by operation of law, such as certain employment or rental contracts). This fact was indicated clearly to complainant 3 by the sellers in KPMG's letter dated 11 December 2013. The Commission also considers that to the extent complainant 3 would like to assume these contracts was in its own discretion and would be subject to its business and usage concept of the Nürburgring. Moreover, the Commission has not found evidence that there had been an alteration in the transaction concept during the tender process, or that except for complainant 3 another

bidder has complained about an alleged change of the transaction structure. In fact, the latter absence of complaints by other bidders was communicated to complainant 3 with KPMG's letter of 11 December 2013.

- (b) The duration of the tender process was not excessively long.
- (c) By letter of 17 December 2013, complainant 3 was informed by the sellers about the deadline of 17 February 2014 for the submission of a confirmatory bid. Complainant 3 was also informed that the sellers might choose the parties qualified for the further process shortly after the end of that extended deadline. The qualified bidders were not hindered from amending their confirmatory bids or to submit the proof of their financing even after that deadline, as long as no definite asset purchase agreement had been signed <sup>(166)</sup>. The deadline of 17 February 2014 was thus effectively extended to allow all bidders to amend their bids, provide proof of their financing, or submit new bids. As this procedural change was known to every qualified bidder, there was no breach of the principles of transparency and equal treatment.
- (d) As all available information was provided by the sellers to all bidders at the same time, and at least three weeks before the final decision of the Creditors' Committee to award the assets to Capricorn, there was sufficient time for the preparation and finalisation of the bidders' offers, and the principle of transparency had been complied with. The Commission also finds that complainant 3 was informed sufficiently about the rules of the tender process in advance by letters of the sellers dated 19 July 2013, 17 October 2013 and 17 December 2013. There was also no breach of the principle of equal treatment between the bidders in the access to the relevant information, as a same amount of information was provided to the bidders that qualified for the process stage concerned.
- (e) There is no evidence that Capricorn negotiated with a beer supplier or with 'Rock am Ring' before the conclusion of the asset purchase agreement. According to the insolvency administrators, it was NBG which conducted all relevant negotiations.
- (f) The notarisation of the asset purchase agreement by the two best bidders (Capricorn and [Bidder 2]) carried out before the meeting of the creditors' committee of 11 March 2014 is not an indicator of a breach of the principles of transparency and equal treatment. There is no evidence that Capricorn was notified of the result of the tender process before the meeting of the creditors' committee took place on 11 March 2014.
- (g) None of the bidders has provided a financing guarantee for the entire purchase price. The sellers have therefore not breached the principle of equal treatment by making *de facto* the requirement of secure financing less strict during the tender process.
- (h) The provision of a mark-up of the asset purchase agreement was part of commercial negotiation and is not a matter relevant from the State aid point of view.
- (i) The considerations of environmental aspects of complainant 3's offer by the sellers were carried out only in respect to the fact that complainant 3 had not submitted a proof of the financing of his bid. Such considerations were not part of the criteria for the selection of the successful bidder. These considerations therefore had no impact on the result of the tender process.
- (j) Regarding complainant 3's allegation that, in the context of the tender process in question, Capricorn and the sellers received State aid advice from the same law firm ([...]) and in particular one lawyer of that firm, the Commission notes that, according to the statement of the German authorities, that law firm and its lawyers: (a) did not provide any advice to the sellers of the tender procedure (including the insolvency administrators and the Creditors' Committee); (b) did not have any access to any information contained in the bids of other interested investors; (c) only had access to the information concerning the tender procedure which was available in the data room and in the press; and (d) did not provide the sellers or the Creditors' Committee with any recommendation. Regarding the particular lawyer of that law firm, to which complainant 3 has referred in its complaint, Germany has also explained the following: (a) that lawyer worked for the Land from May 2012 until April 2013, i.e. before the initiation of the tender process in June 2013; (b) that lawyer was not in any contact with the Land or the Federal Republic of Germany during the tender process; (c) that lawyer never advised the Land or the sellers in relation to the bidding process; and (d) the same lawyer only participated as an independent expert in the hearing of the Land's parliament on 20 June 2013 concerning the law for the public access to the Nürburgring racetrack. Furthermore, Germany has explained that the State aid aspects of the tender, i.e. the fact that the tender process had to be open, transparent, unconditional

<sup>(166)</sup> The respective part of letter of 17 December 2013 reads as follows: 'For the sake of clarity, offers handed in after that timeline will, in principle, also be considered provided that the terms of the offer qualify for the further process. Any disadvantage caused by the delay will not be compensated for and will have to be fully borne by the investor. Please note that the Vendors may choose the parties which will qualify for the further process shortly after the updated timeline ends.'

and non-discriminatory, in order for the buyer not to be liable for any recovery of incompatible State aid to the sellers of the Nürburgring assets, were already made aware to all bidders, as follows: (a) through the Commission decisions to open the formal investigation procedure on 21 March 2012 and to extend it on 7 August 2012; (b) by the sellers, with all relevant documents provided in the tender's data room, including communications exchanged between the Commission and Germany on this matter; and (c) by the relevant case practice of the Commission.

- (276) The Commission therefore rejects the complaint from complainant 3 as unjustified because the assets in question have been sold to the bidder who submitted the highest bid including a proof of its financing, following an open, transparent, non-discriminatory and unconditional tender process.

#### 6.2.3. *Complaint from complainant 4*

- (277) According to the comparison included in Table 10, the bid from Capricorn leads to a higher revenue from the sale in comparison to the bid from [Bidder 2]

- (278) As regards the allegations made by complainant 4, the Commission notes the following:

- (a) The Commission takes note of the insolvency administrators' statement that the financing of the two offers submitted by [Bidder 2] and Capricorn was sufficiently secure for the sellers, even though none of both offers reached the highest possible level of security. By letter dated 24 February 2014, [Bidder 2] informed the sellers about the financial capability of the [Bidder 2] group, indicating that around EUR [930-1030] million are available for investment. The Commission also notes that by its financing commitment dated 10 March 2014 [...] established a loan facility with an aggregate maximum debt commitment equal to the amount of EUR [41-49] million to the benefit of Capricorn.
- (b). As regards the up-front payments, if a non-challengeable Commission decision exists in 2014, the sellers would have access to EUR [30-33] million in case of [Bidder 2] or EUR [58-63] million (plus around EUR 6 million of cash flow of NBG) in case of Capricorn.
- (c) Taking account of the comments made by complainant 4 and the insolvency administrators, on balance, it is not evident that the execution risk was higher for Capricorn's offer compared to [Bidder 2]'s offer.
- (d) In view of the selection criteria indicated in recital 48, the capability of the bidders as such was not a selection criterion.
- (e) In view of the selection criteria indicated in recital 48, the amount of investment to be made after the sale was not a selection criterion.
- (f) The sellers communicated with [Bidder 2] to an acceptable standard during the tender process. [Bidder 2] was not hindered from increasing or modifying his bid until the meeting of the creditors' committee took place on 11 March 2014.

- (279) The Commission has thus not found evidence proving that [Bidder 2] was discriminated in the tender process. The claim about a worse treatment of [Bidder 2] in comparison to other bidders including Capricorn is unjustified. It has to be noted that [Bidder 2] submitted a confirmatory offer, it negotiated the terms of the contract, and as the second best bidder with secured financing, [Bidder 2] was allowed to sign the final version of the draft contract. In addition, as regards the condition of a non-enforceable Commission decision, apart from an amount of EUR [7,1-7,6] million, the money provided by [Bidder 2] would be kept in a blocked account and transferred to the sellers either upon the existence of a non-challengeable Commission decision or if the buyer did not withdraw from the contract despite there being no such enforceable Commission decision by 31 March 2015 (the possibility to extend the period for the withdrawal right was not excluded)

- (280) The Commission therefore rejects the complaint from complainant 4 as unjustified because the assets in question have been sold to the bidder who submitted the highest bid including a proof of its financing, following an open, transparent, non-discriminatory and unconditional tender process.

#### 6.2.4. Conclusion

- (281) For the reasons set out above, on the basis of the available information, the Commission has not found evidence of a breach of the principles of an open, transparent, non-discriminatory and non-conditional tender process with regards to the sale of the assets of NG, MSR and CMHN, or of any offer with a higher price bid with secured financing compared to the price bid made by Capricorn.

### 7. CONCLUSION

- (282) The Commission finds that part of measure 2 (loans granted to FSZ), as well as measures 8, 11 and 15 do not constitute aid within the meaning of Article 107(1).
- (283) The Commission finds that Germany has unlawfully implemented measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 and 10, 12 to 14, and 16 to 19 in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (284) The Commission has concluded that measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 and 10, 12 to 14, and 16 to 19 in favour of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH, Congress- und Motorsport Hotel Nürburgring GmbH, Cash Settlement and Ticketing GmbH, Nürburgring Automotive GmbH, Erlebnispark Nürburgring GmbH & Co. KG, Motorsport Akademie Nürburgring GmbH & Co. KG, Test & Training International GmbH, Bike World Nürburgring GmbH, BikeWorld Nürburgring Besitz GmbH, BikeWorld Nürburgring GmbH, Camp 4 Fun GmbH & Co. KG, IPC Gesellschaft für internationale Projektcoordination mbH and MI-Beteiligungs- und Verwaltungs GmbH, respectively, constituted State aid within the meaning of Article 107(1) and are incompatible with the internal market, because the relevant conditions of the R&R Guidelines are not met and no other compatibility basis was identified.
- (285) The Commission has also concluded that:
- The sale of assets of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH does not constitute State aid,
  - The sale of assets of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH does not lead to economic continuity between Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH and capricorn NÜRBURGRING Besitzgesellschaft GmbH, the new owner of the assets, or its subsidiaries. Thus, any potential recovery of incompatible State aid will not concern capricorn NÜRBURGRING Besitzgesellschaft GmbH, the buyer of the assets sold following the tender process, or its subsidiaries,

HAS ADOPTED THIS DECISION:

#### Article 1

The following measures which Germany has implemented do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union:

Part of measure 2

- the loans in the total amount of EUR 646 738,12 granted by Nürburgring GmbH to Fahrsicherheitszentrum am Nürburgring GmbH & Co. KG between 12 April 2002 and March 2008,

## Measure 8

- the loans granted by Investitions- und Strukturbank Rheinland-Pfalz GmbH to Nürburgring GmbH on 28 July 2010 in the amounts of EUR 96 574 200 and EUR 113 590 800, to Motorsport Resort Nürburgring GmbH in the amount of EUR 92 000 000 and to Congress- und Motorsport Hotel Nürburgring GmbH in the amount of EUR 23 100 000,

## Measure 11

- the loans in the total amount of EUR 85 484 000 granted by Rheinland-Pfälzische Gesellschaft für Immobilien und Projektmanagement GmbH to Motorsport Resort Nürburgring GmbH between 27 May 2008 and 7 July 2009,

## Measure 15

- the transfer of 49,5 % of shares of Motorsport Resort Nürburgring GmbH from Mediinvest GmbH to Nürburgring GmbH for the price in the amount of EUR 1 carried out on 25 March 2010,
- the transfer of 33,8 % of shares of Motorsport Resort Nürburgring GmbH from Geisler & Trimmel General Contractor GmbH to Nürburgring GmbH for the price in the amount of EUR 1 carried out on 25 March 2010,
- the transfer of 6,7 % of shares of Motorsport Resort Nürburgring GmbH from Weber Projektierungs- und Realisierungs GmbH to Rheinland-Pfälzische Gesellschaft für Immobilien und Projektmanagement GmbH for the price in the amount of EUR 1 carried out on 25 March 2010.
- The sale of assets of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH does not constitute State aid.

*Article 2*

The following State aid, unlawfully put into effect by Germany through the measures listed below, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market:

The State aid granted in the form of:

## Measure 1

- the capital in the form of transfers to the capital reserve granted by the Land Rhineland-Palatinate to Nürburgring GmbH in the amounts of EUR 2 179 000 on 1 May 2002 and EUR 22 839 241 on 21 December 2004,
- the capital in the form of increases of own capital provided to Nürburgring GmbH by the Land Rhineland-Palatinate in the amounts of EUR 4 398 300 on 31 August 2004 and EUR 9 000 000 on 4 September 2007 and by the district of Ahrweiler in the amounts of EUR 488 700 on 31 August 2004 and EUR 1 000 000 on 4 September 2007,

## Part of measure 2

- the loans granted by Nürburgring GmbH to Erlebnispark Nürburgring GmbH & Co. KG in the total amount of EUR 6 195 170,02 between 1 January 2006 and 29 April 2009,
- the loans granted by Nürburgring GmbH to Motorsport Akademie Nürburgring GmbH & Co. KG in the amount of EUR 100 000 on 10 December 2002,
- the loans granted by Nürburgring GmbH to Test & Training International GmbH in the amount of EUR 25 000 on 15 August 2002,
- the loans granted by Nürburgring GmbH to Camp 4 Fun GmbH & Co. KG in the total amount of EUR 450 000 between 26 May 2009 and 18 December 2009,
- the loans granted by Nürburgring GmbH to BikeWorld Nürburgring Besitz GmbH in the total amount of EUR 500 000 between 17 October 2003 and 27 October 2004,

- the loans granted by Nürburgring GmbH to Bike World Nürburgring GmbH in the total amount of EUR 1 660 000 between 4 February 2004 and 22 July 2005,
- the loans granted by Nürburgring GmbH to BikeWorld Nürburgring GmbH in the total amount of EUR 1 600 000 between 20 September 2005 and 4 April 2007,

#### Measure 3

- the loans in the total amount of EUR 399 805 370 granted by the Land Rhineland-Palatinate to Nürburgring GmbH from 30 June 2003 to 11 May 2010,

#### Measure 4

- the loan in the amount of EUR 300 000 granted by Nürburgring GmbH to Motorsport Resort Nürburgring GmbH on 27 December 2007,

#### Part of measure 5

- the loans in the total amount of EUR 11 032 060 granted by Nürburgring GmbH to Cash Settlement and Ticketing GmbH from 27 August 2008 to 18 April 2011,
- the letter of comfort provided by NG to CST on 23 December 2009, committing NG until 31 December 2011 to take measures that are necessary for preventing insolvency of CST,
- the subordination of NG's claims against CST in the amount of EUR 10,4 million declared by NG on 13 December 2010,

#### Measure 6

- the service fees in the total amount of EUR 640 000 paid by Nürburgring GmbH to IPC Gesellschaft für internationale Projektcoordination mbH for its services consisting in searching for private investors;
- the loan in the amount of EUR 2 941 000 granted by Nürburgring GmbH to Motorsport Resort Nürburgring GmbH on 15 October 2008

#### Measure 7

- the consideration in the amount of EUR 1 476 830,88 provided by Nürburgring GmbH to MI-Beteiligungs- und Verwaltungs GmbH for the cession of claims of MI-Beteiligungs- und Verwaltungs GmbH, from loans taken by Cash Settlement and Ticketing GmbH as borrower, to Nürburgring GmbH carried out on 17 April 2009,

#### Measure 9

- the guarantee provided by the Land Rhineland-Palatinate on 28 July 2010, in the amounts of EUR 96 574 200 and EUR 113 590 800 to Nürburgring GmbH, EUR 92 000 000 to Motorsport Resort Nürburgring GmbH and of EUR 23 100 000 to Congress- und Motorsport Hotel Nürburgring GmbH, for the fulfilment of liabilities of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH from the loans granted as measure 8,

#### Measure 10

- the fixing of rent below market rate by Nürburgring GmbH resulting in a benefit of EUR 9 million for Nürburgring Automotive GmbH from 1 May 2010 to 31 October 2012,

#### Measure 12

- the guarantee provided by the Land Rhineland-Palatinate towards Investitions- und Strukturbank Rheinland-Pfalz GmbH, allowing Motorsport Resort Nürburgring GmbH to receive loans in the amount of EUR 85 484 000,

#### Measure 13

- the grants provided by the Land Rhineland-Palatinate to Nürburgring GmbH from revenues of the Land Rhineland-Palatinate from a tax on gambling in the amounts of EUR 1,6 million on 29 December 2009, EUR 3,2 million on 29 October 2010 and EUR 3,2 million on 29 March 2011,

## Measure 14

- the loans granted by the Land Rhineland-Palatinate to Nürburgring GmbH in the amounts of EUR 20 million on 21 August 2007, EUR 10 million on 22 December 2009, EUR 4,65 million on 28 December 2010, EUR 3,2 million on 26 April 2011 and EUR 4,95 million on 9 December 2011,
- the subordination of its claims from the loan of 29 August 2007 declared by the Land Rhineland-Palatinate towards Nürburgring GmbH in the amount of EUR 20 million,

## Measure 16

- the loan in the amount of EUR 40 405 000 granted by the Land Rhineland-Palatinate to Nürburgring GmbH on 11 January 2011,
- the grant in the amount of EUR 13,5 million provided by the Land Rhineland-Palatinate to Nürburgring GmbH in July 2011,

## Measure 17

- the compensation granted by Nürburgring GmbH to Nürburgring Automotive GmbH on the basis of the Formula 1 concession from 13 December 2010 to 27 November 2012,

## Measure 18

- the rescheduling of interest payments in the amount of EUR 1,473 million granted by Investitions- und Strukturbank Rheinland-Pfalz GmbH to Nürburgring GmbH on 15 May 2012,
- the rescheduling of interest payments in the amount of EUR 1,205 million granted by Investitions- und Strukturbank Rheinland-Pfalz GmbH to Motorsport Resort Nürburgring GmbH on 15 May 2012,
- the rescheduling of interest payments in the amount of EUR 303 000 granted by Investitions- und Strukturbank Rheinland-Pfalz GmbH to Congress- und Motorsport Hotel Nürburgring GmbH on 15 May 2012;

## Measure 19

- the debt subordination of its claims from measure 8 declared by the Land Rhineland-Palatinate towards Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH on 15 May 2012, in the outstanding amount of the subordinated claim, up to an amount of EUR 254 million, at the time when the decision for the debt subordination was adopted,
- the guarantee provided by the Land Rhineland-Palatinate on 15 May 2012 for the fulfilment of liabilities of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH from the loans granted as measure 8, in the amount of EUR 254 million.

*Article 3*

1. Germany shall recover the incompatible aid granted and as referred to in Article 2 from the beneficiaries, including Nürburgring Betriebsgesellschaft mbH as the economic successor of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH.
2. Any potential recovery of incompatible State aid will not concern capricorn NÜRBURGRING Besitzgesellschaft GmbH, the buyer of the assets sold following the tender process, or its subsidiaries.
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery. Germany shall provide the exact dates of aid provided by the State which are not indicated in the present decision.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 <sup>(167)</sup> and with Commission Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004 <sup>(168)</sup>.
5. Germany shall cancel all outstanding payments of the aid referred to in Article 2 with effect from the date of adoption of this decision.

#### *Article 4*

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

#### *Article 5*

1. Within two months following notification of this Decision, Germany shall submit the following information:
  - (a) the total amount (principal and recovery interests) to be recovered from each beneficiary;
  - (b) a detailed description of the measures already taken and planned to comply with this Decision;
  - (c) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. Germany 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 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 beneficiaries.

#### *Article 6*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 2014.

*For the Commission*  
Joaquín ALMUNIA  
Vice-President

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<sup>(167)</sup> 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).

<sup>(168)</sup> 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).

**COMMISSION DECISION (EU) 2016/152****of 1 October 2014****on State aid SA 27339 (12/C) (ex 11/NN) implemented by Germany for Zweibrücken airport and airlines using the airport***(notified under document C(2014) 5063)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

**1. PROCEDURE**

- (1) In a parliamentary question of December 2008, MEP Hiltrud Breyer raised the issue of the public financing of Zweibrücken Airport <sup>(3)</sup>. She alleged that in the period 2005-2006, the *Land* Rhineland-Palatinate ('Land') had funded the *Flugplatz GmbH Aeroville Zweibrücken* ('FGAZ') with EUR 2,4 million, which FGAZ in turned used to fund its 100 % subsidiary, the *Flughafen Zweibrücken GmbH* ('FZG'). She further alleged that during the same period, construction works on the airport costing EUR 6,96 million were fully paid for by the *Land*.
- (2) The parliamentary question was answered by Commissioner Tajani on 6 January 2009. In addition, it was registered as a complaint under CP 5/2009. On 22 January 2009, 24 September 2010, and 15 March 2011, the Commission requested further information from Germany, which it provided by letters dated 23 March 2009, 27 January 2011, and 19 May 2011.
- (3) On 8 April 2008, the Commission also requested further information from the airline Ryanair, which was provided on 15 July 2011. A German translation of Ryanair's submission was forwarded to Germany on 18 August 2011, and Germany declared on 26 September 2011 that it did not intend to comment on Ryanair's submission at that time.
- (4) By letter dated 22 February 2012, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty ('the opening decision') in respect of the public funding of the operator of Zweibrücken Airport and incentives in favour of airlines using the airport.
- (5) By letter dated 24 February 2012, the Commission requested further information after the opening decision. Germany submitted its comments on the opening decision on 4 May 2012 and responded to the Commission's request for further information on 16 April 2012.
- (6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(4)</sup>. The Commission invited interested parties to submit their comments on the alleged aid.

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

<sup>(2)</sup> OJ C 216, 21.7.2012, p. 56.

<sup>(3)</sup> Written question E-6470/08 of 2 December 2008 by Hiltrud Breyer (Verts/ALE) to the Commission regarding subsidisation of Zweibrücken airport by the Land Rhineland-Palatinate.

<sup>(4)</sup> OJ C 216, 21.7.2012, p. 56.

- (7) The Commission received comments from four interested parties, namely Ryanair, Airport Marketing Services ('AMS'), Germanwings and TUIFly. It forwarded them to Germany, which was given the opportunity to react within one month; its comments were received by letter dated 26 October 2012.
- (8) In addition, the Commission received further comments from Ryanair on 20 December 2013, 17 January 2014 and 31 January 2014. Those submissions were forwarded to Germany, which did not wish to comment on them.
- (9) By letters dated 6 November 2013, 14 March 2014, and 2 April 2014 the Commission requested further information. Germany responded to the Commission's requests for further information on 16 December 2013, 15 January 2014, 5 April 2014, 15 April 2014, 24 April 2014, 11 June 2014 and 27 June 2014.
- (10) By a letter dated 25 February 2014, the Commission informed Germany of the adoption of the 2014 Aviation Guidelines <sup>(5)</sup> on 20 February 2014, of the fact that those guidelines would become applicable to the case at hand from the moment of their publication in the *Official Journal of the European Union*, and gave Germany the opportunity to comment on the guidelines and their application within 20 working days of their publication in the *Official Journal*.
- (11) By letters dated 24 February 2014, the Commission also informed the third parties of the adoption of the 2014 Aviation Guidelines on 20 February 2014, of the fact that those guidelines would become applicable to the case at hand from the moment of their publication in the *Official Journal of the European Union*, and gave the third parties the opportunity to comment on those guidelines and their application within 20 working days of their publication in the *Official Journal*.
- (12) The 2014 Aviation Guidelines were published in the *Official Journal of the European Union* on 4 April 2014. They replaced the 1994 Aviation Guidelines <sup>(6)</sup> as well as the 2005 Aviation Guidelines <sup>(7)</sup>.
- (13) 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 one month of their publication date <sup>(8)</sup>.
- (14) Comments on the application of the 2014 Guidelines were received from Germany on 8 May 2014. Germany agreed with the application of the 2014 Aviation Guidelines in this case. The third parties did not submit any comments.
- (15) By letter dated 17 July 2014, Germany agreed exceptionally to waive its rights deriving from Article 342 of the Treaty in conjunction with Article 3 of Regulation (EC) No 1/1958 <sup>(9)</sup> and to have this Decision adopted and notified pursuant to Article 297 of the Treaty in English.

## 2. BACKGROUND TO THE INVESTIGATION AND CONTEXT OF THE MEASURES

### 2.1. HISTORY AND DEVELOPMENT OF ZWEIBRÜCKEN AIRPORT

- (16) Zweibrücken Airport was a military airfield until 1991, when it was abandoned by the U.S. military. From 1992 until 1999, the airfield was the object of a conversion project co-financed by the Union <sup>(10)</sup>. The Union funding was used to render the airfield available for civilian aviation, and the necessary measures encompassed the eradication of obstacles, the modernisation and installation of a tower and the drainage of the runway. The private investors of the project also envisaged the subsequent creation of a business park, a multimedia park and leisure installations.

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

<sup>(6)</sup> Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the Aviation Sector (OJ C 350, 10.12.1994, p. 5).

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

<sup>(8)</sup> OJ C 113, 15.4.2014, p. 30.

<sup>(9)</sup> Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

<sup>(10)</sup> Commission Decision of 22 December 1993 — K (93) 3964/6 — KONVER I — and Commission Decision of 21 December 1995 — K (95) 3208 — KONVER II. For Rhineland-Palatine the conversion projects included the project 'military airfield Zweibrücken'. Union financing reached EUR 9 million.

- (17) From 2000 until 2006, the airfield was not generally used for commercial aviation. It was used by military planes, private planes, leisure flights and only occasional commercial flights. The majority of the passengers flying from and to Zweibrücken Airport were transported by military flights, whilst the remainder used company-owned planes or taxi flights. Attempts to attract commercial operators failed. Part of the reason was the existence of a NATO air combat training zone (POLYGON), which severely restricted the ability of civilian operators to reach or leave Zweibrücken during the training zone's operating hours.
- (18) It was only after the establishment of a control zone (CTR Zweibrücken), regulating the use of the airspace by civilian and military aircraft, that a commercial operator could be attracted. Commercial traffic with scheduled and charter flights started with Germanwings' inaugural flight to Berlin on 15 September 2006. Charter operator TUIFly commenced operations on 30 March 2007. Ryanair operated its only route from Zweibrücken (to London-Stansted) in the period between 28 October 2008 and 22 September 2009, thereafter ceasing its services at Zweibrücken airport.
- (19) The annual capacity of Zweibrücken Airport is currently around 700 000 passengers, but could reach up to 1 million passengers in view of the capacity of the runway and handling areas.
- (20) Table 1 indicates the development of Zweibrücken Airport in terms of passenger numbers and aircraft movements from 2006 to 2012.

Table 1

**Passenger Numbers 2006-2012 <sup>(11)</sup>**

| Year | Passengers | Aircraft Movements |
|------|------------|--------------------|
| 2006 | 78 000     | 23 160             |
| 2007 | 288 000    | 26 474             |
| 2008 | 327 000    | 27 000             |
| 2009 | 338 000    | 21 000             |
| 2010 | 265 000    | 16 000             |
| 2011 | 224 000    | 14 500             |
| 2012 | 242 880    | 13 230             |

**2.2. GEOGRAPHIC SITUATION OF ZWEIBRÜCKEN AIRPORT**

- (21) Zweibrücken Airport is situated 4 km south-east of the City of Zweibrücken in the German *Land* Rhineland-Palatinate. The nearest <sup>(12)</sup> other airports are:
- (a) *Saarbrücken Airport* (approximately 39 km, or approximately 29 minutes by car)
  - (b) *Frankfurt-Hahn Airport* (approximately 128 km, or approximately 84 minutes by car)
  - (c) *Frankfurt (Main) Airport* (approximately 163 km, or approximately 91 minutes by car)
  - (d) *Luxembourg Airport* (approximately 145 km, or approximately 86 minutes by car)

<sup>(11)</sup> <http://www.flughafen-zweibruecken.de/de/wir-ueber-uns-de/daten-und-fakten-de>.

<sup>(12)</sup> All distances in road kilometres, based on the fastest route. Source: maps.google.com, accessed 25 June 2014.

- (e) *Karlsruhe/Baden-Baden Airport* (approximately 105 km, or approximately 88 minutes by car)
  - (f) *Metz-Nancy Airport* (approximately 129 km, or approximately 78 minutes by car)
  - (g) *Strasbourg Airport* (approximately 113 km, or approximately 87 minutes by car)
- (22) According to the study provided by 'Desel Consulting' and the 'Airport Research GmbH' in 2009 <sup>(13)</sup>, on average about 15 % of passengers per year originate from other Member States (Luxembourg and France). The remaining passengers originate from within Germany, mostly from the region of *Kreis* South-West Saarpfalz, the City of Saarbrücken, the City of Saarlouis, and the region of Saarpfalz-Kreis.

### 2.3. LEGAL AND ECONOMIC SET-UP OF ZWEIBRÜCKEN AIRPORT

- (23) Zweibrücken Airport is owned and operated by FZG. FZG is a 100 % subsidiary of FGAZ, with whom it has concluded a profit and loss transfer agreement ('P&L Agreement'). The P&L Agreement ensures that all of FZG's losses will be covered by and all profits transferred to FGAZ.
- (24) FGAZ, in turn, is in shared ownership. The *Land* Rhineland-Palatinate owns 50 % of the shares, while the remaining 50 % are owned by the *Zweckverband Entwicklungsgebiet Flugplatz Zweibrücken* ('ZEF'), an association of public territorial entities in Rhineland-Palatinate. The public owners of FGAZ cover its financing needs by providing annual capital injections. According to Germany, FGAZ does not itself carry out any activities related to aviation. As far as aviation is concerned, FGAZ simply passes the public funding on to FZG. FGAZ does, however, carry out some activities related to marketing plots of land in the vicinity of the airport.

### 3. DESCRIPTION OF THE MEASURES AND GROUNDS FOR INITIATING THE PROCEDURE

- (25) The Commission investigated several measures involving Zweibrücken Airport. The Commission assessed whether those measures constituted State aid and whether any State aid could be considered compatible with the internal market.
- (26) The following measures were investigated as potentially constituting State aid to FGAZ and FZG:
- (a) direct public financing by *Land* Rhineland-Palatinate and ZEF of Zweibrücken Airport's costs as regards:
    - infrastructure investments (2000-2009)
    - operating costs (2000-2009);
  - (b) a bank loan and participation in the *Land* Rhineland-Palatinate's internal cash pool.
- (27) The following measures were investigated as potentially constituting State aid to the airlines operating from Zweibrücken:
- (a) discounts on airport charges for various airlines (Germanwings, TUIFly, and Ryanair);
  - (b) the marketing contracts with Ryanair.

#### 3.1. PUBLIC FINANCING BY LAND RHINELAND-PALATINATE AND ZEF OF ZWEIBRÜCKEN AIRPORT

##### 3.1.1. DETAILED DESCRIPTION OF THE MEASURE

- (28) The public financing of Zweibrücken Airport took place in two different forms. First, the *Land* Rhineland-Palatinate and the ZEF supported specific infrastructure investments of FZG with direct grants. Secondly, the owners of FGAZ annually injected capital into FGAZ. The purpose of these capital injections, which cover FGAZ's own losses, is to allow FGAZ to comply with its obligations under the P&L Agreement, according to which FGAZ has to cover the losses of FZG.

<sup>(13)</sup> Desel Consulting und Airport Research Center GmbH, 'Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025', Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009, p. 56.

- (29) The direct grants supporting specific infrastructure investments made between 2000 and 2005 and between 2006 and 2009 are listed in Tables 2 and 3.

Table 2

**Infrastructure Investments 2000-2005**

| Zuwendungsbescheid vom | Maßnahmen                             | Gesamtkosten der Investitionsmaßnahmen | Landesmittel | Mittel des Trägers | Ausgezahlte Mittel insgesamt | Davon Landesmittel für Baumaßnahmen |
|------------------------|---------------------------------------|----------------------------------------|--------------|--------------------|------------------------------|-------------------------------------|
|                        |                                       |                                        |              |                    |                              |                                     |
|                        |                                       |                                        |              |                    |                              |                                     |
| 2000                   |                                       |                                        |              |                    |                              |                                     |
| 5.6.2000               | Wendehämmer, Boden-<br>geräte, usw.   | [... (*)                               | [...]        | [...]              | [...]                        | [...]                               |
| 30.11.2000             | Flugzeughalle 25 × 25                 | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
| 30.11.2000             | Flugzeughalle 56 × 18                 | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
| 24.11.2000             | Renovierung Halle 360                 | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
| 1.12.2000              | Renovierung Halle 370                 | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
| Gesamt 2000            |                                       | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
|                        |                                       |                                        |              |                    |                              |                                     |
|                        |                                       |                                        |              |                    |                              |                                     |
| 2001                   |                                       |                                        |              |                    |                              |                                     |
| 23.7.2001              | TODA 1. Phase                         | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
| 22.11.2001             | Umorg. Sicherheitsbereich             | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
| Gesamt 2001            |                                       | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
|                        |                                       |                                        |              |                    |                              |                                     |
|                        |                                       |                                        |              |                    |                              |                                     |
| 2002                   |                                       |                                        |              |                    |                              |                                     |
| 16.7.2002              | außerord. Rep. Start- u.<br>Landebahn | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
| Gesamt 2002            |                                       | [...]                                  | [...]        | [...]              | [...]                        | [...]                               |
|                        |                                       |                                        |              |                    |                              |                                     |

| Zuwendungs-<br>bescheid vom | Maßnahmen                                 | Gesamt-<br>kosten der<br>Investitions-<br>maßnahmen | Landesmittel | Mittel des<br>Trägers | Ausgezahlte<br>Mittel insge-<br>samt | Davon Lan-<br>desmittel für<br>Baumaßnah-<br>men |
|-----------------------------|-------------------------------------------|-----------------------------------------------------|--------------|-----------------------|--------------------------------------|--------------------------------------------------|
|                             |                                           |                                                     |              |                       |                                      |                                                  |
| 2003                        |                                           |                                                     |              |                       |                                      |                                                  |
| 14.4.2003                   | Überarb. Markierungen<br>Flugbetr. fläche | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |
| 15.9.2003                   | 2. Phase TODA                             | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |
| Gesamt 2003                 |                                           | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |
|                             |                                           |                                                     |              |                       |                                      |                                                  |
|                             |                                           |                                                     |              |                       |                                      |                                                  |
| 2004                        |                                           |                                                     |              |                       |                                      |                                                  |
| 26.1.2004                   | Gebäude 320                               | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |
| 1.11.2004                   | Luftsicherheitsmaßn.                      | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |
| Gesamt 2004                 |                                           | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |
|                             |                                           |                                                     |              |                       |                                      |                                                  |
|                             |                                           |                                                     |              |                       |                                      |                                                  |
| 2005                        |                                           |                                                     |              |                       |                                      |                                                  |
| 4.8.2005                    | Feuerlöschfahrzeug                        | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |
| 13.12.2005                  | Feuerlöschfahrzeug                        | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |
| Gesamt 2005                 |                                           | [...]                                               | [...]        | [...]                 | [...]                                | [...]                                            |

(\*) covered by the obligation of professional secrecy

Table 3

### Infrastructure Investments 2006-2009

| Zuwendungs-<br>bescheid vom | Maßnahme               | Gesamt-<br>kosten<br>der Inves-<br>tions-<br>maßnah-<br>me | Landes-<br>mittel | Mittel des<br>ZEF | Mittel des<br>Trägers | ausge-<br>zahlte<br>Mittel des<br>Landes | ausge-<br>zahlte<br>Mittel des<br>ZEF | Davon<br>Landes-<br>mittel für<br>Baumaß-<br>nahme |
|-----------------------------|------------------------|------------------------------------------------------------|-------------------|-------------------|-----------------------|------------------------------------------|---------------------------------------|----------------------------------------------------|
|                             |                        |                                                            |                   |                   |                       |                                          |                                       |                                                    |
| <b>2006</b>                 |                        |                                                            |                   |                   |                       |                                          |                                       |                                                    |
| 22.11.2006                  | Trinkwasser-<br>anlage | [...]                                                      | [...]             |                   | [...]                 | [...]                                    |                                       |                                                    |

[illegible]

| Zuwendungsbescheid vom | Maßnahme                      | Gesamtkosten der Investitionsmaßnahme | Landesmittel | Mittel des ZEF | Mittel des Trägers | ausgezahlte Mittel des Landes | ausgezahlte Mittel des ZEF | Davon Landesmittel für Baumaßnahme |
|------------------------|-------------------------------|---------------------------------------|--------------|----------------|--------------------|-------------------------------|----------------------------|------------------------------------|
| 21.10.2008             | Vorfeldbeleuchtung            | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| 27.10.2008             | Heizgerät                     | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| 9.11.2008              | Sanierung Landebahn           | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| 31.10.2008             | Umbau Terminal                | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| 24.11.2008             | Wetterbeobachtungssystem      | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| 24.11.2008             | Geräte, Fahrzeuge             | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| Gesamt 2008            |                               | [...]                                 | [...]        |                | [...]              | [...]                         |                            | [...]                              |
|                        |                               |                                       |              |                |                    |                               |                            |                                    |
| <b>2009</b>            |                               |                                       |              |                |                    |                               |                            |                                    |
| 12.8.2009              | Landebahnsanierung            | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| 2.9.2009               | Erstellung DES                | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| 16.10.2009             | Guard Lights                  | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| 19.10.2009             | Flugzeugschlepper, Förderband | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |
| Gesamt 2009            |                               | [...]                                 | [...]        | [...]          | [...]              | [...]                         | [...]                      | [...]                              |

- (30) The total investment amount between 2000 and 2009 amounted to EUR 27 987 281, whereas the total amount of grants from the *Land* amounted to EUR 21 588 534. The biggest single investments were the extension of the runway in 2001/2003 (EUR [...]), the modernisation of the terminal in 2006 (EUR [...]), and the modernisation of the runway in 2008/2009 (EUR [...]).
- (31) As far as the capital injections by the *Land* Rhineland-Palatinate/ZEF into FGAZ and the coverage of FZG's losses by FGAZ are concerned, Table 4 provides the relevant data.
- (32) It must furthermore be noted that while *Land* and ZEF both held 50 % of the shares in FGAZ between 2000 and 2009 and in principle provided equal parts of the capital injections, the *Land* in reality subsidised ZEF's share. Until the end of 2005, the *Land* covered, in addition to its own share of 50 % of the required capital injections, 90 % of ZEF's share as well. Afterwards, the *Land* reduced that latter percentage, first to 80 % in 2006 and then to 60 % from 2007 onward. In consequence, the *Land* covered between 95 % (until 2005) and 80 % (from 2007 onward) of the annual losses of FGAZ.

Table 4

**Capital Injections and Results of Business Activities**

| Year         | Capital Injections of Land Rhineland-Palatinate/ZEF into FGAZ | Annual result FGAZ | Annual results FZG | EBITDA FZG |
|--------------|---------------------------------------------------------------|--------------------|--------------------|------------|
| 2000         | [...]                                                         | [...]              | [...]              | [...]      |
| 2001         | [...]                                                         | [...]              | [...]              | [...]      |
| 2002         | [...]                                                         | [...]              | [...]              | [...]      |
| 2003         | [...]                                                         | [...]              | [...]              | [...]      |
| 2004         | [...]                                                         | [...]              | [...]              | [...]      |
| 2005         | [...]                                                         | [...]              | [...]              | [...]      |
| 2006         | [...]                                                         | [...]              | [...]              | [...]      |
| 2007         | [...]                                                         | [...]              | [...]              | [...]      |
| 2008         | [...]                                                         | [...]              | [...]              | [...]      |
| 2009         | [...]                                                         | [...]              | [...]              | [...]      |
| <b>Total</b> | [...]                                                         | [...]              | [...]              | [...]      |

## 3.1.2. REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

- (33) The opening decision distinguishes between public financing of investments in the infrastructure of Zweibrücken Airport and public financing of its operating costs.

3.1.2.1. *Infrastructure investments***Existence of aid**

- (34) The opening decision first noted that as regards investments into the airport infrastructure, FZG is an undertaking for the purposes of Article 107(1) of the Treaty. It recalled that in the *Leipzig/Halle* judgment <sup>(14)</sup>, the General Court confirmed that an entity which constructs and operates airport infrastructure while levying a charge on the users is carrying out an economic activity. The only exception would be certain activities that could be qualified as an exercise of public power; those activities would be qualified as non-economic in nature, and therefore not subject to State aid rules. The opening decision also asked Germany to submit further information on which activities could be qualified as being non-economic in nature.
- (35) The opening decision also observed that FGAZ did not carry out any airport-related activities itself, but merely passed on the public funding it received to FZG. However, it noted that FGAZ did carry out some economic activities with respect to plots of land located in the vicinity of the airport. Because of those activities, the opening decision considered that FGAZ also constituted an undertaking for the purposes of Article 107(1) of the Treaty.
- (36) Considering that the direct grants for investment projects were financed from the Land's budget, and that the capital injections in favour of FGAZ (and ultimately FZG) stemmed from the public budget of the Land and ZEF, the opening decision concluded that the measures were financed through public resources.

<sup>(14)</sup> Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission* (hereinafter: 'Leipzig/Halle judgment') [2011] ECR II-1311, in particular paragraphs 93-94; confirmed by case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] ECLI:EU:C:2012:821.

- (37) As regards the question of whether FGAZ and FZG received an advantage, the opening decision observed that public funding does not constitute an advantage where the public body granting the funding acted like a Market Economy Operator ('MEO'). The opening decision noted that Germany had not presented any evidence that in granting the public funding, it acted like a MEO. Rather, it was apparent that, unlike a private investor, in granting the funding the public authorities had regional and social policy considerations in mind. As it could, therefore, not be concluded that the public authorities acted like a MEO, the opening decision reached the preliminary conclusion that the public funding provided an advantage to FGAZ/FZG.
- (38) The opening decision next noted that the public funding was only granted to FGAZ/FZG, meaning that it was selective in nature.
- (39) Finally, the opening decision explained that because there was increasing competition between regional airports, any advantage granted to Zweibrücken Airport was liable to distort competition. It particularly referred to Saarbrücken Airport, located only 39 kilometres by road away from Zweibrücken Airport. Noting further the traffic development forecasts for Zweibrücken Airport, the opening decision also observed that the advantage would probably have an effect on trade between Member States.
- (40) In conclusion, the opening decision found that since all required elements were fulfilled, the public financing of infrastructure investments at Zweibrücken Airport constituted State aid.

### Compatibility

- (41) The opening decision observed that the 2005 Aviation Guidelines provide the framework against which to assess the compatibility of the public financing of infrastructure investments. They set out a number of criteria, which the Commission has to take into account for the assessment of compatibility pursuant to Article 107(3)(c) of the Treaty. Pursuant to point 61 of the 2005 Aviation Guidelines, such public financing is compatible where:
- (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.
- (42) In addition, State aid to airports — as any other State aid measure — should have an incentive effect and should be necessary and proportional in relation to the targeted legitimate objective in order to be compatible.
- (43) As regards the question whether the construction and operation of the infrastructure meets a clearly defined objective of common interest, the opening decision noted that Zweibrücken Airport serves to improve the accessibility of the part of *Land Rhineland-Palatinate* in which it is located. It furthermore recalled the German submission that the Airport promotes the economic development of the region. However, the opening decision also recalled that the airport only commenced its commercial aviation services in 2006, and that other airports, above all Saarbrücken Airport, are located in its vicinity and provide connectivity to the region. On the basis of the latter finding, the opening decision expressed doubts as to whether the public funding of Zweibrücken's infrastructure served an objective of common interest or merely duplicates the already available infrastructure in the region.
- (44) With respect to the necessity and proportionality of the infrastructure, Germany had submitted that only those investments had been undertaken that were necessary to ensure the compliance of the Airport with all relevant safety standards. The opening decision, however, noted that Zweibrücken Airport was located in such close vicinity to Saarbrücken Airport that it had to be presumed to be in competition with it. Other airports might also stand in direct competition with Zweibrücken Airport, in particular as regards freight or leisure travel. Under these circumstances, the opening decision expressed doubts as to whether the infrastructure at Zweibrücken was necessary and proportionate as regards the stated objective.

- (45) As regards the infrastructure's prospects, the opening decision recalled Germany's submission that the passenger numbers were expected to increase to approximately 335 000 in 2015 and possibly to more than 1 000 000 by 2025. Germany had also submitted that it expected Zweibrücken to become profitable by 2015. However, the opening decision observed that Zweibrücken Airport had generated increasing losses since the start of commercial aviation in 2006, which casts doubt on the ability of the Airport to generate profits in the future. These doubts are reaffirmed by the proximity of Saarbrücken Airport, which could be in competition with Zweibrücken for the same passengers. In the light of this, the opening decision expressed doubts as to the medium-term prospects for use of the airport infrastructure.
- (46) The opening decision finally expressed doubts as to whether all potential users had access to the infrastructure in an equal and non-discriminatory manner. It also raised the question of whether the development of trade would be affected to an extent contrary to the Union's interest, notably in the light of its vicinity to Saarbrücken Airport.

### 3.1.2.2. *Operating aid*

#### **Existence of aid**

- (47) The opening decision first recalled its previous conclusion that both the FGAZ and FZG are undertakings for the purposes of Article 107(1) of the Treaty. It also recalled that since the capital injections stemmed directly from public authorities, they constitute a transfer of State resources and are imputable to the State. Considering further that operating aid relieves the beneficiary of some of the expenditure connected to its business, the capital injections granted FGAZ and FZG an economic advantage which they would not have obtained under normal market conditions. Finally, it recalled that operating aid is liable to distort competition and affect trade between Member States in the same way that public financing of infrastructure investments is. It concluded that the operating aid in the form of capital injections to the benefit of FGAZ and FZG constituted State aid.

#### **Compatibility — SGEI Decision**

- (48) Germany had argued that Zweibrücken Airport was entrusted with providing a service of general economic interest ('SGEI') and that operating aid was exempted from notification and compatible with the internal market on the basis of the 2005 SGEI Decision<sup>(15)</sup>. After observing that Zweibrücken Airport served less than 1 000 000 passengers per year and therefore complied with the condition of Article 2(1)(d) of the 2005 SGEI Decision, the opening decision expressed doubts whether the operation of the Airport constitutes an SGEI.
- (49) More particularly, the opening decision rejected Germany's argument that a contribution to the regional and economic development of the region was sufficient to classify the entire operation of the airport as an SGEI. The opening decision stressed that the region was already well served by other airports and that it was therefore not apparent why it would be necessary to entrust Zweibrücken Airport with an SGEI to provide airport services.
- (50) The opening decision also explained that on the basis of the available information it was not clear whether the conditions of Article 4 of the 2005 SGEI Decision were met. The general obligation to operate the airport, contained in §45 Luftverkehrs-Zulassungs-Ordnung (Air Traffic Licensing Regulation, 'LuftVZO'), did not fulfil the conditions listed in Article 4 of the 2005 SGEI Decision, and this obligation would in any event disappear if it were decided to close the airport. It was further observed that due to missing data, the Commission had not been able to assess compliance with Article 5 of the 2005 SGEI Decision.
- (51) The opening decision finally observed that since the 2012 SGEI Decision<sup>(16)</sup> only exempted State aid for airports with less than 200 000 passengers from notification, any aid to Zweibrücken Airport would have to be notified to the Commission for the period from 31 January 2014 onward, even if it could be considered to comply with the 2005 SGEI Decision.

<sup>(15)</sup> Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

<sup>(16)</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union 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 7, 11.1.2012, p. 3).

**Compatibility — 2005 Aviation Guidelines**

- (52) The opening decision recalled that operating aid is generally not compatible with the internal market, and that it can only exceptionally be declared compatible under strict conditions. According to point 27 of the 2005 Aviation Guidelines, operating aid can only be declared compatible for airports located in the most disadvantaged regions of the Union, that is to say, those falling under Article 107(3)(a) of the Treaty as well as the most remote regions and sparsely populated areas. It observed that Zweibrücken Airport was located in any of those areas, so that the aid could not be considered compatible under point 27 of the guidelines.
- (53) As regards the possibility of declaring the operating aid compatible pursuant to Section 4.2 of the 2005 Aviation Guidelines, the opening decision pointed out that the compatibility criteria in that section are similar to those listed in the 2005 SGEI Decision. As the Commission had reached the preliminary conclusion that the conditions of the 2005 SGEI Decision were not fulfilled, it reached the same conclusion as regards the conditions of the 2005 Aviation Guidelines.
- (54) The opening decision finally also noted that, since 31 January 2012, the rules contained in Section 4.2 of the 2005 Aviation Guidelines are supplemented by the provisions of the 2012 SGEI Framework <sup>(17)</sup>. This means that any public funding that is covered by the 2005 SGEI Decision, but not the 2012 SGEI Decision, would, from 31 January 2014 onward, need to fulfil both the requirements laid down in Section 4.2 of the 2005 Aviation Guidelines and the provisions of the 2012 SGEI Framework.

**Compatibility — Rescue & Restructuring Guidelines**

- (55) The opening decision finally commented on the possible compatibility of the capital injections pursuant to the Rescue & Restructuring Guidelines <sup>(18)</sup>. It observed that since the airport only commenced its commercial operation in 2006, it could be considered to constitute a 'new undertaking' in the sense of the Rescue & Restructuring Guidelines, excluding therefore their application. It also noted that no restructuring plan had been presented on the basis of which the aid could have been granted.
- (56) Accordingly, on the basis of the available information, it was concluded that the operating aid to FZG/FGAZ could not be declared compatible with the internal market.

**3.2. POTENTIAL AID IN CONNECTION WITH A BANK LOAN AND PARTICIPATION IN THE LAND RHINELAND-PALATINATE'S INTERNAL CASH POOL****3.2.1. DETAILED DESCRIPTION OF THE MEASURE**

- (57) On 20 October 2009, the FZG obtained a loan of [...] million from *Sparkasse Südwestpfalz*. The interest rate was set at 2,05 % per annum until 15 October 2012, after which the parties could renegotiate the conditions. The *Land Rhineland-Palatinate* granted FZG a 100 % guarantee of the loan, without demanding any remuneration or collateral in return.
- (58) Since 26 February 2003, FGAZ has also been entitled to participate in a 'cash-pool' (that is to say, a financing pool) established by *Land Rhineland-Palatinate's* Ministry of Finance. The cash-pool is a refinancing mechanism open to undertakings in which the *Land* holds at least 50 % of the shares.
- (59) The maximum loan amount that FGAZ could draw from the cash-pool was set at EUR 3,5 million from 16 January 2009 onward and raised to EUR 6 million on 1 October 2009. FGAZ does not have to provide collateral, the interest rates are set at call money rate, and the loans are repaid whenever FGAZ has liquidity available.

<sup>(17)</sup> Commission Communication on a European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11.1.2012, p. 15).

<sup>(18)</sup> 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).

- (60) Germany explained that the cash-pool functions as follows: the FGAZ requests funds from the cash-pool to ensure its liquidity, and the *Land* provides those funds from the cash-pool. The interest rates charged are market-based call money rates. If the balance of the cash-pool itself is negative, the *Land* replenishes it by taking up loans on the market in its own name. Germany further explained that the *Land* essentially passes on the conditions it obtains on the capital market to the participants in the cash-pool, thereby allowing the participants — the undertakings in which the *Land* holds a majority of the shares — to refinance themselves under the same conditions as the *Land* itself.
- (61) Germany submitted that until May 2006, the FGAZ's balance with the cash-pool was always positive, and only thereafter started to be negative. Germany provided the data set out in Table 5 on the FGAZ's balance with the cash-pool between 2006 and 2009.

Table 5

**FGAZ's balance with the cash-pool between 2006 and 2009**

| Year        | Deposits | Withdrawals | Balance on 31.12. |
|-------------|----------|-------------|-------------------|
| <b>2006</b> | [...]    | [...]       | [...]             |
| <b>2007</b> | [...]    | [...]       | [...]             |
| <b>2008</b> | [...]    | [...]       | [...]             |
| <b>2009</b> | [...]    | [...]       | [...]             |

## 3.2.2. REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

3.2.2.1. *Existence of aid*

- (62) The opening decision first stated that FZG and FGAZ constitute undertakings for the purposes of Article 107(1) of the Treaty. It next observed that it was clear that the guarantee and the cash-pool were imputable to the State and granted from public resources. As regards the loan itself, however, the opening decision asked for further information from Germany on the question of whether the grant of the loan by *Sparkasse Südwestpfalz*, a public bank, was imputable to the State.
- (63) The opening decision applied the MEO test to determine whether the loan, the guarantee, or the cash-pool had provided an advantage to FZG/FGAZ. It noted that as regards the loan and the cash-pool, it had to assess whether both complied with the conditions set out in the 2008 Reference Rate Communication <sup>(19)</sup>. As no information on the relevant reference interest rate had been provided, the Commission asked Germany to provide all the information necessary to assess whether the loan and cash-pool complied with the conditions set out in the 2008 Reference Rate Communication.
- (64) With respect to the guarantee granted by the *Land* Rhineland-Palatinate, the opening decision observed that whether or not the guarantee constituted State aid had to be assessed pursuant to the Guarantee Notice <sup>(20)</sup>. Noting that sufficient information was not available, the opening decision requested Germany to supply all information necessary to assess the guarantee under the Guarantee Notice.
- (65) Considering next that the loan, the guarantee, and the cash-pool were only available to FGAZ/FZG, the opening decision found that they were selective. It also considered that — as was the case regarding the public financing of infrastructure and operating aid — it could not be excluded that the loan, guarantee, and cash-pool distorted competition.

<sup>(19)</sup> Communication from the Commission on the revision of the method for setting the reference and discount rates of 12 December 2007 (OJ C 14, 19.1.2008, p. 6).

<sup>(20)</sup> Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

- (66) On the basis of the available information, the opening decision accordingly concluded that the loan, the public guarantee, and the cash-pool constituted State aid within the meaning of Article 107(1) of the Treaty. The possible compatibility of those measures was not assessed.

### 3.3. DISCOUNTS ON AIRPORT CHARGES FOR RYANAIR, GERMANWINGS AND TUIFly

#### 3.3.1. DETAILED DESCRIPTION OF THE MEASURE

- (67) The schedule of charges presented by Germany entered into force on 1 October 2005. According to that schedule, the landing charges are determined by reference to the aircraft's maximum take-off weight ('MTOW') and the number of passengers on board. For scheduled flights with more than 50 passengers, however, a lump sum of EUR 6 per passenger is envisaged. That lump sum covers all airport charges, including the security charge of EUR 3,58.
- (68) A series of discounts are available where certain conditions are fulfilled:
- (a) New scheduled connections: the Airport grants a 100 % discount on landing, handling and passenger charges for a period of 12 months for any airline operating a new route from Zweibrücken, as long as the new destination is served daily during the summer schedule and at least three times per week during the winter schedule. If the airline bases an aircraft at the airport, the 100 % discount can be extended for an additional six months.
  - (b) New charter connections: the Airport grants a 100 % discount on landing, handling and passenger charges for any airline newly operating from Zweibrücken until a threshold of 100 000 passengers is reached; consequently, for these first 100 000 passengers, no landing, handling or passenger charges have to be paid. The airline has to serve the new destination daily during the summer schedule and at least three times per week during the winter schedule. Airlines fulfilling certain further conditions — such as increasing the frequency of their services by 50-100 % in two consecutive summer schedules and reaching a certain passenger-threshold — are granted a further 100 % discount for an additional 50 000-100 000 passengers.

##### 3.3.1.1. *Charges paid by Germanwings*

- (69) In August/September 2006, Germanwings and FZG concluded an agreement regarding the establishment of the route Zweibrücken — Berlin-Schönefeld, starting in September 2006. That contract envisaged charges of EUR [...] per passenger, covering landing, parking, passenger and security charges. The charges were discounted by [...] for the first year of operation. From 16 September 2007 onward, Germanwings paid EUR [...] per passenger, while from 1 January 2008 onward that payment was reduced to EUR [...] per passenger. On 9 January 2011, Germanwings discontinued its service to and from Zweibrücken.

##### 3.3.1.2. *Charges paid by TUIFly*

- (70) Germany provided a contract between FZG and TUIFly, according to which TUIFly had to pay a lump sum of EUR [...] per passenger, covering all relevant charges. Nevertheless, it further submitted that TUIFly was exempted from all charges for the first [...] passengers. After that passenger number was reached on 1 August 2010, TUIFly paid a lump sum of [...] per passenger.

##### 3.3.1.3. *Charges paid by Ryanair*

- (71) Ryanair served the route Zweibrücken — London-Stansted between 28 October 2008 and 22 September 2009. For the first year of operation, FZG and Ryanair had agreed on [...]. In return, Ryanair committed to reach at least [...] passengers per year. According to Germany, Ryanair paid [...].

##### 3.3.1.4. *Services received by Germanwings, TUIFly and Ryanair*

- (72) The contracts between FZG and the various airlines all contain a section on additional services and charges. Table 6 contains a comparison of the most important additional services and the prices charged to those airlines.

Table 6

**Additional Services and Charges**

| Service                                                            | Price TUIFly | Price Germanwings | Price Ryanair |
|--------------------------------------------------------------------|--------------|-------------------|---------------|
| <b>Air Starter Unit</b>                                            | [...]        | [...]             | [...]         |
| <b>Ground Power Unit</b>                                           | [...]        | [...]             | [...]         |
| <b>Aircraft cleaning (standard)</b>                                | [...]        | [...]             | [...]         |
| <b>Aircraft cleaning (overnight stop)</b>                          | [...]        | [...]             | [...]         |
| <b>Aircraft De-icing</b>                                           | [...]        | [...]             | [...]         |
| <b>De-icing Fluid and Water</b>                                    | [...]        | [...]             | [...]         |
| <b>Empty Wall Space for Advertising</b>                            | [...]        | [...]             | [...]         |
| <b>Car Rental Till</b>                                             | [...]        | [...]             | [...]         |
| <b>Hangar Access for ad hoc Technical Maintenance</b>              | [...]        | [...]             | [...]         |
| <b>At least 4 Press Conference per year</b>                        | [...]        | [...]             | [...]         |
| <b>Two Journeys for Journalists per year, organised by airport</b> | [...]        | [...]             | [...]         |
| <b>PC, Printers, Phones, Fax and SITA-Equipment</b>                | [...]        | [...]             | [...]         |

## 3.3.2. REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

3.3.2.1. *Existence of aid*

- (73) The opening decision first observed that since FZG, which granted the discounts on the airport charges to the various airlines, was entirely owned and controlled by the State, those discounts had to be considered to have been granted by foregoing State resources. It was further considered that the State was very likely to have been involved in the actual conclusion of the contracts with the various airlines, and that the relevant public supervisory authority had to approve the airport's schedule of charges, with the consequence that the granting of discounts on the airport charges to various airlines was imputable to the State.
- (74) In order to answer the question of whether the discounts provided an advantage to the respective airlines, the opening decision recalled that it had to be assessed whether FZG acted like a MEO in granting the discounts. To comply with the MEO test, it was necessary to demonstrate that the decision to grant the discounts was based on sound economic logic and improved the airport's profitability. In addition, the revenue generated by the Airport in connection with a contract with a particular airline could not be lower than the costs of providing airport services to that airline.

- (75) The opening decision noted that there was no indication that Germany had compared expected costs and revenues over the duration of the respective airline contracts. Germany had only provided a medium-term business plan covering the period 2011-2015. In this light, the opening decision considered it to be doubtful whether the revenues generated from the agreements with the airlines were sufficient to cover the costs related to providing them with airport services. It noted that since it commenced its commercial operations, FZG had generated increasing losses, and that the agreements did not include clause, common in other agreements, allowing FZG to recover the discounts in case the airlines decided to terminate their operations from Zweibrücken.
- (76) The opening decision also considered that if Zweibrücken Airport had acted like a MEO, it would have had to consider whether closing the airport was less costly than continuing its operation. It requested Germany to provide information regarding the costs of closure of the airport in comparison to the costs of continuing its operation. Finally, the opening decision noted that the discounts seemed to include the security charges which FZG had to pay to the security service. It observed that any price charged to the airlines which did not allow FZG to recover those costs would constitute an advantage to the airlines. In conclusion, the opening decision expressed serious doubts as regards the compliance of the discounts granted to various airlines with the MEO principle.
- (77) Considering, finally, that the airlines operated on a competitive market and that any advantage granted to them would allow them to strengthen their position on that market, the opening decision found that the discount granted on the charges was likely to affect trade between Member States and to distort or threaten to distort competition.
- (78) The opening decision reached the preliminary conclusion that the discounted charges constituted State aid to the respective airlines (Germanwings, TUIFly, and Ryanair).

#### 3.3.2.2. *Compatibility*

- (79) The opening decision assessed whether the discounted charges could be considered to constitute 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.
- (80) In particular, the opening decision observed that:
- (a) it was doubtful whether the discounted charges fulfilled the conditions of point 79(c) of the 2005 Aviation Guidelines, since it was not clear whether and how the discounts were tied to an increase in passenger numbers;
  - (b) it was doubtful whether the discounted charges fulfilled the conditions of point 79(d) of the 2005 Aviation Guidelines, since it was not clear whether the discounts were degressive and limited in duration;
  - (c) it was doubtful whether the discounted charges fulfilled the conditions of point 79(e) of the 2005 Aviation Guidelines, since it was not clear which costs were covered by the discounted charges;
  - (d) it was doubtful whether the discounted charges fulfilled the conditions of point 79(f) of the 2005 Aviation Guidelines, since the measure did not appear to be linked to the eligible costs;
  - (e) it was doubtful whether the discounted charges fulfilled the conditions of point 79(h) of the 2005 Aviation Guidelines, since there was no indication that FZG made its intention to grant the discounts public and offered them to other airlines as well;
  - (f) it was doubtful whether the discounted charges fulfilled the conditions of point 79(i) of the 2005 Aviation Guidelines, since no business plans on the profitability of the benefiting routes had been made available and it was not clear whether there had been any impact on competing routes;

- (g) it was doubtful whether the discounted charges fulfilled the conditions of point 79(j) of the 2005 Aviation Guidelines, since there was no indication that the required list had been produced;
  - (h) it was doubtful whether the discounted charges fulfilled the conditions of points 79(k) and 79(l) of the 2005 Aviation Guidelines; and
  - (i) it was doubtful whether the discounted charges fulfilled the conditions of point 80 of the 2005 Aviation Guidelines, since it was not clear whether the discounted charges were cumulated with other types of aid.
- (81) In conclusion, the Commission reached the preliminary conclusion that the discounted charges could not be considered compatible start-up aid, since they do not fulfil all the conditions listed in Section 5 of the 2005 Aviation Guidelines.

### 3.4. THE MARKETING CONTRACTS WITH RYANAIR AND AMS

#### 3.4.1. DETAILED DESCRIPTION OF THE MEASURE

- (82) Two marketing services agreements were concluded with Ryanair and its subsidiary AMS. Under a first contract, concluded between Ryanair and FZG, the latter paid EUR [...] to Ryanair for various marketing activities carried out by Ryanair.
- (83) A second contract was concluded on 6 October 2008 between the *Land* Rhineland-Palatinate, represented by the Ministry of Economics, Traffic, Agriculture and Viticulture, and AMS. Neither FGZ nor FZG are parties to that contract. Under the contract, AMS provided various marketing activities, such as placing links to websites determined by the *Land* on Ryanair's website and including short texts about *Land* Rhineland-Palatinate on Ryanair's website. During the first year, the *Land* paid AMS a total of EUR [...], while for the second year the services were to be reduced and the *Land* would have had to pay EUR [...].
- (84) As Ryanair discontinued its services to and from Zweibrücken after less than one year, the marketing services agreement for the second year was eventually cancelled and the price for the first year was reduced to [...] of the agreed upon price. In practice, the *Land* Rhineland-Palatinate then paid a total of EUR 320 833 to AMS for marketing services. It appears that AMS carried out all the agreed activities.

#### 3.4.2. REASONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

##### 3.4.2.1. *Existence of aid*

- (85) The opening decision first observed that the payments by the *Land* Rhineland-Palatinate to AMS/Ryanair involve State resources and are imputable to the State. To the extent that the price paid by Rhineland-Palatinate exceeded the economic value of the services rendered by AMS/Ryanair, they constitute a loss of State resources.
- (86) To assess whether the marketing services agreements granted AMS/Ryanair an advantage, the Commission again had to apply the MEO principle. It observed that at Zweibrücken Airport, only Ryanair had received marketing support to such an extent, that the payments were apparently not conditional on the marketing measures having a measurable impact (such as an increase in the number of passengers), and that it was not known whether *Land* Rhineland-Palatinate had any control over the provision of the marketing services by AMS/Ryanair. The opening decision noted further that the marketing services agreement was clearly tied to the route Zweibrücken — London-Stansted, so that it could be considered an incentive for that new route established by Ryanair in October 2008. Considering that Ryanair directly profited from the marketing activities, it was concluded that Ryanair should have covered at least a part of the related costs. In conclusion, the Commission doubted whether *Land* Rhineland-Palatinate had behaved like a MEO, thereby granting an advantage to AMS/Ryanair.
- (87) As the marketing support was only granted to AMS/Ryanair, it was clear that the measure was selective. For the same reasons as outlined with respect to the discounted airport charges, the opening decision also found that the measure affected trade between Member States and distorted or threatened to distort competition. It accordingly concluded that the marketing support constituted State aid within the meaning of Article 107(1) of the Treaty.

### 3.4.2.2. *Compatibility*

- (88) The opening decision assessed whether the marketing support granted to AMS/Ryanair could be considered to constitute compatible start up aid pursuant to Section 5 of the 2005 Aviation Guidelines. In its assessment, the Commission expressed its doubts as to whether the various conditions for the compatibility of start-up aid were fulfilled. The reasons were essentially the same as those listed in recital 80 of this Decision regarding the compatibility of the discounted charges. Accordingly, it reached the conclusion that the marketing support does not constitute compatible start-up aid.

## 4. COMMENTS FROM GERMANY

### 4.1. PUBLIC FINANCING BY LAND RHINELAND-PALATINATE/ZEF OF ZWEIBRÜCKEN AIRPORT

#### 4.1.1. INFRASTRUCTURE

##### 4.1.1.1. *Existence of aid*

#### **Economic activity and advantage**

- (89) The German authorities first recalled that they did not agree with the Commission's position that the construction of airport infrastructure constitutes an economic activity. Pointing out that the Commission mainly referred to the General Court's judgment in the *Leipzig-Halle* case, Germany noted that an appeal against that judgment was still pending before the Court of Justice, reserving its position until the Court of Justice has decided.
- (90) Secondly, the German authorities asserted that none of the infrastructure investments made before 2006, when Zweibrücken Airport commenced its commercial operations, were subject to State aid rules. Until 2006 the airport served only for general aviation and military aviation purposes, and the German authorities claimed that providing airport services for those purposes did not constitute an economic activity. In any event, it was asserted that because of the small scale of the operations at Zweibrücken Airport until 2006 (there were never more than 30 000 passengers per year until 2006), any public funding did not distort or threaten to distort competition and had no effect on trade between Member States.
- (91) Thirdly, the German authorities submitted that the majority of investments supported with public grants fell within the public policy remit. It was emphasised that most investments were necessary in order to guarantee the safety of operations at the airport (in particular following an order from the relevant safety supervisory authority and complaints by the pilot association 'Cockpit'). All of the measures connected to ensuring the safety of operations at the airport were therefore regarded as falling under the public policy remit.
- (92) Germany strongly objected to the notion that any measures falling within the public policy remit might, if only partially, confer an advantage on the airport in question if that funding was not granted on a non-discriminatory basis to all other airports in the Member State. Germany contended that funding for measures falling within the public policy remit did not constitute State aid, independent of the question whether one or all airports have to bear the costs for such measures. In this regard, there should be a uniform interpretation of the concept of 'public policy remit', especially in the light of the different ways in which Member States define the concept.
- (93) Germany submitted a list of investments which were made in relation to the public policy remit between 2006 and 2009 (for comparison, the total investment during that period amounted to EUR 22 476 812).

Table 7

#### **Overview of costs falling into the public policy remit submitted by Germany <sup>(21)</sup>**

|             | Measures | Costs | Total costs |
|-------------|----------|-------|-------------|
| <b>2006</b> | [...]    | [...] | [...]       |

<sup>(21)</sup> Submitted as Annex 8 to Germany's submission of 27 January 2011.

|             | Measures       | Costs | Total costs |
|-------------|----------------|-------|-------------|
| 2007        | [...]          | [...] | [...]       |
|             | [...]          | [...] |             |
|             | [...]          | [...] |             |
|             | [...]          | [...] |             |
| 2008        | [...]          | [...] | [...]       |
|             | [...]          | [...] |             |
|             | [...]          | [...] |             |
|             | [...]          | [...] |             |
|             | [...]          | [...] |             |
| 2009        | [...]          | [...] | [...]       |
|             | [...]          | [...] |             |
| Grand total | EUR 19 707 315 |       |             |

- (94) Germany stated that it considers the provision of airport security measures pursuant to §8 *Luftsicherheitsgesetz* (Air Security Law), measures assuring operational safety, air control and air safety measures pursuant to §27c(2) *Luftverkehrsgesetz* (Air Traffic Law), meteorological services, and fire brigade services to fall within the public policy remit, whether as investments or operating expenses.
- (95) Germany argued that as regards air control and air safety measures, the financing of those activities has to be seen in the light of §27c(2) *Luftverkehrsgesetz*. Under that provision, a distinction is made between certain airports where the financing of those safety measures at federal level is regarded as being essential for reasons of safety and transport policy, and other, regional airports where such measures are not regarded as strictly necessary from a federal perspective. This is why it is justified that the *Land* publicly finances air control and safety measures at regional airports such as Zweibrücken, since otherwise the airport would have to bear those costs itself. Therefore, the funding of air control and air safety measures, whether financed directly by the State on the federal level or by the *Länder*, is considered by Germany to be part of public policy in all cases.
- (96) Furthermore, according to Germany, costs for the fire brigade 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. Germany argued that 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*.
- (97) Concerning the renovation of the runway, Germany submitted that the related measures fall within the public policy remit as they were urgently needed in order to guarantee the safe utilisation of Zweibrücken Airport. Germany argued in this regard that use even for military purposes would not have been possible without those measures. Therefore, the renovation was necessary to ensure that military use and general aviation would be possible at all. Germany therefore claims that the costs for renovation are not exclusively connected to commercial aviation.
- (98) In this regard, Germany stated that the type of renovation and the costs connected with it were necessitated by the military history of the airport. According to Germany, the works entailed certain dangers, since the presence of unexploded bombs from the war could not be excluded. In fact, two unexploded bombs were apparently removed in the course of the renovation.

- (99) Otherwise, the renovation works included, inter alia, adapting the runway to modern standards regarding width, renewal of drainage, navigation lights and guard lights, signs, emergency power supply with network parallelism, and extension of the fence and the taxiway. The renovations concerning lights, signs and the lifting of the taxiway had been requested in complaints by the pilot association 'Cockpit'. Another substantial part of the renovation was the reorganisation of airport security, including new fences, doors, video supervision and intercom, installation of sliding doors, cable channels, etc.
- (100) Germany, finally, argued that closing Zweibrücken Airport was never considered a viable option, as the continuous operation of the airport was necessitated by the military and general aviation purposes it serves. In this regard, Germany furthermore argued that a closure and deconstruction of the airport would be associated with unjustifiable costs surpassing by far the costs invested. Germany did not, however, present any estimate of the costs related to a closure, or a comparison of those costs with continuing operations.
- (101) In this light, Germany submitted that providing airport services to commercial aviation makes economic sense. Germany argued that the great majority of costs would need to be incurred in any event in order to provide airport services to military and general aviation users (infrastructure etc.), so that also serving commercial aviation only causes limited additional costs while creating additional revenue.

#### **Distortion of competition and effect on trade**

- (102) Germany asserted that the public financing of Zweibrücken Airport's infrastructure does not distort competition and has no effect on trade between Member States. Germany submitted further that neither a distortion of competition nor an effect on trade could be deduced from the mere fact that other airports are located in the vicinity of Zweibrücken. Germany argued that Zweibrücken Airport is not in competition with the airports listed in the opening decision, above all not with Saarbrücken Airport.
- (103) With regard to the relationship between Zweibrücken and Saarbrücken Airports, Germany stated that the two airports complement each other, rather than being in competition. Germany explained that the two airports have different profiles, stemming from their different infrastructure: Saarbrücken Airport has higher quality passenger infrastructure (such as a modern terminal building), and concentrates on scheduled flights and business travellers; Zweibrücken Airport, on the other hand, has a longer runway with a higher weight capacity, making it more suitable for heavier aircraft flying long distance or transporting freight. According to Germany, Zweibrücken Airport therefore concentrates on charter flights and freight.
- (104) Building on the perceived complementarity between Zweibrücken and Saarbrücken airports, Germany declared that a closer cooperation between the two airports is envisaged. Germany submitted further that 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). According to Germany, the cooperation should lead to synergies and save funds. Finally, Germany emphasised that demand for aviation services in the region (the two airports taken together already have 750 000 passengers), maintaining that only Saarbrücken and Zweibrücken together can properly satisfy this demand, in particular because the other neighbouring airports cannot serve as substitutes. According to Germany, the new 'Saar-Palatinate-Airport' would therefore not be in competition with the neighbouring airports, such as Luxembourg, Metz-Nancy-Lorraine, and Frankfurt-Hahn.

#### **4.1.1.2. Compatibility**

- (105) Germany explained that, even if the public financing of infrastructure measures was considered to constitute State aid, it would be compatible with the internal market as it complies with the conditions set out in point 61 of the 2005 Aviation Guidelines. Before discussing each required element, Germany stressed that the infrastructure investments made in Zweibrücken were relatively minor compared to those found to be compatible with the internal market at other publicly funded regional airports and only served to convert existing military infrastructure for civilian use.

**Construction and operation of the infrastructure meets a clearly defined objective of common interest**

- (106) First of all, Germany submitted that the public support for infrastructure investments meets a clearly defined objective of common interest: the infrastructure investments were made in a C-assisted region with the objective of improving regional economic structures. Germany pointed out that Union funding (which was provided from 1991 onwards through the programmes Konver I, Konver II and PERIFRA) was used to convert the military infrastructure for civilian use, financing for example the modernisation and installation of a tower and the drainage of the runway. Germany claimed that it cannot understand why the Commission has doubts as to the objective of common interest after having participated in the financing of the conversion of the former military airfield.
- (107) Providing historical context, Germany explained that the withdrawal of US armed forces from the Zweibrücken airfield in 1991 caused significant structural problems in the Zweibrücken region, such as an unemployment rate of 20 % in the city of Zweibrücken. Germany stated that converting the airfield into a civilian airport therefore served the purpose of creating jobs and improving the regional economic infrastructure. Germany submitted further that the services provided by the airport are indispensable for the region and that the regional economy is highly dependent on easily accessible aviation infrastructure.
- (108) Germany claimed that the Commission's only reason for doubting compliance with that criterion again appears to be the proximity and perceived competition with Saarbrücken Airport. In response, Germany again referred to the complementarity of the two airports, excluding any competition between them. In addition, it further argued that proximity to other regional airports was not of importance as regards the question of whether the subsidised infrastructure meets an objective of common interest. Germany stated further that the only relevant factor was the interest of the *Land* Rhineland-Palatinate, as it was concerned with serving the common interests in its own territory and not having to rely on infrastructure located in other regions.

**The infrastructure is necessary and proportional to the objective**

- (109) Germany explained that the infrastructure is necessary and proportional to the objective which has been set. According to Germany, the infrastructure investments were always limited to complementing and extending existing infrastructure, without creating unnecessarily elaborate or expensive additional facilities. It emphasised that no new airport was created in Zweibrücken, but that a former military airport was simply converted to civilian use. Germany also stressed that the infrastructure is necessary to create jobs. According to Germany, throughout *Land* Rhineland-Palatinate, about 5 000 jobs were directly or indirectly created in connection with the existence of Zweibrücken Airport. Out of those 5 000 jobs, 2 708 were created directly and indirectly at the airport or the surrounding conversion area until 2011. Those jobs also helped save social costs (EUR 25 million per year) and create tax income. Germany stated further that jobs are especially important in this area with an unemployment rate which is currently 2 % above the average of the *Land*. Germany submitted that two expert opinions underline the importance of the airport for the regional economy <sup>(22)</sup>.
- (110) Germany again emphasised that the proximity to Saarbrücken Airport does not undermine the necessity and proportionality of the infrastructure in Zweibrücken. According to Germany, the infrastructure in Zweibrücken is necessary for large and heavy aircraft because they can only land in Zweibrücken, since the runway at Saarbrücken does not provide the necessary length. Germany submits further that Zweibrücken also offers the possibility of night-flights, which is important for freight flights.

**The infrastructure has satisfactory medium-term prospects for use**

- (111) Germany stated that the infrastructure has satisfactory medium-term prospects for use. Germany emphasised that passenger numbers for Zweibrücken Airport increased from only 17 732 passengers in 2005 to 223 165 passengers in 2011. It explained that under that criterion only the projected passenger numbers are relevant, and that the relevant projections demonstrate an increasing demand in the region. Referring to the forecast study provided by 'Desel Consulting' and the 'Airport Research GmbH' in 2009, Germany argued that by 2025 an increase to at least 1 350 000 passengers at Zweibrücken Airport could be expected.

<sup>(22)</sup> Prof. Dr Heuer und Prof. Dr Klopheus, unter Mitarbeit von Dr Berster and Wilken, Deutsches Zentrum für Luft — und Raumfahrt, Januar 2006, 'Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Zweibrücken', S. 146; Desel Consulting und Airport Research Center GmbH, 'Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025', Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009, p. 85.

- (112) Germany once more asserted that the proximity of Saarbrücken Airport did not diminish Zweibrücken's medium-term prospects for use. It submitted forecasts showing that Saarbrücken Airport could also expect increasing passenger numbers and that the envisaged cooperation between the two airports would ensure that they will not compete for the same passengers in the future.

#### **Equal and non-discriminatory access to the infrastructure**

- (113) Germany stated that all potential users of the infrastructure have access to it in an equal and non-discriminatory manner. The schedule of charges from 2005 in principle applies uniformly to all users of the airport under the same conditions. While Germany submitted that some deviations from the official schedule of charges were agreed upon in practice for scheduled and charter flights, it maintained that reduced charges for the first year and discounts were offered to all airline companies on a non-discriminatory basis, with comparable quotas.

#### **The development of trade is not affected to an extent contrary to the Union interest; the general principles of necessity and proportionality**

- (114) Germany explained that the development of trade is not affected to an extent contrary to the common interest based on the arguments already made. According to Germany, the measures were necessary because Zweibrücken Airport cannot be substituted by Saarbrücken Airport. Germany stated further that the infrastructure investments were limited to measures necessary to ensure the operational safety of the airport. It stressed, in this context, that the modernisation of the runway would have been necessary even if the Airport had not been made available for commercial aviation.

#### **4.1.2. OPERATING AID**

##### **4.1.2.1. *Existence of aid***

- (115) As regards the question of whether operating an airport is an economic activity, Germany repeated that until the Airport started providing services for commercial aviation in 2006, it merely served general aviation and military aviation purposes. In this respect, Germany submitted that financing the operation of the airport with respect to those activities did not constitute an economic activity.
- (116) Germany further argued that the majority of the losses of FZG that are covered by FGZ via the P&L Agreement stem from FZG performing tasks falling within the public policy remit. According to Germany, covering costs related to the performance of public powers cannot constitute State aid.
- (117) As regards the remaining elements of the definition of State aid in Article 107(1) of the Treaty, Germany referred to the arguments it submitted in this regard with respect to the infrastructure investment measures, holding that they equally apply here.

##### **4.1.2.2. *Compatibility***

#### **2005 SGEI Decision**

- (118) Germany argued that the annual payments covering the losses of FZG comply with the principles of the 2005 SGEI Decision. Germany asserted that the Airport's operating license, which imposes a duty to operate, constitutes the entrustment act. In addition, Germany stated that the Airport has been at least 'in fact' entrusted with the provision of an SGEI. According to Germany, even if, however, the Commission were to find that no entrustment act existed, the operating aid to the Airport would nevertheless comply with the principles of the SGEI rules and would therefore have to be considered to be compatible with the internal market.
- (119) Germany furthermore rejected the Commission's suggestion that the duty to operate pursuant to the airport's operating licence would automatically come to an end if the airport was to cease its operations. It asserted that the financial support granted to the airport serves to enable the airport to continue operating and thereby to fulfil its duty to operate, that is to say, to provide the SGEI with which it has been entrusted. Germany argued further that preventing the closure of the facility is the essence of the duty to operate.

- (120) Referring to the wide discretion of Member States to define what constitutes a SGEI, Germany pointed out that it had discretion to determine the necessity and extent of entrusting the airport with an SGEI. In as far as the Commission had referred to the proximity to Saarbrücken Airport, Germany again stressed that without the two airports the region would suffer from a severe under-supply of airport services, necessitating the entrustment of both airports with an SGEI.

#### **Sections 4.2 and 4.3 of the 2005 Aviation Guidelines**

- (121) Germany asserted that even if the operating aid were to be considered not to have been exempted from notification under the 2005 SGEI Decision, it would be compatible pursuant to the 2005 Aviation Guidelines.
- (122) At the outset, Germany stressed that a large part of the losses covered result from the Airport performing activities falling within the public policy remit. In addition, it pointed out that the P&L Agreement does not cover costs that an airport operator 'normally' would have to bear. It argued in this context that a large part of the costs not related to the performance of activities falling within the public policy remit stem from the particular history of Zweibrücken airport and are, in this sense, not 'normal costs'. Germany submitted that the Airport has the obligation to cater to general aviation and had to incur costs to convert the existing military infrastructure.
- (123) In any event, Germany asserted that the conditions of Sections 4.2 and 4.3 of the 2005 Aviation Guidelines were fulfilled 'in fact'. In particular, Germany stated that, as only the actual losses are covered, the presence of overcompensation can be excluded.

#### **4.2. POTENTIAL AID IN CONNECTION WITH A BANK LOAN AND PARTICIPATION IN THE LAND RHINELAND-PALATINATE'S INTERNAL CASH POOL**

- (124) With respect to the bank loan, Germany submitted that the *Sparkasse Südwestpfalz*, which granted the loan, operates as a normal commercial bank and acted as such in granting the loan, so that the decision to grant the loan is not imputable to the State. Germany stated further that when taking up the loan, the FZG compared offers from various banks, and the *Sparkasse* loan complied with market terms.
- (125) As regards the 100 % guarantee of the loan granted by the *Land*, Germany submitted that it is normal commercial practice for a shareholder to guarantee the loans taken out by its subsidiaries. In any event, Germany argued that the loan was used exclusively for the modernisation of the runway, necessitated by safety concerns and thus falling within the public policy remit. As the measure financed by the loan was thus not subject to State aid rules, it argued that the guarantee granted by the *Land* does not constitute aid either. Finally, Germany asserted that even if the guarantee were to be considered to be subject to State aid rules, no advantage was conferred on FZG, since the interest rate on the guaranteed loan was still higher than comparable loans granted to FGAZ that were not secured by a guarantee.
- (126) Concerning the internal cash pool, Germany claimed that the *Land's* internal cash-pool is a normal financing mechanism used in the relationship between mother companies and subsidiaries. Germany stated that the cash-pool is a financial instrument which was established by the *Land* in 2002. The *Land's* institutions and foundations and all undertakings governed by private law of which the *Land* owns more than 50 %, can participate in the cash pooling facility. Germany explained that the daily account balance of the cash pool is managed by the 'Landeshauptkasse' of the *Land*.
- (127) According to Germany, the cash pool is not financed directly out of the budget of the *Land*, but from the surplus cash of the participants. Germany explains further that any surplus of cash in the cash pool is invested on the capital markets; in the same way, a deficit is balanced by loans obtained on the capital market. Thus, Germany was of the opinion that any financial support from the cash-pooling facility is not granted through State resources, and is also not imputable to the State.
- (128) Germany pointed out that even though no collateral is required from the undertakings benefiting from the cash-pool, they are under the *Land's* supervision and as majority shareholder of FGAZ the *Land* could always request securities.

- (129) In Germany's opinion it makes economic sense that the mother company enables its subsidiaries to finance themselves at rates comparable to those available to the mother company — in this case the *Land* Rhineland-Palatinate — itself. According to Germany, the financing derived from the cash pool could therefore not be compared to a classical loan. Germany finally asserted that the *Land* has never injected resources from its regular budget into the cash-pool, but has rather taken up capital on the market where necessary.
- (130) Asserting that the loan, the guarantee and the cash-pool do not constitute State aid, Germany did not submit any arguments concerning their compatibility.

#### 4.3. DISCOUNTS ON AIRPORT CHARGES FOR RYANAIR, GERMANWINGS AND TUIFly

- (131) Germany submitted that the contracts between Zweibrücken Airport and the various airlines did not contain any State aid, as they were not imputable to the State in the first place. It asserted that the negotiation and conclusion of those agreements was the responsibility of FZG, falling within the scope of its purely commercial tasks. According to Germany, while the contracts were discussed with FZG's supervisory board, the *Land* Rhineland-Palatinate was only indirectly involved via its representatives on the supervisory board of FGAZ. Germany stated further that the *Land* did not directly participate in any negotiations on discounts with the airlines. Germany submitted that imputability could, finally, not stem from the fact that the schedule of charges had to be approved by a public supervisory authority according to § 43a LuftVZO, which is a general regulatory requirement applying to public and private airports alike.
- (132) Germany was further of the opinion that the discounts granted to various airlines did not confer any selective advantage upon them, as the discounts were equally available to all interested airlines. It submitted that the discounts would only have granted a selective advantage if they had not been available on a non-discriminatory basis and if one airline had paid higher or lower charges than others, without there being any objective reason for this differentiation.
- (133) According to Germany, at the same time, granting the discounts is said to have made economic sense for FZG, as it allowed the airlines to establish themselves at an airport that was new to commercial aviation. Germany submitted that by granting the discounts, the Airport distributed the risk involved in establishing a new route between itself and the airlines, while also allowing both sides to profit from increasing passenger numbers. Germany asserted that without the discounts, the airlines would not have been willing to establish themselves in Zweibrücken.
- (134) Germany stated that the rebates for the airlines have to be regarded as a possibility to generate additional income for FZG, as the fixed costs for operating the airport had to be incurred in any event (to serve general and military aviation) while the establishment of new airlines only causes very marginal additional variable costs. According to Germany, because serving new airlines did not lead to noticeable incremental costs, it was not necessary to prepare *ex ante* business plans to determine whether a contract with an airline would be incrementally profitable.
- (135) According to Germany the reduced airport fees are not selective because they were granted on a non-discriminatory basis. Therefore, Germany was of the opinion that there was no distortion of competition. Germany asserted that the airlines were not able to create a stronger position on the market based on these fees.
- (136) Asserting that the discounts to various airlines do not constitute State aid, Germany did not submit any arguments concerning their compatibility.

#### 4.4. THE MARKETING CONTRACTS WITH RYANAIR AND AMS

- (137) Germany stressed that the marketing contracts concluded between the *Land* and AMS are independent from FZG. German asserted that the objective of the marketing contracts was to buy marketing services at market price that would primarily promote *Land* Rhineland-Palatinate as a destination for tourism and economic activities. According to Germany, as the marketing services agreement was not directed specifically at promoting the airport, there was no link between the marketing measures and passenger numbers. Germany stated that the marketing measures incidentally also aimed at promoting Zweibrücken Airport.

- (138) Stressing that by concluding the marketing services agreement the *Land* simply purchased marketing services at market price, Germany submitted that the marketing contract did not contain State aid and did not have to be assessed as an aid measure benefiting an airline pursuant to the 2005 Aviation Guidelines.

## 5. COMMENTS FROM INTERESTED PARTIES

### 5.1. RYANAIR

#### 5.1.1. DISCOUNTED AIRPORT CHARGES

- (139) Ryanair asserted that the discounts granted to various airlines by FZG did not contain State aid, as they complied with the MEO principle. First, Ryanair argued that in applying the MEO principle to the relationship between airport and airlines, it should only be asked whether the contract was incrementally profitable for the airport. Ryanair considered that all infrastructure and fixed operating costs should be treated as sunk costs. According to Ryanair, when assessing whether the contract complied with the MEO principle, the Commission should thus only take the incremental costs of the airport, which are directly related to providing airport services to the airline in question, into account, and examine whether the total revenue derived from the contract outweighs those incremental costs. In this context, Ryanair emphasised that none of the infrastructure costs were incurred in connection with the agreement between Ryanair and FZG, and they could thus not count as incremental costs connected to that agreement.
- (140) In assessing the revenue, on the other hand, Ryanair asserted that the Commission must also take account of network externalities that would have been expected to materialise when FZG and Ryanair concluded the services contract in 2008. Ryanair stated that the fact that those network externalities did not materialise, in the end, could not have been foreseen and is therefore of no relevance.
- (141) Ryanair further explained that the discount did not selectively favour Ryanair. Ryanair asserted that the discount available for the first year of operations was offered in recognition of the significant commercial risk it took when establishing scheduled year-round operations to an airport that was unknown at that time. According to Ryanair, in the case of Zweibrücken it would have made no sense for Ryanair to accept such a commercial risk without an incentive scheme.
- (142) Ryanair furthermore stated that a similar arrangement was open to any other airline, that is to say, the discount on airport services fees for the first year of operation was available to all airlines starting new routes from Zweibrücken. In particular, Ryanair stressed that its contract with FZG contained a clause providing that '[t]his Agreement is entered into on a non-exclusive basis. The Parties agree that the conditions granted to Ryanair according to the Agreement are also available, on a transparent and non-discriminatory basis, to any other airline that would commit itself to an equivalent volume of airline activity at the Airport' <sup>(23)</sup>.
- (143) In any event, Ryanair put forward that the agreements between itself and FZG cannot contain State aid as they are not imputable to the State. Ryanair claimed that the evidence used by the Commission in order to show imputability to the State is not sufficient, as it may reflect the public authorities' interest in the airport's commercial relations and future, but does not show any actual involvement of any of the public authorities in FZG's negotiations and agreements with Ryanair.
- (144) Furthermore, Ryanair submitted a series of notes prepared by Oxera, and an analysis prepared by Professor Damien P. McLoughlin.

#### **Oxera Note 1 — Identifying the market benchmark in comparator analysis for MEO tests. Ryanair State aid cases, prepared for Ryanair by Oxera, 9 April 2013**

- (145) Oxera believed that the Commission's approach of only accepting comparator airports in the same catchment area as the airport under investigation is flawed.

<sup>(23)</sup> Airport Services Agreement between Ryanair and FZG of 22 September 2008, Section 3.

(146) Oxera argued that market benchmark prices obtained from comparator airports are not tainted by State aid given to surrounding airports. Therefore, it is possible to robustly estimate a market benchmark for the MEO tests.

(147) This is because:

- (a) comparator analyses are widely used for MEO tests outside of the field of State aid;
- (b) companies affect each other's pricing decisions only to the extent that their products are substitutes or complements;
- (c) airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the reports submitted face only limited competition from State-owned airports within their respective catchment areas (less than 1/3 of commercial airports within the catchment areas of the comparator airports are fully State owned, and none of them were subject to State aid investigations (as of April 2013));
- (d) even where comparator airports face competition from State-owned airports within the same catchment area, there may be reasons to believe their behaviour is in line with the MEO principle (for example, where there is a large private ownership stake or where the airport is privately managed);
- (e) MEO airports will not set prices below incremental cost.

**Oxera Note 2 — Principles underlying profitability analysis for MEO tests. Ryanair State aid cases, prepared for Ryanair by Oxera, 9 April 2013**

(148) Oxera argued that the profitability analysis undertaken by Oxera in its reports submitted to the Commission follows the principles that would be adopted by a rational private sector investor and reflects the approach apparent from Commission precedents.

(149) The principles underlying the profitability analysis are:

- (a) the assessment is undertaken on an incremental basis;
- (b) an *ex ante* business plan is not necessarily required;
- (c) for an uncongested airport, the single till approach is the appropriate pricing methodology;
- (d) only those revenues associated with the economic activity of the operating airport should be considered;
- (e) the entire duration of the agreement, including any extensions, should be considered;
- (f) future financial flows should be discounted in order to assess profitability of the agreements;
- (g) incremental profitability of Ryanair agreements to the airports should be assessed on the basis of estimates of the internal rate of return or net present value (NPV) measures.

**Analysis of Professor Damien P. McLoughlin — Brand building: why and how small brands should invest in marketing, prepared for Ryanair, 10 April 2013**

(150) The paper aimed to set out the commercial logic underlying regional airports' decisions to buy advertising on Ryanair.com from AMS.

(151) The paper argued that there are a large number of very strong, well known, and habitually used airports. Weaker competitors must overcome static buying behaviour of consumers to expand their business. Smaller regional airports need to find a way to consistently communicate their brand message to as wide an audience as possible. Traditional forms of marketing communication require expenditure beyond their resources.

**Oxera Notes 3 and 4 — How should AMS Agreements be treated within the profitability analysis as part of the market operator test?, 17 and 31 January 2014**

- (152) Ryanair submitted further reports by its consultant Oxera. In these reports, Oxera discussed the principles which, according to the airline, should be taken into account as part of the MEO test in the profitability analysis of, on the one hand, airport services agreements between Ryanair and airports and, on the other hand, the marketing services agreements between AMS and the same airports <sup>(24)</sup>. Ryanair emphasised that those reports do not in any way change its position presented earlier that the airport services agreements and the marketing services agreements should be analysed under separate MEO tests.
- (153) The reports indicated that the profits generated by AMS should be included as revenues in a joint analysis regarding profitability while the expenses of AMS would have to be incorporated in the costs. To do this, the reports suggested the application of a cash-flow-based methodology to the joint profitability analysis, meaning that the expenditure by airports on AMS could be treated as incremental operating expenses.
- (154) The reports emphasised that marketing activities contribute to the creation and support of the brand's value, which helps to generate effects and benefits not only for the duration of the contract, but also after its termination. This would especially be the case if, due to the fact that Ryanair has concluded an agreement with this airport, other airlines establish themselves at the airport, which will in turn attract more shops to install themselves there and therefore bring in more non aeronautical revenues for the airport. According to Ryanair, if the Commission proceeds to undertake a joint analysis of profitability, those benefits have to be taken into account by treating the expenses of AMS as incremental operating costs, net of AMS payments.
- (155) Furthermore, Ryanair is of the opinion that a terminal value would have to be included in the projected incremental profits at the end of the airport services agreement in order to take into account the value generated after the termination of the agreement. The terminal value could be adapted on the basis of a 'renewal'-probability, measuring the expectation that profits will persist after the termination of the agreement with Ryanair or if similar conditions are agreed with other airlines. Ryanair considered that it would then be possible to calculate a lower limit for benefits generated jointly by the agreement with AMS and the airport services agreement, reflecting the uncertainties of incremental profits after the termination of the airport services agreement.
- (156) To supplement this approach, the reports presented a synthesis of the results of studies on the effects of marketing on the value of a brand. Those studies recognise that marketing can support the value of a brand and can help to build a customer base. According to the reports, in the case of an airport, marketing on Ryanair.com increases the visibility of the brand in particular. The reports moreover stated that smaller regional airports wishing to increase their air traffic can therefore especially increase the value of their brand by concluding marketing services agreements with AMS.
- (157) The reports lastly indicated that a cash-flow-based approach is to be preferred over a capitalisation approach, in which the costs of marketing services provided by AMS would be treated as capital expenditure on an intangible asset (that is, the value of the brand) <sup>(25)</sup>. The capitalisation approach would only take into account the proportion of marketing expenditure that is attributable to the intangible assets of an airport. The marketing expenses would be treated as capital expenditure in an intangible asset, and then depreciated for the duration of the contract, taking into consideration a residual value at the foreseen termination of the airport services agreement. This approach would not take into account the incremental profits which the conclusion of the airport services agreement with Ryanair would bring in and it is also difficult to calculate the value of the intangible asset due to the expenses of the brand and the time period of use of the asset. The cash-flow method is more appropriate than a capitalisation approach, since the latter would not capture the positive benefits to the airport that are expected to arise as a result of signing the airport services agreement with Ryanair.

<sup>(24)</sup> Oxera, 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?' prepared for Ryanair, on 17 January 2014.

<sup>(25)</sup> Oxera, 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test? — Practical application' prepared for Ryanair, on 31 January 2014.

## 5.1.2. MARKETING SERVICES AGREEMENTS

- (158) Ryanair stressed that AMS' marketing services agreements are separate from Ryanair's agreements with airports and should be assessed separately, since they cannot be considered a single beneficiary. The agreements were negotiated independently, related to different services, and were not subject to any linkage that would justify their consideration as a single alleged State aid measure. The conclusion of a marketing services agreement with AMS is not a condition for the operation of routes by Ryanair to and from an airport. Ryanair stressed that the marketing services agreement of AMS was concluded with the Ministry, the co-owner of the airport, and it benefitted the airport but was not intended to improve the load factor or yield on Ryanair routes.
- (159) As to the value of marketing, Ryanair claimed that marketing space on Ryanair's website is a scarce resource and demand for that space is high, including from businesses other than airports. According to Ryanair, even legacy airlines now realise the value of their websites for marketing and advertising. Ryanair submitted that airports choose to build a brand by advertising on Ryanair.com or on other airline websites. Ryanair stated further that this increased brand recognition can benefit the airports in a number of mutually reinforcing and complementary ways. Zweibrücken Airport is far less renowned internationally than either Aéroport de Paris or Heathrow Airport, and it therefore needs to invest in advertising to improve its brand recognition and maximise the number of inbound passengers. Ryanair concluded that the *Land* had a double motivation to conclude the marketing services agreement with AMS: first, a purely commercial one, as a 50 % co-owner of the operator of the Zweibrücken Airport; secondly, as part of its duty to promote tourism and business opportunities in the *Land*. Ryanair is therefore of the opinion that the *Land* purchased valuable marketing services at market price.

## 5.2. AIRPORT MARKETING SERVICES (AMS)

- (160) AMS submitted that the Commission should not, contrary to what is suggested in the opening decision, treat FZG's agreement with Ryanair and the *Land*'s marketing services agreement with AMS as connected, but rather as two separate business transactions. AMS stated that it is a subsidiary of Ryanair with a real commercial purpose of its own, created in order to develop an activity that does not belong to the core business of Ryanair. AMS clarified that it is used by Ryanair as an intermediary to sell advertising space on its website. AMS submitted further that, in principle, AMS' marketing services agreements with airports are negotiated and concluded separately from Ryanair's agreements with the same airports. AMS claimed that the agreement between AMS and the *Land* does not grant any advantage to Ryanair; Ryanair does not pressure its partners to conclude marketing services agreements with AMS and Ryanair's route performance is generally the same on routes to airports with an AMS marketing services agreement and to those without such an agreement.
- (161) AMS further submitted that in purchasing marketing services, FZG acted in line with the MEO principle, as advertising on Ryanair.com is said to represent a high real value for the *Land* and that the price charged by AMS was the market price for these services. AMS argued that the prices at which advertising space is provided by AMS, and the volumes in which it is acquired, do not discriminate between public and private advertisers. AMS stated further that public and private bodies are said to compete for access to the limited space to advertise on Ryanair.com. This means, according to AMS, that no State aid can be contained in AMS' arrangements with public airports, as AMS could just as easily sell the website space to a private company, at a comparable price.
- (162) AMS also emphasised that it makes inherent sense for a small regional airport to purchase marketing services from AMS. AMS asserted that those airports typically have a need to increase their brand recognition and that advertising on an airline website can increase the number of more profitable foreign passengers (foreign passengers generate more non-aeronautical revenue than outbound passengers originating from the region where the airport is located). AMS stressed that the *Land* acted not only as the co-owner of the airport's operator, with a direct interest in the enhancement of its brand image and revenues, but also as the authority entrusted with the task of promoting tourism and business opportunities in *Land* Rhineland-Palatinate through various means including, in particular, advertising.

## 5.3. GERMANWINGS

- (163) By way of background, Germanwings briefly explained why it first decided to take up operations from Zweibrücken. It indicated that it chose Zweibrücken over Saarbrücken because of the better runway in Zweibrücken, pointing out that the topography of the runway in Saarbrücken was difficult. It also explains that in 2006, when Germanwings decided to fly from Zweibrücken, Zweibrücken was better equipped for instrument landing (CAT system) and the flying time to Berlin was slightly shorter. Germanwings asserted that due to unprofitability of the Berlin route it decided to discontinue its services from Zweibrücken in 2011.
- (164) Germanwings first asserted that its contracts with FZG do not contain State aid because it is not imputable to the State. It claimed that various press releases by politicians cannot demonstrate that the State was involved in negotiating or concluding these contracts, and that the obligation to have a schedule of charges approved by the supervisory authority pursuant to § 43a LuftVZO did not apply to individual agreements.
- (165) Secondly, Germanwings claimed that in concluding the various agreements FZG acted like a MEO. It stressed that the MEO principle does not require that an investor makes no losses in the short term, but that doing so may be a normal business strategy to be profitable in the medium to long term. The idea that an airport cannot impose charges that do not cover its costs, which Germanwings finds reflected in the opening decision, is said to stem from Article 102 of the Treaty and to only be applicable in the antitrust context, so that it should not be applied in State aid cases.

## 5.4. TUIFly

- (166) By way of background, TUIFly explained why it first moved its operations from Saarbrücken Airport to Zweibrücken Airport. TUIFly stated that it moved to Zweibrücken Airport because of safety concerns at Saarbrücken Airport. TUIFly asserted that during bad weather, the infrastructure and topographical features of Saarbrücken Airport meant that a fully-loaded TUIFly aircraft of type B737-800 could not properly land at the airport, thereby forcing those airplanes to divert to Zweibrücken Airport even before it had commenced its commercial operations. According to TUIFly, apart from causing delays and inconveniences for passengers, those diversions were associated with additional costs and organisational issues for the airline. TUIFly maintained that the severe safety concerns at Saarbrücken Airport made its operations there unsustainable and a move to Zweibrücken Airport unavoidable. In addition, it noted that the short runway in Saarbrücken meant that some fully loaded planes could not start, with the consequence that medium distance flights (such as to the Canary Islands) had to start with half-empty tanks and stop for refuelling in Spain or Portugal.
- (167) TUIFly claimed that its agreement with FZG did not contain any State aid, and that the charges paid by TUIFly conformed to market rates. It asserted that the conditions at Zweibrücken Airport and in the surrounding region are such that, in order for an airline to operate profitably from Zweibrücken, low airport charges are necessary. In particular, TUIFly referred to the state of the passenger infrastructure at Zweibrücken Airport, the lack of suitable public transportation (railway) to and from the airport, the Airport's location in a region with low purchasing power, the initially bad state of the runway, the absence of crew accommodation, etc. TUIFly also claimed that unlike Saarbrücken Airport (or any other airport where TUIFly operates), Zweibrücken Airport does not have the status of a 'customs airport', with the consequence that TUIFly is obliged to pay a 'custom charge' of between EUR [...] and EUR [...] per flight. According to TUIFly, this represents an additional cost of approximately EUR [...] per passenger and increases TUIFly's total operating costs by more than EUR [...] per year.

## 6. COMMENTS FROM GERMANY ON THIRD PARTY COMMENTS

## 6.1. COMMENTS ON RYANAIR'S COMMENTS

- (168) Germany welcomed the fact that Ryanair's submissions confirm Germany's position that neither Zweibrücken Airport, nor the airlines operating from Zweibrücken, have received State aid. It also agreed that the contract between the *Land* Rhineland-Palatinate and AMS has to be assessed separately from the contract between FZG and Ryanair, that the former had real value for the *Land*, and that it was concluded at market price. Germany stressed, in particular, the importance of tourism for the region, maintaining that the agreement with AMS served to promote tourism.

## 6.2. COMMENTS ON AMS'S COMMENTS

- (169) As AMS confirmed Germany's position that the contract between AMS and the *Land* Rhineland-Palatinate did not contain any State aid, Germany refrained from commenting on individual submissions in detail.

## 6.3. COMMENTS ON GERMANWINGS' COMMENTS

- (170) Germany limited its response to Germanwings' submission to commenting on a number of factual suggestions put forward by Germanwings. In particular, it stressed that contrary to what Germanwings appears to suggest, there was no competition between Zweibrücken and Saarbrücken, but that the two airports always considered themselves to complement each other. Germany asserted that the choice of an airline to serve one airport or another is the result of a strategic decision of that airline, on which Germany could not comment.

## 7. ASSESSMENT

- (171) 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.'
- (172) 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 must:
- (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.

## 7.1. PUBLIC FINANCING BY LAND RHINELAND-PALATINATE/ZEF OF ZWEIBRÜCKEN AIRPORT

## 7.1.1. EXISTENCE OF AID

7.1.1.1. *Economic activity and notion of undertaking*

- (173) According to settled case law, the Commission must first establish whether the FGAZ and FZG 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 <sup>(26)</sup>. Any activity consisting in offering goods or services on a given market is an economic activity <sup>(27)</sup>.
- (174) In its *Leipzig/Halle Airport* judgment the Court of Justice confirmed that the operation of an airport for commercial purpose and the construction of the airport infrastructure constitute an economic activity <sup>(28)</sup>. 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 <sup>(29)</sup>.

<sup>(26)</sup> Case C-35/96 *Commission v Italy* [1998] ECR I-3851; Case 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.

<sup>(27)</sup> Case 118/85 *Commission v Italy* [1987] ECR 2599; Case 35/96 *Commission v Italy* [1998] ECR I-3851.

<sup>(28)</sup> *Leipzig/Halle judgment*, in particular paragraphs 93-94; confirmed by case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] ECLI:EU:C:2012:821; see also Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by case C-82/01P *Aéroports de Paris v Commission* [2002] ECR I-9297 and case T-196/04 *Ryanair v Commission* ('Charleroi judgment') [2008] ECR II-3643.

<sup>(29)</sup> Cases C-159/91 and C-160/91 *Poucet v AGV and Pistre v Cancave* [1993] ECR I-637.

- (175) Regarding the moment in time from which on 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 recognized 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) <sup>(30)</sup>, the operation and construction of airport infrastructure must be considered as an economic activity falling within the ambit of State aid control.

### Single economic unit

- (176) Before examining the nature of the activities carried out by FGAZ and FZG, however, the Commission recalls that two separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking.
- (177) As the Court of Justice held, '[i]n competition law, the term "undertaking" must be understood as designating an economic unit ... even if in law that economic unit consists of several persons, natural or legal' <sup>(31)</sup>. In this respect, the Court has ruled that several entities can be deemed to perform an economic activity together, thereby constituting an economic unit, under specific conditions <sup>(32)</sup>.
- (178) To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links <sup>(33)</sup>.
- (179) In this case, the Commission considers that FGAZ and FZG are so closely connected that they must be considered to constitute one single economic unit for the purposes of State aid rules. First, it must be recalled that FZG is a 100 % subsidiary of FGAZ, giving FGAZ the power to control FZG via the shareholder assembly. In addition, FGAZ and FZG are connected via a P&L agreement, which according to Germany means that the two entities are treated as a single economic unit under German tax law. The members of FZG's supervisory board are, according to its statute, always identical to those on the FGAZ's supervisory board. In both undertakings, FGAZ and FZG, the management is appointed by the respective supervisory board (which, as indicated, is identical for both entities). In practice, [...] was at all material times the managing director for both FGAZ and FZG (in addition, a second managing director was appointed only for FZG, but not for FGAZ). As sole managing director of FGAZ, [...] therefore represented FGAZ in the shareholder assembly of FZG, with FGAZ being the sole shareholder.
- (180) In practice, the available information demonstrates that important decisions regarding Zweibrücken Airport are regularly taken at the level of FGAZ, with instructions then being passed down to FZG. The information provided by Germany regarding the decision-taking process with respect to the modernisation of the runway in 2008/2009 is instructive in this regard. The supervisory board of FGAZ first took the decision to modernise the runway. FGAZ's shareholder assembly then directed FGAZ's management to call a shareholder assembly of FZG. The management of FGAZ then represented FGAZ as the sole shareholder in FZG's shareholder assembly and directed FZG's management to implement FGAZ's decision to modernise the runway.
- (181) In conclusion, the Commission considers that the links between FGAZ and FZG are sufficiently close to treat the two entities as one economic unit. In particular, FZG is economically and legally entirely dependent on FGAZ and does not have a commercial will of its own. For the purpose of the application of Union State aid law, FGAZ/FZG therefore form one undertaking.

<sup>(30)</sup> *Leipzig-Halle judgment*, paragraphs 42-43.

<sup>(31)</sup> Case C-170/83 *Hydrotherm* [1984] ECR I-2999, paragraph 11. See also case T-137/02 *Pollmeier Malchow v Commission* [2004] ECR II-3541, paragraph 50.

<sup>(32)</sup> The joint exercise of an economic activity is normally assessed by analysing the existence of functional, economic and organic links between the entities. See for instance, case C-480/09 P *AcquaElectrabel Produzione SpA v Commission*, [2010] ECR I-13355, paragraphs 47-55; Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and Others* [2006] ECR I-289, paragraph 112.

<sup>(33)</sup> Case C-480/09 P *AcquaElectrabel Produzione SpA v Commission* [2010] ECR I-13355, paragraphs 47-55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* [2006] ECR I-289, paragraph 112.

### Economic activity

- (182) FGAZ/FZG are engaged in constructing, maintaining and operating Zweibrücken Airport. FGAZ/FZG offer airport services and charge users — commercial aviation operators as well as non-commercial general aviation users — for the use of the airport infrastructure, thereby commercially exploiting the infrastructure. Following from the case law cited in recitals 174-175, it must therefore be concluded that FGAZ/FZG were engaged in an economic activity as from the date of judgment in *Aéroports de Paris* (that is to say, 12 December 2000) onward.
- (183) In this context, the Commission stresses that the economic activity of FGAZ/FZG did not commence only with the start of commercial aviation at Zweibrücken in 2006.
- (184) First, it is clear from the submission of Germany that Zweibrücken had already previously attempted — unsuccessfully — to attract commercial aviation to the airport, demonstrating the intent to enter into this market.
- (185) Secondly, maintaining that constructing and operating an airport only amounts to an economic activity once commercial aviation has successfully been attracted would lead to unacceptable conclusions: there is no cause to dissociate the preparatory activity of building or enlarging infrastructure from the subsequent commercial use to which it is put; indeed, the nature of the development activity must be determined according to whether or not the subsequent use of the infrastructure which has been built amounts to an economic activity <sup>(34)</sup>. In its judgment in the *Leipzig/Halle Airport* case, the General Court clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part.
- (186) Finally, it must be pointed out that offering airport services for general aviation purposes also constitutes an economic activity. The same is true as regards the provision of airport services to military users for remuneration <sup>(35)</sup>. FGAZ/FZG therefore already engaged in an economic activity before 2006.
- (187) It is therefore concluded that from 12 December 2000 onward, FGAZ/FZG were engaged in an economic activity and constitute, as a single economic unit, an undertaking for the purposes of Article 107(1) of the Treaty.

### Public policy remit

- (188) While FGAZ/FZG must therefore be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty, it must be recalled that not all activities of an airport owner and operator are necessarily of an economic nature <sup>(36)</sup>.
- (189) The Court of Justice <sup>(37)</sup> has held that activities that normally fall under a State's 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 may include, for example, security, air traffic control, police, customs, etc. The financing has to be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities <sup>(38)</sup>.
- (190) Therefore, the financing of activities falling within the public policy remit or of infrastructure directly related to those activities in general does not constitute State aid <sup>(39)</sup>. At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature <sup>(40)</sup>.

<sup>(34)</sup> *Leipzig/Halle judgment*, paragraph 95. See also, by analogy, Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, paragraph 26.

<sup>(35)</sup> See minutes of FGAZ's supervisory board of 2 October 2006, indicating that the airport is remunerated for offering services to military users.

<sup>(36)</sup> Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

<sup>(37)</sup> Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraphs 7 and 8, and Case C-30/87 *Bodson/Pompes funèbres des régions libérées* [1988] ECR 2479, paragraph 18.

<sup>(38)</sup> Case C-343/95 *Calì & Figli v Servizi ecologici porto di Genova* [1997] ECR I-1547; Commission Decision N309/02 of 19 March 2003; Commission Decision N438/02 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector (OJ C 284, 21.11.2002).

<sup>(39)</sup> Commission Decision N309/02 of 19 March 2003.

<sup>(40)</sup> See, in particular, Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

- (191) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities <sup>(41)</sup>. Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services 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 costs of the provision of some activities that might be non-economic in themselves but are inherent to the deployment of their economic activities.
- (192) Germany submitted that the costs arising from the following activities (whether as investment costs or operating expenses) are to be considered as falling within the public policy remit: airport security measures pursuant to §8 *Luftsicherheitsgesetz* (Air Security Law, hereinafter: 'LuftSiG'), measures assuring operational safety, air control and air safety measures pursuant to §27c(2) *Luftverkehrsgesetz* (Air Traffic Law, hereinafter: 'LuftVG'), meteorological services, and the fire brigade.
- (193) The Commission is of the view that measures pursuant to §8 LuftSiG, measures pursuant to §27c(2) LuftVG (including meteorological services), and the fire brigade service can, in principle and subject to the analysis in recitals 195 *et seq.* below, be considered to constitute activities falling within the public policy remit.
- (194) With respect to measures relating purely to operational safety, however, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport <sup>(42)</sup>. Subject to a more detailed review with respect to individual activities and costs, the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling 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.
- (195) As regards the legal framework, Germany has submitted that for the fire brigade there are no legal rules strictly imposing those costs on the airport operator. Furthermore, the Commission observes that the remuneration of costs for the fire brigades falls within the legal competence of the *Länder* and those costs are usually remunerated by the relevant regional authorities. The remuneration is limited to the extent necessary to cover those costs.
- (196) As regards air traffic control and meteorological services, the Commission notes that §27d and §27f LuftVG provide that the costs related to §27c LuftVG are covered by the State for a number of specific airports. While the Commission does not, in this case, need to decide whether the provision may grant an advantage to those airports that profit from State financing pursuant to §27d and §27f LuftVG, it is clear that the law envisages that all other airports have to bear the relevant costs themselves. In this light, costs related to air traffic control and meteorological services must be considered to constitute normal operating expenses of at least those airports not addressed by §27d and §27f LuftVG.
- (197) With respect to measures pursuant to §8 LuftSiG, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) LuftSiG only the costs related to the provision and maintenance of spaces and premises necessary for the performance of the activities listed in §8(1), (2) LuftSiG may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to FGAZ/FZG relieved that undertaking of costs it had to bear pursuant to §8(3) LuftSiG, that public financing is not exempted from scrutiny under Union State aid rules.

<sup>(41)</sup> See, amongst others, Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 36, and case-law cited.

<sup>(42)</sup> 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.

### Conclusions on public policy remit

- (198) In the light of the above considerations, the Commission finds it appropriate to draw more specific conclusions regarding investment costs and operating expenses allegedly falling with the public policy remit.
- (199) As regards operating expenses incurred between 2000 and 2009, the Commission accepts that operating expenses linked 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 those activities. As regards operating costs linked to measures taken pursuant to §8 LuftSiG, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to §8(3) LuftSiG qualify as public policy remit costs. With respect to air control and air safety measures as well as meteorological services pursuant to §27c(2) LuftVG, and noting that Zweibrücken is not one of the airports for which a corresponding need has been recognised by the Federal government pursuant to §27d(1) and §27f(1) LuftVG, the Commission finds that operating costs linked to air control and air safety measures as well as meteorological services cannot qualify as public policy remit costs. Also, operating costs related to ensuring the operational safety of the airport do not qualify as public policy remit costs.
- (200) Considering investments made between 2000 and 2009, the Commission accepts that investments directly related to the fire brigade qualify as public policy remit expenses. Moreover, the remuneration by the relevant public authorities was limited to the extent necessary to cover those costs. As regards investments linked to measures taken pursuant to §8 LuftSiG, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to §8(3) LuftSiG qualify as public policy remit costs. With respect to investments linked to air control and air safety measures as well as meteorological services pursuant to §27c(2) LuftVG, and noting that Zweibrücken is not one of the airports for which a corresponding need has been recognised by the Federal government pursuant to §27d and §27f LuftVG, the Commission finds that investments linked to air traffic control and air safety measures as well as meteorological services cannot qualify as public policy remit costs. Also, 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 the modernisation and extension of the runway, as well as the installation of guard lights etc., cannot be qualified as falling within the public policy remit.
- (201) 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.

### Economic activity and use by the military

- (202) The Commission observes that Zweibrücken Airport is also used by the German and other military forces, including for training purposes. This is despite the fact that Zweibrücken is not a military airfield, but a civilian airport <sup>(43)</sup>.
- (203) The Commission considers that, in principle, the provision of airport services to the military, including by civilian airports, can constitute an activity falling within the public policy remit. It is not clear, however, to what extent Germany is of the opinion that the public financing of the Airport merely covers the costs arising from catering to the airport services needs of the military. The Commission observes that particularly as regards the operating costs, Germany does not include costs arising from the presence of the military as falling within the public policy remit. The same is in principle true for the investments, where Germany does not point to investments being strictly related to the military users of the airport.
- (204) However, Germany does maintain that the continuing use of the airport by the military is one reason why investments into the safety of the airport (runway etc.) were absolutely necessary and why closure of the airport was not an option.

<sup>(43)</sup> Zweibrücken is not listed in the Military Aeronautical Information Publication Germany (MIL AIP Germany), containing a list of all military airports in Germany.

- (205) The Commission observes, in this context, that Zweibrücken Airport appears to be offering airport services to the military for remuneration. The supervisory board minutes of FGAZ of 2 October 2006 recount a discussion about military exercises in Zweibrücken. The management stresses that one of the reasons in favour of allowing such exercises to take place is the revenue generated thereby, which indicates that, from the perspective of FGAZ/FZG, offering airport services to the military is an economic activity. The discussion further touches upon whether FZG should allow military exercises in Zweibrücken in the future, which suggests that it is within the discretion of FGAZ/FZG whether or not to cater to the military.
- (206) The Commission further considers that the failure of Germany to identify any particular costs incurred, either in terms of investments or operating costs, specifically related to the military users of the airport may be taken to indicate that the military is, indeed, just another customer of Zweibrücken Airport.
- (207) In conclusion, the Commission considers the provision of airport services to the military to be an economic activity at Zweibrücken Airport, noting in particular the failure to identify any costs individually linked to the presence of the military at Zweibrücken Airport and the (partially) economic justification given by FGAZ/FZG's for catering to the military.
- (208) Even in the alternative scenario — namely if the Commission would have concluded that the costs arising due to the military's presence could be covered by the State as falling within the public policy remit —, it would still have to be observed that the public funding of the airport's non-economic activity of catering to the military should not be allowed to lead to a cross-subsidisation of the airport's economic activities. In particular, it would not be possible to consider the entire investment into assets also used by the military (runway etc.) or fixed operating costs as falling within the public policy remit.

#### 7.1.1.2. *State resources and imputability to the State*

- (209) In order to constitute State aid, the measures in question have to be financed from State resources and the decision to grant the measure must be imputable to the State.
- (210) 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 <sup>(44)</sup>. Resources of local authorities are, for the application of Article 107 of the Treaty, State resources <sup>(45)</sup>.
- (211) In this case, the relevant measures — namely direct investment grants to FZG and annual capital injections in favour of FGAZ/FZG — were granted directly from the budget of the local authorities. The investment grants came directly from the *Land* Rhineland-Palatinate, while the capital injections were co-financed by the *Land* and the ZEF, an association of local public territorial entities.
- (212) Thus, the Commission considers that they are financed through State resources and are also imputable to the State.

#### 7.1.1.3. *Economic advantage*

- (213) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say, in the absence of State intervention <sup>(46)</sup>. Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention <sup>(47)</sup>. Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.
- (214) The Commission further recalls that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid' <sup>(48)</sup>. In this case, in order to determine whether the public financing of Zweibrücken Airport grants FGAZ/FZG an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the direct investment grants and capital injections to that of a MEO who is guided by prospects of profitability in the long-term <sup>(49)</sup>.

<sup>(44)</sup> Case C-482/99 *France v Commission* ('Stardust Marine') [2002] ECR I-4397.

<sup>(45)</sup> Joined Cases T-267/08 and T-279/08, *Nord-Pas-de-Calais* [2011], ECLI:EU:T:2011:209, paragraph 108.

<sup>(46)</sup> Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60 and case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, paragraph 41.

<sup>(47)</sup> Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

<sup>(48)</sup> Case C-482/99 *France v Commission* ('Stardust Marine') [2002] ECR I-4397, paragraph 69.

<sup>(49)</sup> Case C-305/89 *Italy v Commission* ('ALFA Romeo') [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia v Commission* [2000] ECR II-03871, paragraph 84.

- (215) The assessment should leave aside any positive repercussions on the economy of the region in which the airport is located, since the Court has clarified that the relevant question for applying the MEO principle is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' <sup>(50)</sup>.
- (216) In *Stardust Marine* the Court stated that, '[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.' <sup>(51)</sup>.
- (217) Furthermore, the Court declared in the *EDF* case that, '[...] for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen.' <sup>(52)</sup>.
- (218) In order to be able to apply the MEO principle, the Commission has to place itself at the time when each decision to provide public funds to FGAZ/FZG 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 infrastructure measures at stake was taken.

#### Direct investment grants

- (219) The Commission notes that the direct investment grants covered a portion of the investment costs incurred by FGAZ/FZG in the context of its economic activity. The operator of an airport normally has to bear all the costs related to the construction and operation of the airport (with the exception of those costs that fall within the public policy remit and do not generally have to be borne by the airport operator under the applicable legal framework), including the investment costs, so that covering a part of those costs relieves the FGAZ/FZG of a burden it would normally have to bear.
- (220) Germany did not explicitly argue that the direct investment grants complied with the MEO principle. It rather submitted that closing the airport was never a realistic option for the local authorities and that, given the need to operate the airport, it was economically sensible to also open it to commercial aviation. At other points, Germany argued that the investments in the airport were motivated by the will to economically invigorate the region, and that public subsidies were necessary since the revenue generated by the commercial exploitation of the airport would not be sufficient to cover the related costs.
- (221) Germany also stressed that the infrastructure is necessary to create jobs (about 5 000 in all of *Land* Rhineland-Palatinate, out of which 2 708 jobs depend directly and indirectly on the airport), save social costs (EUR 25 million per year) and create tax income. Germany stated further that jobs are especially important in this area with an unemployment rate which is currently 2 % above the average of the *Land*. Germany also submitted that two expert opinions underline the importance of the airport for the regional economy <sup>(53)</sup>.
- (222) However, social and regional considerations cannot be taken into account when conducting the MEO test. Moreover, even if the Commission were to take those social and regional considerations into account, the studies submitted by Germany show that, in June 2012, FZG only provided 115 jobs, at Zweibrücken Airport itself. Those studies confirm that the commercial area around the converted airport provides a total of 2 708 direct and indirect jobs. However, out of those, only 7,8 %, so 210 jobs, are concerned with transport and storage, that is to say, activities which are directly connected to the presence of the airport.
- (223) While it could, in principle, be accepted that even non-repayable grants to a company that is entirely owned by the State could qualify as market-conform investments, Germany has not presented a business plan or *ex ante*

<sup>(50)</sup> Case 40/85 *Belgium v Commission* [1986] ECR I-2321.

<sup>(51)</sup> *Stardust Marine*, paragraph 71.

<sup>(52)</sup> Case C-124/10P *European Commission v Électricité de France (EDF)* [2012], ECLI:EU:C:2012:318, paragraph 85.

<sup>(53)</sup> See footnote 22.

calculations regarding the expected profitability of the investment grants. The only projections that were presented are a study from 2003 outlining which commercial aviation passenger numbers could lead to profitability and the 2010 projection of expected annual results between 2011 and 2015. The latter expected that the FZG would become profitable only in 2015, assuming that the passenger numbers would rise to more than 500 000 passengers per annum.

- (224) The infrastructure investments at Zweibrücken airport entail significant costs (see investments costs detailed in Tables 2 and 3, net of any public policy remit investments as identified in recitals 198 to 200 and investment that took place before 12 December 2000), and a long period of negative results (foreseeably at least until 2015).
- (225) Despite the inherent and significant uncertainties related to the project, such as its long-term nature, there was neither an *ex ante* business plan, nor a sensitivity analysis of any underlying profitability assumptions. This is not in line with the type of analysis that a prudent investor would have undertaken for such a project.
- (226) Finally, the Commission notes that since 2000, FGAZ/FZG have generated losses every year, with an increasing tendency since 2005.
- (227) Firstly, the direct investment grants were non-repayable in nature and did not yield a return on investment. Secondly, Germany has not presented any evidence that the investment grants were put at the disposal of FZG on market terms. Thirdly, Germany does not rely on the MEO principle. The Commission therefore finds that the direct investment grants by the *Land* in favour of FZG granted after 12 December 2000 conferred an economic advantage on FZG (to the extent that the investment grants were not purely related to public policy remit activities as concluded in recitals 198 to 200).

#### **Annual capital injections**

- (228) The annual capital injections by the *Land* Rhineland-Palatinate and ZEF served to cover FGAZ's annual losses, which were in turn almost entirely brought about by the annual losses of FZG (see Table 4). In the end, the annual capital injections therefore served to cover a part of the normal investment and operating expenses of FGAZ/FZG, thereby relieving the undertaking of an economic burden it would normally have to bear.
- (229) For the same reason as outlined in recitals 222 to 228 with respect to the direct investment grants to FZG, the Commission also finds that the annual capital injections in favour of FGAZ/FZG were not provided under normal market conditions. Notably, Germany has not submitted that the capital injections were normal market investments. Germany has not presented any evidence demonstrating *ex ante* profitability considerations, nor has it explained why a MEO would continue injecting capital into an undertaking that constantly generates losses. In this light, the annual capital injections must be qualified as granting an economic advantage to FGAZ/FZG.

#### **Conclusion**

- (230) In view of the foregoing, the Commission considers that in the absence of an *ex ante* business plan or other sensible profitability studies, a MEO would not have taken the decision to embark on the investment project in question and to cover, on a continuous annual basis, increasing losses of FGAZ/FZG. Therefore, the decision of *Land* Rhineland-Palatinate and ZEF to grant those measures confers an economic advantage on FGAZ/FZG which it would not have obtained under normal market conditions.

##### **7.1.1.4. Selectivity**

- (231) To fall within the scope of Article 107(1) of the Treaty, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of State aid.
- (232) In the case at hand, the direct investment grants and the annual capital injections only benefit FGAZ/FZG. Both measures are thus selective by definition within the meaning of Article 107(1) of the Treaty.

#### 7.1.1.5. *Distortion of competition and effect on trade*

- (233) 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 <sup>(54)</sup>. The economic advantage granted by the direct investment grants and the annual capital injections in this case to the airport operator strengthen its economic position, as the airport operator was able to set up its business without bearing all of the inherent investment and operating costs.
- (234) As assessed in recital 173 *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, 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.
- (235) 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. Furthermore, point 45 of the 2014 Aviation Guidelines explicitly states that ‘the relatively small size of the undertaking which receives public funding does not, as such, exclude the possibility that trade between Member States might be affected.’
- (236) Zweibrücken Airport currently serves approximately 242 000 passengers per year, and has served as many as approximately 340 000 passengers per year in the past. The forecast provided by Germany established that passenger numbers could rise to more than 1 million passengers per year in 2025. As observed in recital 21, Zweibrücken Airport is located in the immediate vicinity of Saarbrücken Airport (39 kilometres) and within two hours’ drive from six other airports. According to the air traffic projection study provided by Germany, on average 15 % of passengers using Zweibrücken Airport originate from other Member States (France and Luxembourg). There are international flights from Zweibrücken airport to destinations such as Mallorca or Antalya. The runway at Zweibrücken is of sufficient length (3 000 m) and allows airlines to serve medium-haul international destinations. In the light of these facts, it must be considered that public funding to FGZ/FZG distorts or threatens to distort competition and has at least a potential effect on trade between Member States.
- (237) Apart from these general considerations, the Commission also considers that Zweibrücken Airport is or has been in direct competition with Saarbrücken Airport. First, it must not be overlooked that TUIfly, formerly Saarbrücken Airport’s biggest client, left that airport and moved to Saarbrücken in 2007. Secondly, for a substantial period of time 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. FZG’s airport services agreement with Germanwings even envisaged higher service charges to be paid to FZG in the event that Air Berlin should terminate its Berlin service from Saarbrücken.
- (238) In addition to these indicators for competition between Zweibrücken and Saarbrücken Airports, there is also evidence that despite the official submission by Germany that the two airports never perceived themselves as being in direct competition, officials of the *Land* Rhineland-Palatinate 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, the relationship between the two airports would be one of competition <sup>(55)</sup>. The notes further state that ‘from the perspective of Rhineland-Palatinate, it can be expected that Zweibrücken Airport will prevail in this competition in the long term’ <sup>(56)</sup>. Those statements indicate that at least in 2003, the perceived relationship between the two airports was indeed one of competition.
- (239) Against this background, the public financing granted to FGZ/FZG must be considered as being liable to distort competition and have an effect on trade between Member States.

<sup>(54)</sup> Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

<sup>(55)</sup> *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.

<sup>(56)</sup> *Einschätzung der rheinland-pfälzischen Innenministeriums*, 15 May 2003.

#### 7.1.1.6. **Conclusion**

- (240) In the light of the considerations in recitals 173 to 239, the Commission considers that the public funding granted to FGAZ/FZG in the form of direct investment grants and annual capital injections between 2000 and 2009 constitutes State aid within the meaning of Article 107(1) of the TFEU.

#### 7.1.2. **LAWFULNESS OF THE AID**

- (241) 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.
- (242) As the funds have already been put at the disposal of FGAZ/FZG, the Commission considers that Germany has not respected the prohibition of Article 108(3) of the Treaty <sup>(57)</sup>.

#### 7.1.3. **COMPATIBILITY**

##### 7.1.3.1. ***The applicability of the 2014 and 2005 Aviation Guidelines***

- (243) 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 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.
- (244) 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.
- (245) According to the 2014 Aviation Guidelines, the Commission considers that the *Commission notice on the determination of the applicable rules for the assessment of unlawful State aid* <sup>(58)</sup> applies to unlawful investment aid to airports. In this respect, if the unlawful investment aid was granted before 4 April 2014, the Commission will apply the compatibility rules in force at the time when the unlawful investment aid was granted. Accordingly, the Commission will apply the principles set out in the 2005 Aviation guidelines in the case of unlawful investment aid to airports granted before 4 April 2014 <sup>(59)</sup>.
- (246) 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 illegal operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in the 2014 Aviation Guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period <sup>(60)</sup>.
- (247) The Commission has already concluded in recital 242 that the direct and annual capital injections constitute unlawful State aid granted before 4 April 2014.

##### 7.1.3.2. ***Distinction between investment and operating aid***

- (248) In view of the provisions of the 2014 Aviation Guidelines referred to in recitals 245 and 246, the Commission has to determine whether the measure in question constitutes unlawful investment or operating aid.

<sup>(57)</sup> Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127.

<sup>(58)</sup> OJ C 119, 22.5.2002, p. 22.

<sup>(59)</sup> Point 173 of the 2014 Aviation Guidelines.

<sup>(60)</sup> Point 172 of the 2014 Aviation Guidelines.

- (249) According to point 25(r) 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(r) of the Guidelines investment aid can relate both to an upfront payment (that is to say cover upfront investment costs) and to aid paid out in the form of periodic instalments (to cover capital costs, in terms of annual depreciation and costs of financing).
- (250) Operating aid, on the other hand, means aid 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’ <sup>(61)</sup>.
- (251) In the light of those definitions, it can be considered that the direct capital injections, which were all linked to particular investment projects, constitute investment aid in favour of FGAZ/FZG.
- (252) In contrast, the part of the annual capital injections that was used to cover annual operating losses <sup>(62)</sup> of FGAZ/FZG, net of the costs included in the EBITDA that fall within a public policy remit as established in recitals 198 to 200 and the costs incurred prior to 12 December 2000, constitute operating aid in favour of FGAZ/FZG.
- (253) Finally, the part of the annual capital injections that covers losses of FGAZ/FZG that are not already included in the EBITDA (that is to say, the annual depreciation of assets, costs of financing, etc.), minus costs falling within a public policy remit as established in recitals 198 to 200 and the costs incurred prior to 12 December 2000, constitute investment aid.

#### 7.1.3.3. *Compatibility of investment aid*

- (254) According to paragraph 61 of the 2005 Aviation Guidelines, the Commission must examine whether the following cumulative conditions are met:
- (a) the construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.);
  - (b) the infrastructure is necessary and proportional to the objective which has been set;
  - (c) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;
  - (d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner; and
  - (e) the development of trade is not affected to an extent contrary to the Union interest.
- (255) In addition, State aid to airports — as any other State aid measure — must have an incentive effect and be necessary and proportional in relation to the aimed legitimate objective in order to be compatible.
- (256) Germany asserted that the investment aid in favour of FGAZ/FZG complies with all the compatibility criteria in the 2005 Aviation Guidelines.

##### (a) *Contribution to a clearly defined objective of common interest*

- (257) The Commission recalls that the 2005 Aviation Guidelines do not set out precise criteria according to which it will be assessed whether investment aid to an airport contributes to a clearly defined objective of common interest. However, a mere duplication of existing airport infrastructure cannot be considered to serve an objective of common interest.
- (258) In this respect, the Commission therefore has to assess, first, whether Zweibrücken Airport duplicates existing airport infrastructure in the region.

<sup>(61)</sup> Point 25(v) of the 2014 Aviation Guidelines.

<sup>(62)</sup> Expressed in Earnings Before Interest, Taxes, Depreciation and Amortisation (‘EBITDA’).

**Duplication: Overlap between Zweibrücken and Saarbrücken Airports**

- (259) The Commission recalls that Zweibrücken Airport is located in the immediate vicinity of Saarbrücken Airport. The linear distance between the two airports is approximately 20 kilometres, which translates into approximately 39 road kilometres. The traveling time by car between the two airports is approximately 30 minutes. In addition, at least 6 other airports are located within less than 2 hours traveling time from Zweibrücken Airport.
- (260) The close proximity between the two airports means that both serve virtually identical catchment areas. The various studies presented by Germany in this case <sup>(63)</sup>, as well as in the parallel formal investigation procedure regarding Saarbrücken Airport <sup>(64)</sup> confirm that the majority of passengers using the two airports stem from Western Rhineland-Palatinate and Saarland.
- (261) The profiles of Saarbrücken and Zweibrücken Airports are also relatively similar. When commercial aviation commenced in Zweibrücken in 2006, the first client was Germanwings, offering a route to Berlin. The same route was served from Saarbrücken by Luxair and, from 2007 onward, by Air Berlin. Zweibrücken's second big client was TUIFly, offering flights to various vacation locations, mainly in the Mediterranean. Before serving Zweibrücken, TUIFly had been one of Saarbrücken Airport's biggest clients.
- (262) Zweibrücken also attempted to break into the low-cost market more broadly by contracting with Ryanair, which, however, only maintained the London-Stansted route for less than a year. Eventually Germanwings also abandoned the airport, with the consequence that since the end of 2011 Zweibrücken Airport concentrates almost exclusively on vacation charter flights and some air freight.
- (263) Vacation charter flights are and were, however, also offered from Saarbrücken. Importantly, it appears that the main destinations served from Zweibrücken are also frequently served from Saarbrücken. By way of example, the summer 2014 flight schedule demonstrates that the two most frequent destinations served from Zweibrücken are Antalya and Palma de Mallorca, making up as much as 70 % of the weekly flights. At the same time, both destinations are served from Saarbrücken as well with a similar frequency: in the week of 16-23 June 2014, 16 flights departed from Zweibrücken to Antalya or Palma de Mallorca, while 18 flights to those same destinations departed from Saarbrücken.

**Duplication: capacity, passenger numbers, and annual results**

- (264) After Zweibrücken Airport entered the market for commercial aviation, the passenger numbers increased rapidly, from 78 000 passengers in 2006 to 338 000 passengers in 2009. Following this period of rapid growth, the numbers started to decrease, falling to 242 000 passengers in 2012. Considering that the capacity at Zweibrücken is 700 000 passengers, the airport has therefore never operated at more than 50 % of its available capacity, and is currently operating at approximately 35 % of the available capacity.
- (265) In comparison, the passenger numbers at Saarbrücken were essentially steady at around 450 000 passengers per annum until Zweibrücken entered the commercial aviation market, when passenger numbers dropped from 487 000 passengers in 2005 to 350 000 passengers in 2007. After adapting the airport charges, Saarbrücken Airport managed to attract Air Berlin in 2007, which led to a rebound and increasing passenger numbers, reaching a maximum of 518 000 passengers in 2008. In 2012, 425 000 passengers used Saarbrücken Airport. Considering that Saarbrücken's capacity is currently also 700 000 passengers per annum, only between 50-75 % of its available capacity was used. In this regard it must be noted that the capacity of Saarbrücken Airport could be higher (namely 750 000-800 000 passengers per annum) if it were not limited with respect to the number of security checks on passengers the Airport can handle per hour. This limitation arises from the fact that Saarbrücken Airport only has two security scanners available at the moment.

<sup>(63)</sup> Desel Consulting und Airport Research Center GmbH, 'Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025', Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009; Intraplan Consult GmbH, 'Luftverkehrsprognose Flughafen Saarbrücken — Vorgehensweise und Ergebnisse', October 2010.

<sup>(64)</sup> Commission decision of 1 October 2014 in State aid case SA.26190 — Germany — Saarbrücken Airport, not yet published in Official Journal.

- (266) The Commission also notes that both Saarbrücken and Zweibrücken Airports were loss-making during the period under investigation (2000-2009). Notably, at both airports the annual losses increased sharply from 2006 onward, when Zweibrücken entered the commercial aviation market.

#### **Duplication: evidence of direct competition between the two airports**

- (267) The Commission has already observed in recitals 237 and 238, that there are some indications that Zweibrücken Airport found itself in direct competition with Saarbrücken Airport. First, it must again be recalled that TUIFly, formerly Saarbrücken Airport's biggest client, left that airport and moved to Zweibrücken Airport in 2007 <sup>(65)</sup>. Secondly, for a substantial period of time, 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 routes served by airlines. FZG's airport services agreement with Germanwings even envisaged higher services charges to be paid to FZG in the event that Air Berlin should terminate its Berlin service from Saarbrücken.
- (268) In addition to the further indicators already mentioned (see recital 238), the Commission also points to the minutes of FGAZ's supervisory board meeting of 26 June 2009. In summarizing the report from the management board, the minutes recount a meeting between FGAZ's management, Ryanair, and the Rhineland-Palatinate Ministry of Economics. During that meeting, which discussed the future of Ryanair's relationship with Zweibrücken, the representative of the Ministry 'pointed out to [Ryanair] that the Rhineland-Palatinate Government would consider it a very unpleasant act if Ryanair were to start serving Saarbrücken'. Rather than demonstrating complementarity between the two airports, that note rather indicates that the two airports were competing for business.

#### **Duplication: freight**

- (269) The Commission further observes that Zweibrücken Airport is also engaged in handling air freight. While freight is not a significant aspect of operations at Saarbrücken Airport, it forms a central element of Frankfurt-Hahn Airport's business model. As stated in recital 21, Frankfurt-Hahn Airport is located only approximately 128 km or approximately 84 minutes by car away from Zweibrücken. In addition, freight is also handled at Luxembourg airport, located approximately 145 km, or approximately 86 minutes by car (see recital 21) away from Zweibrücken Airport.
- (270) In this regard, the Commission notes that freight is usually more mobile than passenger transport <sup>(66)</sup>. In general, the catchment area for freight airports is considered to have a radius of at least around 200 kilometres and 2 hours travelling time. To a certain extent the industry seems to suggest that up to a half a day of trucking time (that is to say, up to 12 hours driving time by trucks) would in general be acceptable <sup>(67)</sup>.
- (271) Considering that the catchment area for freight is typically much larger than for passengers, Frankfurt-Hahn and Luxembourg Airports provide sufficient air freight capacity for the region.

#### **Duplication: discussion of findings**

- (272) On the basis of the considerations outlined in recitals 259 to 270, the Commission finds that Zweibrücken Airport duplicates the airport infrastructure available at Saarbrücken Airport. More particularly, the Commission considers that even before Zweibrücken entered the commercial aviation market, the region was well connected by the existing airports, primarily Saarbrücken Airport, and that Zweibrücken Airport does not increase the connectivity of the region.

<sup>(65)</sup> The Commission notes that TUIFly submitted that its decision to leave Saarbrücken and move to Zweibrücken was motivated by security concerns related to Saarbrücken's runway. On the other hand, Germany has asserted in the context of the formal investigation procedure in case SA.26190 that decisions of airlines to leave Saarbrücken were never justified with reference to Saarbrücken's infrastructure. The Commission is not in a position to speculate as to the precise motives of TUIFly in moving from Saarbrücken to Zweibrücken.

<sup>(66)</sup> For example Leipzig/Halle airport was in competition with Vatry airport (France) for the establishment of the DHL European hub. See *Leipzig/Halle judgment*, paragraph 93.

<sup>(67)</sup> Response of Liege airport to the public consultation on the 2014 Aviation Guidelines.

- (273) Moreover, any aviation service demand not satisfied by Saarbrücken Airport could easily be met by the other 6 airports that can be reached within less than 2 hours traveling time. In particular as regards leisure flights, traveling times of up to 2 hours are commonly accepted. The same is true as regards demand for air freight services.
- (274) Germany has not presented any evidence that projected passenger numbers required the market entry of Zweibrücken Airport. In particular, while the entry into the commercial aviation market took place in 2006, the earliest passenger number projection study provided dates from September 2009 <sup>(68)</sup>. It cannot therefore be maintained that the public funding since 2000 was aimed at satisfying demand for aviation services that would otherwise not be met.
- (275) The Commission also notes that in 1997 Saarbrücken Airport projected its own passenger numbers to rise to 676 000 by 2010 <sup>(69)</sup>. As Zweibrücken Airport was, at that time, not yet active on the commercial aviation market, it can be assumed that that projection was the most reliable passenger forecast for the region. As Saarbrücken has a capacity of 700 000-800 000 passengers per annum, it is clear that the passenger numbers forecasted in 1997 could be satisfied by Saarbrücken Airport alone for a significant period of time.
- (276) The Commission is furthermore of the opinion that even the actual passenger numbers at Zweibrücken and Saarbrücken Airports do not demonstrate that Saarbrücken's capacity is insufficient to satisfy demand in the region. It is true that the combined passenger numbers at Saarbrücken and Zweibrücken reached approximately 850 000 passengers in 2008 and 810 000 in 2009, which is more than the maximum capacity of Saarbrücken Airport. At the same time, the Commission considers that those numbers project a somewhat distorted image of the real demand in the region: first, the high passenger numbers appear to be driven by direct competition between the Berlin routes offered from Zweibrücken and Saarbrücken (and Germanwings and Air Berlin/Luxair, respectively), which temporarily attracted additional passengers. However, once Germanwings terminated its unprofitable route to Berlin, the demand on the route decreased. Secondly, the Commission finds (see Section 7.3) that Germanwings, TUIFly and Ryanair all benefited from incompatible State aid granted to them by FGAZ/FZG. Insofar as this might have translated into reduced ticket prices, it is doubtful that the thus-subsidised passenger numbers at Zweibrücken represented the real demand in the region. Finally, it must be noted that the joint passenger numbers have dropped since 2009: the joint passenger numbers for Zweibrücken and Saarbrücken were approximately 670 000 in 2012, and thus below the capacity limit of Saarbrücken Airport.
- (277) The Commission can furthermore not accept the argument advanced by Germany that the two airports are only complementing — rather than competing with — each other. First, 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.
- (278) The Commission further finds that the differences in infrastructure that do exist between the two airports do not undermine its finding that Zweibrücken Airport duplicates airport infrastructure that already existed before in Saarbrücken. While it is again true that Zweibrücken has a longer runway, making it more suitable for long-distance flights and heavy freight planes, these differences are not sufficient to justify two airports in such close proximity. First, as explained in recitals 269 and 270, air freight demand is sufficiently served by Frankfurt-Hahn and Luxembourg Airports, where — according to the Commission's information — there is no relevant restriction with respect to the weight of planes. Secondly, Germany has not demonstrated that a significant number of the commercial passenger flights that depart from Zweibrücken could not start from Saarbrücken.
- (279) Considering, finally, that Saarbrücken Airport was apparently able to accommodate the aviation service demands now partially taken over by Zweibrücken before the latter entered the market, the difference in infrastructure does not justify duplicating the infrastructure that already existed in Saarbrücken.

<sup>(68)</sup> Desel Consulting und Airport Research Center GmbH, 'Fluggast- und Flugbewegungsprognose für den Flughafen Zweibrücken bis zum Jahr 2025', Gutachten im Auftrag der Flughafen Zweibrücken GmbH, September 2009.

<sup>(69)</sup> Commission decision of 1 October 2014 in State aid case SA.26190 — Germany — Saarbrücken airport, not yet published in Official Journal.

**Conclusion**

- (280) In the light of the facts and considerations presented and discussed in recitals 255 to 279, the Commission finds that the investment aid in favour of FGAZ/FZG served to create or maintain infrastructure that merely duplicates the (unprofitable) airport in Saarbrücken. The investment aid therefore cannot be considered to contribute to an objective of common interest.
- (281) As the compatibility conditions enumerated (in recital 254) are cumulative, the Commission does not need to assess the remaining compatibility conditions. Accordingly, to the extent that it constitutes State aid, the investment aid should be found not to be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.
- (282) As Germany has not put forward and the Commission has not identified any alternative grounds of compatibility, it is therefore concluded that, to the extent that it amounts to State aid, the investment aid in favour of FGAZ/FZG is incompatible with the internal market.

**7.1.3.4. Compatibility of operating aid under the SGEI rules**

- (283) Germany argues that public funding relating to operating aid in favour of FGAZ/FZG must be considered to be compatible with the internal market as compensation for the provision of a SGEI pursuant to Article 106(2) of the Treaty.
- (284) Article 106(2) of the Treaty states that ‘undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.’
- (285) That Article contains a (partial) derogation from the prohibition of State aid contained in Article 107(1) of the Treaty to the extent that the aid is necessary and proportional to ensure the performance of the SGEI under acceptable economic conditions.
- (286) Prior to 31 January 2012, the 2005 SGEI Framework<sup>(70)</sup> and the 2005 SGEI Decision represented the Commission’s policy in applying the derogation in Article 106(2) of the Treaty.
- (287) The Commission notes that both those instruments require that the undertaking in question be entrusted with a genuine SGEI. The entrustment of the airport operator with public service missions must also be recorded in ‘one or more official documents’ containing, inter alia, the ‘precise nature of the public service obligation’<sup>(71)</sup>.

**Genuine SGEI**

- (288) As regards, first, the question of whether the operation of Zweibrücken Airport constitutes a genuine SGEI, the Commission recalls that for an activity to constitute an SGEI, that activity should exhibit special characteristics as compared with ordinary economic activities, and that the objective of general interest which is pursued cannot simply be that of development of certain economic activities or economic areas as provided for in Article 107(3)(c) of the Treaty<sup>(72)</sup>. In this light, the Commission considers that this can only be the case if part of the area served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development<sup>(73)</sup>.
- (289) The Commission further considers that there is a certain overlap between the proper definition of a SGEI and the question whether the public financing of an airport (both investment and operating costs) contributes to a well-defined objective of common interest. The Commission has recalled in recitals 257 *et seq.* that public funding that leads to the duplication of airport infrastructure in a given region cannot be considered as contributing to an objective of common interest (see also recitals 294 *et seq.*). The Commission also recalls that the overall

<sup>(70)</sup> OJ C 297, 29.11.2005.

<sup>(71)</sup> 2005 Aviation Guidelines, paragraph 66. See also Article 4 of the 2005 SGEI Decision.

<sup>(72)</sup> See Decision N 381/04 — France — Project for a high capacity telecommunications network in the Pyrénées-Atlantiques (DORSAL) (OJ C 162, 2.7.2005, p. 5).

<sup>(73)</sup> See 2014 Aviation Guidelines, point 72.

management of an airport can only be considered to constitute an SGEI 'if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development' <sup>(74)</sup>. In this light, the Commission likewise considers that the operation of an airport that duplicates another airport in the same region cannot be considered to constitute a genuine SGEI <sup>(75)</sup>.

- (290) The Commission has concluded that, to the extent that it amounts to State aid, the public funding of Zweibrücken Airport's infrastructure is incompatible with the internal market because it duplicates existing infrastructure. Likewise, the Commission finds that the operation of Zweibrücken Airport does not constitute a genuine service of general economic interest. To the extent that Germany considers that the operation of Zweibrücken Airport amounts to an SGEI, it has therefore made a manifest error in the definition of the SGEI <sup>(76)</sup>.

#### Entrustment act

- (291) Secondly, the Commission finds that FGAZ/FZG were in any event not properly entrusted with the operation of Zweibrücken Airport as an SGEI. As relevant entrustment acts, Germany has only pointed to the general operating licence of the Airport and its 'obligation to operate' pursuant to §45 LuftVZO. The Commission notes that according to Germany, the imposition of an obligation to operate was the result of an upgrade of Zweibrücken Airport from an 'airfield' to an 'airport' in the sense of §49 and §38 LuftVZO <sup>(77)</sup>. That upgrade, however, only occurred at the beginning of 2010, meaning that for the period under investigation in this case (2000-2009) no entrustment can be inferred from §45 LuftVZO.
- (292) Germany furthermore submits that '[a] general official entrustment of FZG with SGEI did not occur, apart from the operating licence and the inclusion in Rhineland-Palatinate's conversion project'. Considering that Germany has not explained how the operating licence, by itself, can constitute a proper entrustment act fulfilling the requirements mentioned in recital 287, or how inclusion in the conversion project constitutes a proper entrustment, the Commission finds that FGAZ/FZG have not been properly entrusted with a genuine SGEI.
- (293) Accordingly, for the reasons outlined in recitals 288 *et seq.* it is concluded that the public funding granted to FGAZ/FZG amounting to operating aid cannot be considered as SGEI compensation compatible with the internal market.

#### 7.1.3.5. Compatibility of operating aid pursuant to the 2014 Aviation Guidelines

- (294) Section 5.1 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 those criteria to all cases concerning operating aid, including pending notifications and unlawful non-notified aid cases.
- (295) Unlawful operating aid granted before the date of publication of the 2014 Aviation Guidelines may be declared compatible to the full extent of uncovered operating costs provided that the following conditions <sup>(78)</sup> are met:
- (a) *contribution to a well-defined objective of common interest*: this condition is fulfilled, *inter alia*, if the aid increases the mobility of citizens of the Union and connectivity of the regions or facilitates regional development <sup>(79)</sup>;
  - (b) *need for State intervention*: the aid must be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver <sup>(80)</sup>;

<sup>(74)</sup> Point 72 of the 2014 Aviation Guidelines. See also point 34 of the 2005 Aviation Guidelines.

<sup>(75)</sup> See also Case T-79/10 *Colt Télécommunications France v Commission* [2013], ECLI:EU:T:2013:463, paragraphs 150-151, 154, 158 and 166.

<sup>(76)</sup> *Ibid*, paragraphs 92, 119.

<sup>(77)</sup> Submission Germany of 27 January 2011, p. 17: 'Aus der Aufstufung des Flughafens [vom Verkehrslandeplatz zum Verkehrsflughafen] folgt des Weiteren eine Betriebspflicht des Flughafens'.

<sup>(78)</sup> 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.

<sup>(79)</sup> Point 137, 113 and 114 of the 2014 Aviation Guidelines.

<sup>(80)</sup> Point 137 and 116 of the 2014 Aviation Guidelines.

- (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 traffic, the level of economic activity of the airport concerned would be significantly reduced <sup>(81)</sup>;
- (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 <sup>(82)</sup>;
- (e) *avoidance of undue negative effects on competition and trade* <sup>(83)</sup>.

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

- (296) Point 114 of the 2014 Aviation Guidelines outlines that ‘the duplication of unprofitable airports does not contribute to an objective of common interest’. The Commission considers that the arguments presented in recitals 259 *et seq.* with respect to the compatibility of investment aid in favour of FGAZ/FZG under the 2005 Aviation Guidelines are equally applicable to the compatibility of operating aid pursuant to the 2014 Aviation Guidelines. For that reason, the Commission finds that the operating aid granted to FGAZ/FZG merely duplicates an unprofitable airport and therefore does not contribute to a well-defined objective of common interest. The operating aid to FGAZ/FZG, to the extent that it constitutes State aid, can therefore not be found to be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

## Conclusion

- (297) The Commission concludes that the operating aid granted to FGAZ/FZG is not compatible with the internal market, either pursuant to Article 106(2) of the Treaty or pursuant to Article 107(3)(c) of the Treaty. As Germany has not put forward and the Commission has not identified any alternative grounds of compatibility, it is therefore concluded that, to the extent that it amounts to State aid, the operating aid in favour of FGAZ/FZG is incompatible with the internal market.

## 7.2. POTENTIAL AID IN CONNECTION WITH A BANK LOAN AND PARTICIPATION IN THE LAND RHINELAND-PALATINATE'S INTERNAL CASH POOL

### 7.2.1. EXISTENCE OF AID

#### 7.2.1.1. *Economic activity and notion of undertaking*

- (298) For the reasons outlined in recital 173 *et seq.*, FGAZ/FZG must be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty.

#### 7.2.1.2. *State resources and imputability to the State*

- (299) In order to constitute State aid, the measures in question must be financed from State resources and the decision to grant the measure must be imputable to the State.
- (300) 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 <sup>(84)</sup>. Resources of local authorities are, for the application of Article 107 of the Treaty, State resources <sup>(85)</sup>.

## 100 % State guarantee

- (301) Any public guarantee involves a potential loss of resources by the State. As the 100 % State guarantee was issued directly by the Land Rhineland-Palatinate, it was granted from State resources and is also imputable to the State.

<sup>(81)</sup> Point 137 and 124 of the 2014 Aviation Guidelines.

<sup>(82)</sup> Point 137 and 125 of the 2014 Aviation Guidelines.

<sup>(83)</sup> Point 137 and 131 of the 2014 Aviation Guidelines.

<sup>(84)</sup> Case C-482/99 *France v Commission* ('Stardust Marine') [2002] ECR I-4397.

<sup>(85)</sup> Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais* [2011], ECLI:EU:T:2011:209, paragraph 108.

### Cash-pool of the Land

- (302) Germany submitted that the cash-pool of the *Land* Rhineland-Palatinate is not financed directly out of the public budget of the *Land*. It claims that that all funds in the cash-pool either stem from the participating undertakings or are obtained in the form of loans on the capital market.
- (303) The Commission considers that in the case at hand, at all material times the State exercised direct or indirect control over the resources in the cash-pool, with the consequence that they constituted State resources. First, only undertakings in majority ownership by *Land* Rhineland-Palatinate (at least 50 % ownership) can participate in the cash-pool. Because of the majority public ownership, the participating undertakings are clearly public undertakings within the meaning of Article 2(b) of Commission Directive 2006/111/EC <sup>(86)</sup>. Since all the participating undertakings are thus public undertakings, their resources constitute State resources. This fact alone signifies that the funds of the cash-pool, to the extent they are made up of the deposits made by the participating undertakings, constitute State resources.
- (304) Secondly, in the event that the participating undertakings' deposits in the cash-pool are insufficient to satisfy the liquidity needs of a participant, *Land* Rhineland-Palatinate obtains short-term financing on the financial market in its own name and passes those funds on to the undertakings participating in the cash-pool. As the *Land* takes out the necessary loans in its own name, it must be considered that the funds thus obtained constitute State resources as well.
- (305) Thus, the Commission considers that the funding provided by the cash-pool is financed by State resources, as both the deposits by participating undertakings and the loans taken out by the *Land* to overcome liquidity gaps in the cash-pool constitute State resources.
- (306) It is furthermore clear that the *Land* had far-reaching control over the operation of the cash-pool, with the consequence that the financing provided to participating undertakings is imputable to the State. The Commission first notes that the Agreement for participation in the cash-pool is concluded between the *Land* and the undertakings involved. The decision to allow an undertaking to participate in the cash-pool is thus taken directly by the *Land*. The *Land* also decides on the maximum amount that a participating undertaking may withdraw from the cash-pool in the form of a credit line. In addition, *Land* Rhineland-Palatinate directly manages the day-to-day operations of the cash-pool through the 'Landeshauptkasse', which is an institution of the Ministry of Finance of the *Land* Rhineland-Palatinate. The 'Landeshauptkasse' also officially represents the *Land* when obtaining funds on the market to bridge liquidity gaps in the cash-pool.
- (307) Based on these elements, it appears that the State is capable of directly controlling the activities of the cash-pool, most centrally the question of which undertaking may participate and the individual credit line granted to each participating undertaking. Hence, the decisions concerning the participation in the cash-pool and concerning the extent of that participation are imputable to the State.

### Loan granted by Sparkasse Südwestpfalz

- (308) As regards the loan itself, the Commission accepts that the *Sparkasse Südwestpfalz* is an independent bank that takes decisions on granting loans under its own responsibility. There is no clear indication that the decision to grant the loan to FGAZ/FZG is imputable to the State. Thus, the Commission considers that the measure is not imputable to the State.

#### 7.2.1.3. Economic advantage

#### 100 % State guarantee

- (309) According to point 3.2 of the Guarantee Notice, an individual State guarantee is not aid when the following conditions are all met: '(a) The borrower is not in financial difficulty [...], (b) The extent of the guarantee can be properly measured when it is granted. [...] (c) the guarantee does not cover more than 80 % of the outstanding loan or other financial obligation [...], (d) A market-oriented price is paid for the guarantee [...]'.

<sup>(86)</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

- (310) In this case the *Land* Rhineland-Palatinate provided a 100 % guarantee to collateralise a loan granted in favour of FGAZ/FZG, thus the guarantee exceeds the threshold of 80 % of the outstanding loan. Also, as explained below, the market price of the guarantee is not paid. Therefore the guarantee clearly involves an advantage.
- (311) According to point 4.2 second subparagraph of the Guarantee Notice, the advantage can be calculated as the difference between the specific market interest rate FGAZ/FZG would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premium paid has been taken into account.
- (312) With respect to the guarantee issued by the *Land*, the Commission recalls that FGAZ/FZG obtained this 100 % guarantee free of charge and without providing collateral. It is clear that under normal market conditions, FGAZ/FZG would have had to pay a premium in order to obtain a guarantee on its loans from a third party.
- (313) As FGAZ/FZG did not have to pay a premium, it obtained an economic advantage not otherwise available on the market. The amount of that advantage is equivalent to the premium that FGAZ/FZG would have had to pay under normal market conditions.

#### **Cash-pool of the Land**

- (314) With respect to the participation of FGAZ/FZG in the cash-pool, Germany has explained that the cash-pool functions as follows: the FGAZ requests funds from the pool to ensure its liquidity, and the *Land* provides those funds from the cash-pool. The interest rates charged are market-based call money rates, at the level available to the *Land* itself. Where the deposits of participating undertakings are insufficient to cover the request, the *Land* replenishes the cash-pool by taking up loans in its own name. Germany further explains that the *Land* essentially passes on the conditions it obtains on the capital market to the participants in the cash-pool, thereby allowing the participants — the *Land*'s subsidiary undertakings — to refinance themselves under the same conditions as the *Land* itself, without any considerations of their creditworthiness. Moreover, the Commission observes that this financing is available to the undertakings for an unlimited period of time.
- (315) In the light of this mechanism, an advantage is granted to FGAZ where the conditions on which the *Land* grants loans from the cash-pool are more favourable than those otherwise available to FGAZ on the market. The conditions for taking up loans from the cash-pool are the same as those available to the *Land* to refinance itself. Considering that the *Land*, as a public authority, is able to take up loans at very favourable rates (as there is virtually no risk of default), the Commission considers that the rate at which FGAZ can obtain a loan from the cash-pool is more favourable than that otherwise available to it. In addition, FGAZ does not have to provide collateral for those loans and its financial situation/creditworthiness is not taken into account. Thus, by allowing the FGAZ to participate in the cash-pool, the *Land* granted the undertaking FGAZ/FZG an economic advantage <sup>(87)</sup>.

#### **7.2.1.4. Selectivity**

- (316) As the 100 % guarantee and the right to participate in the cash-pool was granted only to FGAZ/FZG (and, in the case of the cash-pool, other undertakings in which the *Land* holds a majority of shares), both measures have to be qualified as being selective in nature.

#### **7.2.1.5. Distortion of competition and effect on trade**

- (317) For the same reasons as outlined in recitals 233 *et seq.*, the Commission considers that any selective economic advantage granted to FGAZ/FZG is liable to distort competition and affect trade between Member States.

#### **7.2.1.6. Conclusion**

- (318) In conclusion, the Commission finds that by granting FGAZ/FZG a 100 % guarantee on a bank loan free of charge and allowing FGAZ to participate in the *Land*'s cash-pool, the *Land* granted State aid to FGAZ/FZG.

<sup>(87)</sup> The effect of the cash-pool is rather similar to a 100 % guarantee granted to FGAZ/FZG without charging a premium or requesting collateral. The *Land* bears the risk of FGAZ/FZG defaulting, without obtaining a compensatory payment in return.

- (319) In addition, the Commission concludes that the loan by *Sparkasse Südwestpfalz* itself did not constitute State aid.

#### 7.2.2. COMPATIBILITY

- (320) The Commission considers that the compatibility considerations presented in recitals 248 *et seq.* and 283 *et seq.* with respect to State aid in the form of direct investment grants and annual capital injections are equally applicable to the State aid in the form of a guarantee and participation in the cash-pool. Accordingly, the Commission finds that the State aid granted by way of providing FGAZ/FZG a 100 % guarantee free of charge and allowing it to participate in the *Land's* cash-pool is incompatible with the internal market.

### 7.3. DISCOUNTS ON AIRPORT CHARGES AND MARKETING SERVICES AGREEMENT WITH RYANAIR

#### 7.3.1. EXISTENCE OF AID

##### 7.3.1.1. *Economic activity and notion of undertaking*

- (321) By providing air transportation services, airlines are performing an economic activity and therefore constitute undertakings for the purposes of Article 107(1) of the Treaty. It must accordingly be analysed whether the agreements between the airlines and the airport in question, if imputable to the State and effecting a transfer of State resources, granted the former an economic advantage.

##### 7.3.1.2. *State resources and imputability to the State*

- (322) The measure must be imputable to the State and be granted from State resources. The Court of Justice held in the *Stardust Marine* <sup>(88)</sup> judgment that the resources of an undertaking incorporated under private law, whose shares are in majority publicly owned, constitute State resources. In this respect, it is consistent Commission practice to consider that irrespective of whether a public undertaking is loss-making or profit-making, all its resources are to be considered as State resources <sup>(89)</sup>.
- (323) Concerning imputability, in its *Stardust Marine* judgment the Court of Justice furthermore held that the fact that the State or a State entity is the sole or majority shareholder of an undertaking is not sufficient to find that a transfer of resources by that undertaking is imputable to its public shareholders <sup>(90)</sup>. According to the Court of Justice, even if the State was in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case could not be automatically presumed, since a public undertaking may also act with more or less independence, according to the degree of autonomy left to it by the State.
- (324) According to the Court of Justice, indicators from which imputability might be inferred, are <sup>(91)</sup>:
- (a) the fact that the undertaking in question could not take the contested decision without taking account of the requirements of the public authorities;
  - (b) the fact that the undertaking had to take account of directives issued by public authorities;
  - (c) the integration of the public undertaking into the structures of the public administration;
  - (d) the nature of the public undertaking's activities and the exercise of those activities on the market in normal conditions of competition with private operators;
  - (e) the legal status of the undertaking;
  - (f) the intensity of the supervision exercised by the public authorities over the management of the undertaking;
  - (g) any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.

<sup>(88)</sup> *Stardust Marine*, paragraphs 51 *et seq.*

<sup>(89)</sup> See for example Commission decision C 41/2005, *Hungarian Stranded Costs* (OJ C 324, 21.12.2005, p. 12), with further references.

<sup>(90)</sup> *Stardust Marine*, paragraphs 51 *et seq.*

<sup>(91)</sup> *Ibid.*

### State resources

- (325) The Commission notes that FGAZ/FZG are owned 100 % by the State, namely 50 % by the *Land* Rhineland-Palatinate and 50 % by the ZEF. FGAZ/FZG must thus be considered to constitute public undertakings within the meaning of Article 2(b) of Directive 2006/111/EC. The State, as the sole shareholder of FGAZ/FZG and by appointing the (identical) supervisory boards of FGAZ/FZG (which in turn appoint the management), can be presumed to have a dominant influence over FGAZ/FZG, and can control its resources. Thus, any advantage granted from FGAZ/FZG's resources would signify a loss of State resources, thus constituting a transfer of State resources.

### Imputability

- (326) While Germany submitted that the conclusion of contracts between airlines and FZG is not imputable to the State, it acknowledged that the State — represented by the *Land* Rhineland-Palatinate and the ZEF — is indirectly involved, namely via its representatives on the supervisory board of FZG's mother company, FGAZ. According to the statutes of FGAZ and FZG, the supervisory boards of both entities are entirely constituted by representatives appointed by public authorities, namely the *Land* and the ZEF. A representative appointed by the *Land* is automatically the chairman of both supervisory boards. The supervisory boards appoint FGAZ's and FZG's management. For both entities the supervisory boards have to approve all transactions amounting to more than EUR [...], which gives them broad control over the economic activities of FGAZ/FZG.
- (327) Secondly, the minutes of the supervisory board of FGAZ demonstrate that the supervisory board was informed of and consulted on the negotiation and conclusion of contracts with airlines. What is more, the minutes also demonstrate that, in concluding the contracts, the FGAZ/FZG management had to take the requirements of the public authorities into account. For instance, the minutes of the board meeting of 13 July 2006 show that after the management reported on the successful conclusion of the contract with Germanwings, the chairman of the supervisory board indicated that the *Land* was very pleased with the development, noting that it could lead to the creation of jobs and help to economically justify the airport. Most notably, the chairman also suggested that these positive effects — the creation of jobs and economic justification of the airport — could lead to an extension of the P&L Agreement between FGAZ and FZG. Considering that FZG was vitally dependent on the P&L Agreement to cover its operating losses, and that the *Land* and ZEF had the power not to extend the profit and loss transfer agreement or to discontinue the capital injections that made its operation possible, it is clear that the FGAZ/FZG management had to take the requirements of the public authorities into account if it wanted to ensure its own economic survival.
- (328) The supervisory board minutes of 13 July 2006 also indicate that a military exercise which had taken place at Zweibrücken Airport had led to complaints from the population about the noise. The management pointed out that the military exercise by the Dutch air force had created significant revenue. The chairman nevertheless suggested that the management should, in the future, carefully consider whether military exercises should be carried out and should inform the population in time. All of the above shows that the public authorities were involved in the day-to-day management decisions of FGAZ/FZG and agreed to them.
- (329) The minutes of the supervisory board meeting of 26 June 2009 furthermore suggest that the State, represented by the *Land* Rhineland-Palatinate, was directly involved in negotiations with airlines. The minutes recount the management's report to the supervisory board, mentioning a meeting between the management, a representative of Rhineland-Palatinate's Ministry of Economics, and Ryanair in London. During that meeting the relationship between Ryanair and Zweibrücken Airport was discussed. The active involvement of the Ministry may be deduced, apart from the mere presence of a representative in those commercial negotiations, from the Ministry's representative reminding Ryanair that serving Saarbrücken Airport would be considered an 'unpleasant act' by Rhineland-Palatinate's government.
- (330) The future of Ryanair's engagement in Zweibrücken was then discussed in the supervisory board, which considered that without a marked improvement in Ryanair's schedule and taking into account the monetary contribution demanded by Ryanair <sup>(92)</sup>, it supported the management's proposal to terminate the relationship. Taking into account the monetary contribution demanded by Ryanair, which would have rendered the approval of a new contract by the supervisory board obligatory, and the early involvement of the public authorities in the

<sup>(92)</sup> In the course of that meeting, Ryanair offered to maintain the route between London and Zweibrücken open during the winter 'for EUR [...]', and that it would be willing to start two new routes (Barcelona and Alicante) from Zweibrücken 'for EUR [...]'.

negotiations, it is clear that the supervisory board had far-reaching control over the commercial decision of the management. This may be seen as a further indicator that the management had to take the requirements of the public authorities into account in taking decisions, and demonstrates the degree of control and influence exercised by the supervisory board over the commercial decisions of FGAZ/FZG.

- (331) In the light of these considerations, the Commission considers that there are sufficient indicators to find that the conclusion of airport service contracts between FGAZ/FZG and the various airlines are imputable to the State.

#### 7.3.1.3. *Economic advantage*

- (332) In order to assess whether an agreement between a publically-owned airport and an airline confers an economic advantage on the latter, it is necessary to analyse whether that agreement complied with the MEO principle. In applying the MEO test to an agreement between an airport and an airline, it must be assessed whether, at the date when the agreement was concluded, a prudent market economy operator would have expected the agreement to lead to a higher profit than would have been achieved otherwise. That higher profit is to be measured by the difference between the incremental revenues expected to be generated by the agreement (that is, the difference between the revenues that would be achieved if the agreement were concluded and the revenues that would be achieved in the absence of the agreement) and the incremental costs expected to be incurred as a result of the contract (that is, the difference between the costs that would be incurred if the agreement were concluded and the costs that would be incurred in the absence of the agreement), the resulting cash flows being discounted with an appropriate discount rate.
- (333) In this analysis, all the relevant incremental revenues and costs associated with the agreement must be taken into account. The various elements (discounts to airport charges, marketing grants, other financial incentives) must not be assessed separately. Indeed, as stated in the Charleroi judgment: 'It is (...) necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context [...]' <sup>(93)</sup>.
- (334) The expected incremental revenues must include in particular the revenues from airport charges, taking into account the discounts as well as the traffic expected to be generated by the agreement and the non-aeronautical revenues expected to be generated by the additional traffic. The expected incremental costs must include in particular all the incremental operating and investment costs that would not be incurred in the absence of the agreement as well as the costs of the marketing grants and other financial incentives.
- (335) The Commission also notes in this context that price differentiation (including marketing support and other incentives) is a standard business practice. Such differentiated pricing policies should, however, be commercially justified <sup>(94)</sup>.

#### **Application of the MEOP to the agreements in question, in particular with Ryanair**

- (336) In order to apply this principle, taking into account the facts of this case, the Commission considers that the first step should be to reply to the following questions:
- (a) Should the marketing services agreement and the airport services agreement, which were signed within two weeks of each other, be analysed separately or together?
  - (b) What benefits could a hypothetical MEO acting in the stead of FGAZ/FZG the *Land* have expected to gain from marketing services agreements?
  - (c) What, for the purposes of applying the MEO principle, is the relevance of comparing the terms of the airport services agreements referred to in the formal investigation procedure with the airport charges billed at other airports?
- (337) After replying to these questions, the next step for the Commission will be to apply the MEO principle to the various measures under discussion.

<sup>(93)</sup> Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, paragraph 59.

<sup>(94)</sup> See Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/08 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p. 24).

(a) *Regarding an analysis of the marketing services agreement and the airport services agreement together*

(338) The Commission considers that two types of measures covered by the formal investigation in this case, namely the airports service agreement and the marketing services agreements, must be evaluated together as one single measure. This approach concerns the airport services agreement concluded between Ryanair and FZG, on the one hand, and the marketing services agreements between FZG and Ryanair as well as AMS and *Land Rhineland-Palatinate*, on the other hand. Ryanair does not dispute that the marketing services agreement concluded directly between Ryanair and FZG is to be assessed together with the airport services agreement. In the Commission's view, the same applies for the marketing services agreement with AMS.

(339) There are several indications pointing towards the fact that those agreements should be evaluated as one single measure since they were entered into within the framework of a single transaction.

(340) First of all, the contracts were entered into by essentially the same parties at nearly the same point in time:

(a) AMS is the 100 % subsidiary of Ryanair. The marketing services agreement was signed on behalf of AMS by Mr Edward Wilson, who at the time was a Director of AMS and concurrently a Director of Ryanair<sup>(93)</sup>. For the purpose of the application of State aid rules, AMS and Ryanair are considered to be a single undertaking, in the sense that AMS acts as an intermediary in the interest and under the control of Ryanair. For the agreements in this case, this can also be inferred from the fact that the marketing services agreement states in its preamble that 'AMS has exclusive license to offer marketing services on the travel website [www.ryanair.com](http://www.ryanair.com), the website of the Irish low fares airline Ryanair.'

Furthermore, it was noted in recitals 326 *et seq.* that the decision of FGAZ/FZG to conclude airport services agreements with airlines such as Ryanair were imputable to the State. The controlling influence over FGAZ/FZG was, in this regard, exercised by the *Land Rhineland-Palatinate* and ZEF. Considering, however, that it was always the *Land* which appointed FGAZ/FZG's supervisory board chairman, and that the *Land* effectively financed between 95 % and 80 % of the losses of the FGAZ/FZG (thereby having significant influence on the ZEF and a larger financial interest in the undertaking), it can safely be considered that the *Land* had effective control over FGAZ/FZG. As regards the commercial relationship between Ryanair and FGAZ/FZG on the one hand, and the *Land Rhineland-Palatinate* on the other hand, the Commission finds that the interest of FGAZ/FZG and the *Land* in entering into the respective agreements converged to a very large degree: both were interested in increasing traffic at the Airport, and it made little difference to the *Land* whether the FGAZ/FZG concluded the contract (the costs of which it would later have to reimburse via the P&L Agreement) or whether it concluded the contract itself. In this light, the fact that one of the marketing services agreements was concluded with the *Land* directly while the airport services agreement was concluded with its dependent subsidiary cannot militate against assessing the agreements as one commercial transaction.

(b) The agreements were also concluded at nearly the same point in time, as the airports service agreement (22 September 2008) was concluded exactly two weeks before the marketing services agreement with AMS (6 October 2008).

(341) Second, the marketing services agreement with AMS states in its first section, entitled 'Purpose of the Agreement', that the agreement is 'rooted in the Ryanair's commitment to operate on a route between Zweibrücken and London'. That formulation establishes an unambiguous direct link between the service agreement and the marketing services agreement in the sense that one would not have been concluded without the other. The marketing services agreement is based on the conclusion of the airport services agreement and the services provided by Ryanair. Indeed, the preamble to the marketing services agreement states that the *Land Rhineland-Palatinate* intends to target Ryanair passengers in order to promote tourism and business opportunities in the region, and in particular Zweibrücken Airport as a destination.

(342) Third, the marketing services agreement states in its preamble that *Land Rhineland-Palatinate* has decided to 'actively promote the Zweibrücken Airport as a holiday destination for international air travellers and also as an attractive business centre'. This is an indication that the conclusion of the marketing services agreement has as its primary and specific purpose to promote specifically Zweibrücken Airport (and the surrounding region).

<sup>(93)</sup> See <http://corporate.ryanair.com/investors/biographies/>, accessed on 23 June 2014.

- (343) Fourth, the marketing services agreement provides specifically that two links are to be placed in the right hand bar on the Zweibrücken destination page and five paragraphs within the Top Five Things To Do section of the Zweibrücken destination page of Ryanair.com. It can be deduced from those provisions that the purpose of the agreement is to support Zweibrücken Airport specifically and not *Land* Rhineland-Palatinate as a whole.
- (344) Fifth, the agreement can be terminated immediately by Rhineland-Palatinate in the event that Ryanair stops operating the route between Zweibrücken and London. This demonstrates yet again that the marketing services agreement and the airport services agreement are inseparably linked.
- (345) In conclusion, the marketing services agreement concluded by Rhineland-Palatinate and AMS is thus indivisibly linked to the airport service agreement signed by Ryanair and FZG. The above considerations demonstrate that without the airport services agreement, the marketing services agreement would not have been concluded. Indeed, the marketing services agreement states explicitly that it is based on Ryanair's Zweibrücken-London service, and essentially envisages marketing services aimed at promoting that route. At the same time, it appears that the conclusion of the airport services agreement was also dependent on the marketing services agreement: although the airport services agreement was concluded earlier in time, it did not oblige Ryanair to take up services from Zweibrücken. Rather, it explicitly stipulated that 'if service is not commenced by 28 October 2008 this agreement will lapse without liability to either party'. In fact, Ryanair only commenced its operations at Zweibrücken after the AMS contract had been concluded.
- (346) For those reasons, the Commission considers it appropriate to analyse the airport services agreement of 22 September 2008 and the marketing services agreement of 6 October 2008 jointly, with a view to determining whether they constitute State aid or not.
- (b) *Regarding the benefits that an MEO could have expected to gain from marketing services agreements and the price that it would have been willing to pay for those services*
- (347) In order to be able to apply the MEO principle to the case in point, the behaviour of FGAZ/FZG and the *Land* as signatories of airport services agreement with Ryanair and the marketing services agreement with AMS must be compared to that of a hypothetical MEO in charge of operating Zweibrücken Airport.
- (348) When analysing the transaction in question, it would be advisable to assess the benefits that this hypothetical MEO, motivated by the prospect of profits, could gain from purchasing marketing services. This analysis should not take into account the general impact of such services on tourism and the region's economic performance. Only the impact of these services on the airport's profitability should be taken into account, as this would be the only concern for a hypothetical MEO.
- (349) Thus, marketing services should stimulate passenger traffic on the air routes covered by marketing services agreements and the corresponding airport services agreements, as the marketing services are designed to promote those air routes. Although that impact will mainly benefit the airline concerned, it may also be of benefit to the airport operator. An increase in passenger traffic may lead to an increase in revenues generated by certain airport charges for the airport operator, as well as an increase in non-aviation revenues, in particular from car parks, restaurants and other businesses.
- (350) There can therefore be no doubt that an MEO operating Zweibrücken Airport in the stead of FGAZ/FZG and the *Land* would have taken this positive effect into account when considering entering into a marketing services agreement and the corresponding airport services agreement. The MEO would have taken into account the impact of the air route in question on future revenues and costs by, in this case, estimating the number of passengers using these routes, which would have reflected the positive effect of marketing services. Moreover, this effect would have been evaluated for the entire term of operation of the air routes in question, as set out in the airport services agreement and the marketing services agreement.
- (351) When an airport operator enters into an agreement for the promotion of certain air routes, it is standard practice to estimate the load ratio (or the load factor) <sup>(96)</sup> for the air routes in question and to take this into account when assessing future revenues. The Commission agrees with Ryanair on this issue, that is to say, that marketing services agreements do not just generate costs for the airport operator, they also bring benefits with them.

<sup>(96)</sup> The load ratio or load factor is defined as the proportion of places filled in the aircraft in operation on the air route in question.

- (352) In addition, it would be advisable to determine whether other benefits could reasonably be expected and quantified for a hypothetical MEO operating Zweibrücken Airport in the stead of FGAZ/FZG and the *Land*, that is to say, other than the benefits from the positive effect on passenger traffic on the air routes covered by the marketing services agreement during the term of operation of these routes, as set out in the marketing services agreement or the airport services agreement.
- (353) Certain interested third parties support this argument, in particular Ryanair in its study of 17 January 2014. The study of 17 January 2014 is based on the theory that marketing services acquired by an airport operator, such as FGAZ/FZG and the *Land*, will help to improve the airport's brand image and, as a result, to sustainably increase the number of passengers using the airport and not just the numbers on the air routes covered by the marketing services agreement and the airport services agreement for the term of operation set out in those agreements. In particular, Ryanair found in its study that the marketing services will have sustainable positive effects on passenger traffic in the airport even after the marketing services agreement has expired.
- (354) It should first be noted that there is nothing to suggest that, when the marketing services agreement was entered into, the airport operator or the *Land* ever considered, still less quantified, the marketing services agreement's possible beneficial effects on air routes additional to those covered by the agreement, or the possibility of such effects continuing after the agreement had expired. Moreover, Germany did not suggest any method for estimating the possible value that a hypothetical MEO operating Zweibrücken Airport in the stead of FGAZ/FZG and the *Land* could have placed on such effects when assessing whether or not to enter into the agreements in 2008.
- (355) In addition, the sustainable nature of these effects cannot be assessed based on the information available. It is possible that advertising Zweibrücken and the region on Ryanair's internet site may have encouraged people visiting that site to buy Ryanair tickets to Zweibrücken when the advertising was first posted or just thereafter. However, it is highly unlikely that the effect of the advertising on visitors lasted or had an influence on plane ticket purchases for more than a few weeks after it was posted on the Ryanair internet site. An advertising campaign is more likely to have a sustainable effect when the promotional activities involve one or more advertising media to which consumers are regularly exposed over a given period. For example, an advertising campaign involving general TV and radio stations, popular internet sites and/or various advertising posters displayed outside or inside public places could have a sustainable effect if consumers are regularly exposed to those media. However, promotional activities limited to just Ryanair's internet site are highly unlikely to have an effect that lasts much past the end of the promotion.
- (356) In fact, it is very likely that most people do not visit Ryanair's internet site frequently enough for the advertising there alone to leave them with a clear recollection of the region concerned. This argument is well supported by two factors. Firstly, under the terms of the marketing services agreement, the promotion of the Zweibrücken region on the homepage of the Ryanair internet site was limited to five paragraphs of 150 words under 'Top Five Things To Do' on the page for the destination of Zweibrücken, the presence for a very short period of time (16 days) of a simple link on the [www.ryanair.com](http://www.ryanair.com) homepage leading to a site made available by the *Land*, and the presence of two simple links on the page for the destination of Zweibrücken leading again to a site made available by the *Land*. Both the type of promotional activities (a simple link with a limited marketing value) and their short lifespan would have severely reduced the effect of these activities after the end of the promotion, in particular as these activities were limited to the Ryanair internet site and were not supported by any other media. Secondly, the preponderance of marketing activities set out in the agreement entered into with AMS was only in relation to the internet page for the destination of Zweibrücken. It is very likely that most people do not visit that page often; if and when they do, it is probably only because they are already interested in that destination.
- (357) Thus, even if the marketing services did increase passenger traffic on the air routes covered by the marketing services agreements for the period of their implementation, it is very likely that this effect was zero or negligible after that period and that the effect on other air routes was similarly insignificant.
- (358) It also follows from the Ryanair studies of 17 and 31 January 2014 that the generation of benefits going beyond the air routes covered by marketing services agreements or lasting after the period of their implementation for these routes, as set out in the marketing services agreement and airport services agreement, was extremely uncertain and could not be quantified with a degree of reliability that would be considered sufficient by a prudent MEO.

- (359) Thus, for example, according to the study of 17 January 2014, 'future incremental profits beyond the scheduled expiry of the airport services agreement are inherently uncertain'. Moreover, that study suggests two methods for evaluating *a priori* the positive effects of marketing service agreements: a 'cash flow' approach and a 'capitalisation' approach.
- (360) The 'cash flow' approach involves evaluating the benefits of marketing services agreements and airport services agreements by assessing the future revenues which may be generated by the airport operator through marketing services and the airport services agreement, minus corresponding costs. In the 'capitalisation' approach, improvement of the brand image of the airport through marketing services is treated as an intangible asset, acquired for the price laid down in the marketing services agreement.
- (361) However, the study highlights the major difficulties presented by the 'capitalisation' approach and shows that the results produced by this method may be unreliable; it suggests that the 'cash flow' approach would be better. In particular, the study finds:

'The capitalisation approach should only take into account the proportion of marketing expenditure that is attributable to the intangible asset base of an airport. However, it may be difficult to identify the proportion of marketing expenditure that is targeted towards generating expected future revenues for the airport (i.e. an investment in the intangible asset base of the airport) as opposed to generating current revenues for the airport.'

It also stresses that:

'In order to implement the capitalisation-based approach, it is necessary to estimate the average length of time that an airport would be able to retain a customer due to the AMS marketing campaign. In practice, it would be very difficult to estimate the average period of customer retention following an AMS campaign due to insufficient data.'

- (362) The study of 31 January 2014 proposes a practical application of the 'cash flow' approach. Under this approach, the benefits of marketing services agreements and airport services agreements which last even after the marketing services agreement has expired are expressed as a 'terminal value' that is calculated on the agreement's expiry date. This terminal value is calculated based on the incremental profits expected from the airport services agreement and marketing services agreement in the final year of application of the airport services agreement. Those profits are extended into the following period, the term of which is equal to the term of the airport services agreement, and are adjusted to take into account the growth rate for the air transport market in Europe and the probability factor designed to reflect the airport services agreement's and marketing services agreement's capacities to contribute to the airport's profits after they have expired. According to the study of 31 January 2014, the capacity for producing lasting benefits depends on various factors 'including greater prominence and a stronger brand, alongside network externalities and repeat passengers', although no details are given about these factors. Moreover, this method takes into account a discount rate which reflects capital costs.
- (363) The study suggests a probability factor of 30 %, which it considers prudent. However, this very theoretical study does not provide any serious evidence for this factor, either quantitatively or qualitatively. It does not base itself on any facts relating to Ryanair's activities, air transport markets or airport services to substantiate this rate of 30 %. It does not establish any link between this rate and the factors that it mentions in passing (prominence, strong brand, network externalities and repeat passengers) and that are supposed to extend the benefits of the airport services agreement and market service agreement after their expiry dates. Finally, it does not in any way base itself on the specific content of marketing services provided for in the various contracts with AMS when analysing to what extent those services could influence those factors.
- (364) Moreover, it does not prove that there is any likelihood that, on expiry of the airport services agreement and the marketing services agreement, the profits generated by these agreements for the airport operator in the final year of their application will continue in the future. Likewise, it provides no evidence that the growth rate of the air transport market in Europe is a useful indicator for measuring the impact of an airport services agreement and a marketing services agreement for a given airport.
- (365) A 'terminal value' calculated using the method suggested by Ryanair would therefore be highly unlikely to be taken into account by a prudent MEO when deciding whether or not to enter into an agreement.

- (366) The study of 31 January 2014 therefore shows that a 'cash flow' approach would only lead to very uncertain and unreliable results, as would the 'capitalisation' method.
- (367) Moreover, neither Germany nor any interested third party has provided any evidence that the method put forward by Ryanair in the study of 31 January 2014, or any other method aiming to quantify the profits after expiry of airport services agreements and marketing services agreements, has been successfully implemented by regional airport operators comparable to Zweibrücken's operator. Germany has not made any comments on the studies of 17 and 31 January 2014.
- (368) Moreover, a terminal value calculated using the method put forward by Ryanair is only positive (and, therefore, only tends to increase the profitability of the airport services agreement and marketing services agreement) if the incremental profit expected from these agreements in the final year of application of the airport services agreement is positive. If it is negative, taking the terminal value into account will usually reduce the profitability of the agreements. It will be demonstrated below (see recitals 378 *et seq.*) that the 2008 agreements resulted in negative incremental cash flows.
- (369) Moreover, as stated above (see recitals 341 *et seq.*), the marketing services clearly target persons likely to use the route covered by the marketing services agreement. If this route is not renewed on expiry of the airport services agreement, it is unlikely that marketing services will continue to have a positive effect on passenger traffic at the airport after the expiry date. It is very difficult for an airport operator to assess the likelihood of an airline continuing to run a route on expiry of the term to which it has committed itself in the airport services agreement. Low-cost airlines, in particular, have shown that, when it comes to opening and closing routes, they are very responsive to market conditions which, more often than not, change very quickly. Therefore, when entering into a transaction such as the one being examined in this case, a prudent MEO would not rely on an airline company extending the operation of the route in question on expiry of the agreement.
- (370) To conclude, it is clear from the above that the only benefit that a prudent MEO would expect from a marketing services agreement, and which it would quantify when deciding on whether or not to enter into such an agreement, together with an airport services agreement, would be that the marketing services would have a positive effect on the number of passengers using the routes covered by the agreements in question for the term of operation of those routes, as set out in the agreements. The Commission considers that any other possible benefits are too uncertain to be quantified and taken into account.

(c) *The feasibility of comparing Zweibrücken airport to other European airports*

- (371) Under the new guidelines for applying the MEO principle, the existence of aid to an airline using a particular airport can, in principle, be excluded if the price charged for the airport services corresponds to the market price, or if it can be demonstrated through an *ex ante* analysis — that is to say one founded on information available when the aid is granted and on developments foreseeable at the time — that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport <sup>(96)</sup>. However, as regards the first approach (a comparison with the 'market price'), the Commission doubts that, at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. It therefore considers an *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines <sup>(97)</sup>.
- (372) It should be noted that, in general, the application of the MEO principle based on an average price on other, similar markets may prove helpful if such a price can be reasonably identified or deduced from other market indicators. However, this method is not as relevant in the case of airport services, as the structure of costs and revenues tends to differ greatly from one airport to another. This is because costs and revenues depend on how developed an airport is, the number of airlines which use the airport, its capacity in terms of passenger traffic, the state of the infrastructure and related investments, the regulatory framework which can vary from one Member State to another and any debts or obligations entered into by the airport in the past <sup>(99)</sup>.

<sup>(96)</sup> See point 53 of the 2014 Aviation Guidelines.

<sup>(97)</sup> See points 59 and 61 of the 2014 Aviation Guidelines.

<sup>(99)</sup> See footnote 94.

- (373) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As can be seen in this case, commercial practices between airports and airlines are not always based exclusively on a published schedule of charges. Rather, these commercial relations are very varied. They include sharing risks with regard to passenger traffic and any related commercial and financial liability, standard incentive schemes and changing the spread of risks over the term of the agreements. Consequently, one transaction cannot really be compared with another based on a turnaround price or price per passenger.
- (374) Finally, assuming that it could be established, based on a valid comparative analysis, that the 'prices' involved in the various transactions that are the subject of this assessment are equivalent to or higher than the 'market prices' established through a comparative sample of transactions, the Commission would, for all that, not be able to conclude from this that these transactions comply with MEO test if it emerges that, when they were set, the airport operator had expected them to generate incremental costs higher than the incremental revenues. An MEO will thus have no incentive to offer goods or services at 'market price' if doing so would result in an incremental loss.
- (375) In such conditions, the Commission considers that, taking into account all the information available to it, there are no grounds for diverging from the approach recommended in the 2014 Aviation Guidelines for applying the MEO principle to relations between airports and airlines, that is to say, an *ex-ante* analysis of incremental profitability.

#### 7.3.1.4. *Assessment of incremental costs and revenues*

##### **Time frame**

- (376) When deciding on whether or not to enter into an airport services agreement and/or a marketing services agreement, a MEO will choose a time frame for its assessment based on the term of the agreements in question or the term set in each individual agreement. In other words, it will assess the incremental costs and revenues for the term of application of the agreements.
- (377) There does not seem to be any justification for choosing a longer period. On the date of signature of the agreements, a prudent MEO will not count on the agreements being renewed once they have expired, whether under the same or new terms. Moreover, a generally prudent operator would be aware that low-cost airlines such as Ryanair have always been and are known for being very responsive to market developments, both when starting up or shutting down routes and when increasing or decreasing the number of flights.

##### **Assessment**

- (378) Germany asserts that FGAZ/FZG did not prepare *ex ante* business plans before concluding individual airport services agreements with the various airlines. It explained that since the majority of the costs of the airport could be considered to be fixed and that an expansion of the commercial activities would not lead to significant additional costs, no such *ex ante* business plans were necessary.
- (379) Nevertheless, upon request by the Commission, Germany prepared an overview of the incremental costs and revenues that could have been expected at the time the relevant agreements were concluded. Germany prepared that data for each of the agreements concluded with airlines during the period under investigation, that is to say 2000-2009, as summarised in Table 8.

Table 8

#### **Incremental profitability of contracts with Germanwings, TUIFly and Ryanair**

|                                      | Germanwings<br>(Contract 15 Sept.<br>2006-15 Sept.<br>2009) | Germanwings<br>(Contract 30 June<br>2008-31 Dec.<br>2011) <sup>(1)</sup> | TUIFly<br>(Contract 1 Apr.<br>2008-31 Mar.<br>2011) <sup>(2)</sup> | Ryanair<br>(Contract 22 Sept.<br>2008-21 Sept.<br>2009) <sup>(3)</sup> |
|--------------------------------------|-------------------------------------------------------------|--------------------------------------------------------------------------|--------------------------------------------------------------------|------------------------------------------------------------------------|
| Expected Passengers                  | [...]                                                       | [...]                                                                    | [...]                                                              | [...]                                                                  |
| Expected Additional Aviation Revenue | [...]                                                       | [...]                                                                    | [...]                                                              | [...]                                                                  |

|                                          | Germanwings<br>(Contract 15 Sept.<br>2006-15 Sept.<br>2009) | Germanwings<br>(Contract 30 June<br>2008-31 Dec.<br>2011) <sup>(1)</sup> | TUIFly<br>(Contract 1 Apr.<br>2008-31 Mar.<br>2011) <sup>(2)</sup> | Ryanair<br>(Contract 22 Sept.<br>2008-21 Sept.<br>2009) <sup>(3)</sup> |
|------------------------------------------|-------------------------------------------------------------|--------------------------------------------------------------------------|--------------------------------------------------------------------|------------------------------------------------------------------------|
| Expected Additional Non-Aviation Revenue | [...]                                                       | [...]                                                                    | [...]                                                              | [...]                                                                  |
| Expected Additional Costs                | [...]                                                       | [...]                                                                    | [...]                                                              | [...]                                                                  |
| Costs Marketing Support                  | [...]                                                       | [...]                                                                    | [...]                                                              | [...]                                                                  |
| Expected Nominal Result                  | [...]                                                       | [...]                                                                    | [...]                                                              | [...]                                                                  |
| Discount Rate                            | [...]                                                       | [...]                                                                    | [...]                                                              | [...]                                                                  |
| Expected Discounted Result               | [...]                                                       | [...]                                                                    | [...]                                                              | [...]                                                                  |

<sup>(1)</sup> [...]

<sup>(2)</sup> [...]

<sup>(3)</sup> [...]

(380) In preparing Table 8, Germany took the following considerations into account:

- (a) The expected passenger numbers were deduced from the envisaged number of flights per week and extrapolated for the duration of the agreement.
- (b) The expected aviation revenues (handling and landing charges, cleaning and de-icing, etc.) were calculated over the duration of the agreement on the basis of the conditions agreed on with each airline, taking into account the relevant rebates and incentives.
- (c) The expected non-aviation revenues (parking charges, spending in the terminal, etc.) were also calculated over the duration of the agreement.
- (d) The expected incremental costs were calculated over the duration of the agreement, taking into account depreciation of investments necessary for handling commercial aviation (the new terminal, new check-in counters, parking lots, etc.) as well as additional personnel and materials costs. Only the costs caused by each individual airline were taken into account. On that basis, Germany argued that the costs of the new terminal and if hiring new staff were originally caused by Germanwings taking up business from Zweibrücken, so that those costs were mostly allocated to the first Germanwings contract.
- (e) At the Commission's request, marketing support payments made to Ryanair under the agreement between the *Land* and AMS were taken into account as incremental costs of the Ryanair contract.
- (f) The discount rate was based on the discount rates of the German Bundesbank starting from 2008.

(381) The Commission finds that the approach taken by Germany in estimating the passenger numbers, and calculating on that basis the expected incremental aviation and non-aviation revenues, is sound. The same holds true with respect to the discount rates.

(382) The Commission further notes Germany's disagreement that in calculating the incremental revenue only over the duration of the agreement, long-term gains are not taken into account. In response, the Commission refers to its reasoning developed in recitals 376 and 377, that it is indeed appropriate to take only the incremental costs and revenues generated over the duration of the agreement into account.

(383) The Commission also takes note of Germany's submission that the marketing services agreement could not be regarded as only producing costs, but should be also viewed as generating income. Germany did not propose any methodology to evaluate the specific incremental revenue generated by the marketing services agreement beyond

increasing traffic (and thus also non-aeronautical revenues) at the airport. In any event, the Commission has already determined in recitals 347 *et seq.* that a MEO would take only the incremental revenue of the airport into account in evaluating the positive effects of the marketing services agreement.

- (384) As regards incremental operating costs in particular, the Commission must base itself on the data provided by Germany and FGAZ/FZG as long as these appear reasonable, as it is not itself in a position to independently estimate those costs. The same is, in principle, true for the incremental investment costs, as Germany and FGAZ/FZG are in a better position to estimate which investment can be directly traced back to a particular airport services agreement. Having analysed the information provided by Germany, the Commission accepts the general calculation of the incremental costs as reasonable.
- (385) Furthermore, it appears reasonable that the hiring of additional staff to handle Germanwings and initial investments in renovating the terminal can be traced back to the first agreement with Germanwings, as that agreement was the trigger to forcefully develop commercial aviation at Zweibrücken.

### Conclusion

- (386) As the expected discounted result is negative for the first Germanwings agreement as well as for the TUIFly and Ryanair agreements, the Commission finds that FGAZ/FZG did not act like a MEO in concluding those agreements. The Airport could not have expected to cover at least the incremental costs brought about by any one of those agreements. As FGAZ/FZG thus did not behave like a MEO, its decision to conclude the agreements on those terms granted Germanwings, TUIFly and Ryanair an economic advantage.
- (387) In contrast, the second Germanwings agreement could have been expected to lead to a positive discounted result. In concluding that agreement, FGAZ/FZG therefore did not grant an economic advantage to Germanwings.

#### 7.3.1.5. *Selectivity*

- (388) The economic advantage identified in recitals 376 *et seq.* was granted on a selective basis, as only airlines operating from Zweibrücken Airport benefited from it.
- (389) In this context, the argument advanced by Germany that the discounts on airport charges granted to airlines flying from Zweibrücken were not selective must be rejected. Germany argued that the discounts were open to all airlines wishing to operate from Zweibrücken, which allegedly rendered them non-selective.
- (390) In response, the Commission first observes that the individual agreements concluded with the airlines diverge from the schedule of charges and from each other (see recitals 67 to 72), thus containing individually-negotiated conditions. The precise advantage granted would then appear to be selective as regards each individual airline.
- (391) Secondly, however, the Commission observes that even if the schedule of charges had been applied in the same way to each airline wishing to operate from Zweibrücken, any advantage conferred thereunder would still have to be considered selective. As Advocate-General Mengozzi opined in the *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* case, accepting Germany's argumentation would amount to 'radically denying the possibility of classifying as State aid the conditions on which a public undertaking offers its services where those conditions are applicable to all its contracting parties without distinction' <sup>(100)</sup>. Advocate-General Mengozzi further remarked that

'in my opinion, the Commission correctly observed, such an exclusion would not appear to be in line with either the case-law of the Court according to which public interventions which affect all the traders of a particular economic sector without distinction can also be selective in nature, nor with the various precedents where selective benefits arising from the provision of goods or services by public (or private) undertakings at identical rates or on identical conditions for all operators carrying on a specific activity were regarded as selective' <sup>(101)</sup>.

<sup>(100)</sup> Opinion Advocate-General, Case C-284/12 *Lufthansa v Flughafen Frankfurt-Hahn* [2013] not yet reported, paragraph 50.

<sup>(101)</sup> Ibid (internal footnotes omitted). See also *ibid*, paragraphs 51-52.

### 7.3.1.6. *Distortion of competition and effect on trade*

(392) A measure granted by a State is considered to distort or to threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes <sup>(102)</sup>. For all practical purposes, a distortion of competition is thus assumed as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. The case law of the European Courts has established that any grant of aid to an undertaking exercising its activities in the internal market can be liable to affect trade between Member States <sup>(103)</sup>.

(393) Since the entry into force of the third package on the liberalisation of air transport on 1 January 1993 <sup>(104)</sup>, air carriers can freely operate flights on intra-European connections. As the Court of Justice has observed,

‘where an undertaking operates in a sector in which ... producers from various Member States compete, any aid which it may receive from the public authorities is liable to affect trade between the Member States and impair competition, inasmuch as its continuing presence on the market prevents competitors from increasing their market share and reduces their chances of increasing exports’ <sup>(105)</sup>.

(394) The Commission has found that FGAZ/FZG and the *Land* Rhineland-Palatinate granted a selective advantage to Germanwings, TUIFly and Ryanair. These airlines are active on a competitive, Union-wide market and the advantage they received was liable to improve their competitive position on that market. In this light, the Commission finds that the advantage granted to Germanwings, TUIFly and Ryanair is liable to distort competition and affect trade between Member States.

### 7.3.1.7. *Conclusion*

(395) For the foregoing reasons, the Commission finds that Germanwings, TUIFly, and Ryanair have received State aid, amounting to approximately EUR 1 054 985, EUR 232 781, and EUR 464 879, respectively.

### 7.3.2. COMPATIBILITY

(396) The Commission notes that Germany has not advanced any arguments to show that the aid granted to TUIFly, Germanwings and Ryanair is compatible with the internal market.

(397) Following the case law of the Court of Justice <sup>(106)</sup>, the Commission recalls that it is Germany’s responsibility to indicate the legal basis on which a State aid measure could be found compatible with the internal market and to demonstrate that all required conditions are met. In the opening decision the Commission requested Germany to provide information on whether compatibility could be established pursuant to the 2005 Aviation Guidelines. Germany, however, did not make any submissions with a view to showing that the relevant conditions for compatible start-up aid under the 2005 Aviation Guidelines were met. Nor did the interested parties who submitted comments put forward any arguments demonstrating the compatibility of the State aid measure with the internal market.

(398) The Commission nevertheless finds it useful to briefly consider whether the State aid in question could be considered compatible start-up aid.

<sup>(102)</sup> Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 267, paragraph 11 and joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and others v Commission of the European Communities* [2000] ECR II-2325, paragraph 80.

<sup>(103)</sup> Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980], ECR 2671, paragraphs 11 and 12 and Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities* [1998] ECR II-717, paragraphs 48-50.

<sup>(104)</sup> Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8) and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

<sup>(105)</sup> Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 26.

<sup>(106)</sup> See notably Case C-364/90 *Italy v Commission* [1993] ECR I-2097, paragraph 20.

### 7.3.2.1. *Applicable legal framework*

(399) As regards start-up aid, the 2014 Aviation Guidelines state that:

‘the Commission will apply the principles set out in these guidelines to all notified start-up aid measure in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014’ <sup>(107)</sup>.

(400) The 2005 Aviation Guidelines, in turn, stipulate that:

‘the Commission will assess the compatibility of ... start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the Treaty [now Article 108(3) of the Treaty], on the basis of these guidelines if payment of the aid started after the guidelines were published in the Official Journal of the European Union.’

(401) As the agreements with Germanwings, TUIFly, and Ryanair were concluded after the publication of the 2005 Aviation Guidelines in the *Official Journal* on 9 December 2005, those guidelines constitute the applicable legal basis for the assessment of their compatibility with the internal market.

### 7.3.2.2. *Compatibility assessment pursuant to 2005 Aviation Guidelines*

(402) Given that the compatibility conditions for start-up aid enshrined in point 79 of the 2005 Aviation Guidelines are cumulative, the Commission considers that it is only necessary to demonstrate that one of those conditions is not fulfilled in order to find that the aid to the airlines is not compatible. The Commission starts its analysis with the condition set out in point 79(d) of the 2005 Aviation Guidelines.

(403) Point 79(d) of the 2005 Aviation Guidelines requires, inter alia, that the amount of aid granted in any one year does not exceed 50 % of total eligible costs for that year and total aid does not exceed an average of 30 % of eligible costs. Eligible costs are defined as the ‘additional start-up costs incurred in launching the new route or frequency ... which the air operator will not have to bear once it is up and running’ <sup>(108)</sup>.

(404) In the opening decision the Commission observed that the agreements with Germanwings, TUIFly and Ryanair did not provide for any connection between the aid granted and the eligible costs. Germany was therefore asked to provide details on the relationship between the aid and the eligible costs. Neither Germany nor the third parties commenting on the opening decision provided any such information. In this light, and considering that the agreements with the airlines in question make no reference to the costs of the airlines, let alone the eligible costs, the Commission finds that the compatibility condition enshrined in point 79(d) of the 2005 Aviation Guidelines is not fulfilled.

(405) In conclusion, the aid to the airlines cannot be found to constitute compatible start-up aid, as at least one of the compatibility conditions is not fulfilled. The State aid granted to Germanwings, TUIFly and Ryanair therefore constitutes unlawful and incompatible State aid that has to be recovered.

## 8. RECOVERY

(406) 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 <sup>(109)</sup> 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 <sup>(110)</sup>. In this context, the Court has stated that that objective is attained once the

<sup>(107)</sup> 2014 Aviation Guidelines, point 174.

<sup>(108)</sup> 2005 Aviation Guidelines, point 79(e).

<sup>(109)</sup> Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

<sup>(110)</sup> Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

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 <sup>(111)</sup>.

- (407) Following that case-law, Article 14 of Council Regulation (EC) No 659/1999 <sup>(112)</sup> 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'.
- (408) Therefore, the State aid mentioned above (see recitals 282, 297, 318, 320, 395 and 405, taking into account recitals 198 to 200) must be reimbursed to Germany, insofar as it has been paid out.
- (409) Table 9 indicates the approximate recovery amounts.

Table 9

**Information about the approximate amounts of aid received, to be recovered and already recovered**

| Identity of the beneficiary        | Total approximate amount of aid received (in EUR) | Total approximate amount of aid to be recovered <sup>(1)</sup> (in EUR) (Principal) | Total amount already reimbursed (in EUR) |                                  |
|------------------------------------|---------------------------------------------------|-------------------------------------------------------------------------------------|------------------------------------------|----------------------------------|
|                                    |                                                   |                                                                                     | Principal                                | Recovery interest <sup>(2)</sup> |
| FGAZ/FZG: Direct Investment Grants |                                                   |                                                                                     |                                          |                                  |
| FGAZ/FZG: Capital Injections       |                                                   |                                                                                     |                                          |                                  |
| FGAZ/FZG: 100 % Guarantee          |                                                   |                                                                                     |                                          |                                  |
| FGAZ/FZG: Cash-Pool Participation  |                                                   |                                                                                     |                                          |                                  |
| Germanwings                        | 1 115 971                                         | 1 115 971                                                                           |                                          |                                  |
| TUIFly                             | 233 002                                           | 233 002                                                                             |                                          |                                  |
| Ryanair/AMS                        | 469 132                                           | 469 132                                                                             |                                          |                                  |

<sup>(1)</sup> The amounts to be recovered from FGAZ/FZG have to be calculated on the basis of the formula set out in Article 3 and cannot at this stage be identified approximately.

<sup>(2)</sup> Considering that the aid is put at the disposal of the airlines continuously during the time concerned, the Commission considers it acceptable to fix as the date from which onward the recovery interest has to be calculated the last day of the period for which the aid amount was calculated (for example, 31 December if that period is a calendar year, or 31 October if that period starts on 1 January and ends on 31 October). In that respect, by choosing the last day of the period at stake, the Commission adopts the approach which is the most favourable to the beneficiaries.

- (410) To take account of the actual advantage received by the airline and its subsidiaries under the agreements, the amounts indicated in Table 9 may be adjusted, according to the supporting evidence provided by Germany, based on (i) the difference between, on the one hand, actual payments as presented *ex post*, that were made by the airline with regard to the airport charges (including the landing fee, the passenger fee and ground handling services under the airport services agreement), and on the other hand the forecasted cash flows (*ex ante*) on these items of income and shown in Table 8, and (ii) the difference between, on the one hand, the actual marketing payments as presented *ex post* which were paid to the airline or its subsidiaries under marketing services agreements and, on the other hand, the marketing costs as foreseen *ex ante*, corresponding to the amounts indicated in Table 8,

<sup>(111)</sup> Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 64-65.

<sup>(112)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

HAS ADOPTED THIS DECISION:

#### Article 1

1. The State aid, unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty in favour of *Flugplatz GmbH Aeroville Zweibrücken* ('FGAZ')/*Flughafen Zweibrücken GmbH* ('FZG') between 2000 and 2009 by means of direct investment grants, annual capital injections, the grant of a 100 % guarantee on a bank loan free of charge, and allowing FGAZ to participate in *Land Rhineland-Pfalz's* cash-pool, is incompatible with the internal market.
2. The State aid, unlawfully put into effect by Germany in breach of Article 108(3) of the Treaty in favour of Germanwings, TUIFly and Ryanair/AMS by means of the airport services agreements and marketing services agreements concluded on 15 September 2006 (Germanwings), 1 April 2008 (TUIFly), and 22 September 2008/6 October 2008 (Ryanair/Airport Marketing Services ('AMS')) is incompatible with the internal market.

#### Article 2

1. The loan granted to FZG by *Sparkasse Südwestpfalz* does not constitute State aid.
2. The airport services agreement concluded by FZG with Germanwings on 30 June 2008 does not constitute State aid.

#### Article 3

1. Germany shall recover the incompatible aid referred to in Article 1 from the beneficiaries.
2. FGAZ and FZG shall be jointly liable to repay the State aid received by either of them.
3. Ryanair and AMS shall be jointly liable to repay the State aid received by either of them.
4. The sums to be recovered are as follows:
  - (a) in respect of the direct investment grants granted by the *Land Rhineland-Palatinate* and the ZEF in favour of FZG: **EUR 20 564 170** granted between 12 December 2000 and 31 December 2009, minus the costs of fire brigade services and the costs for which the airport operator is entitled to reimbursement pursuant to §8(3) *Luftverkehrsgesetz* to the extent that they were covered by the direct investment grants;
  - (b) in respect of the annual capital injections granted by the *Land Rhineland-Palatinate* and the ZEF in favour of FGAZ: **EUR 26 629 000** granted between 2000 and 2009, minus the costs of fire brigade services and the costs for which the airport operator is entitled to reimbursement pursuant to §8(3) *Luftverkehrsgesetz* to the extent that they were covered by the annual capital injections, and minus those sums granted before 12 December 2000;
  - (c) in respect of the 100 % guarantee on the loan granted by the *Land Rhineland-Palatinate* in favour of FZG: the cash-equivalent of the value of the guarantee, to be determined pursuant to the Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees;
  - (d) in respect of the participation of FGAZ in the cash-pool of *Land Rhineland-Palatinate*: the cash-equivalent of the advantageous loan conditions, to be determined pursuant to the Communication from the Commission on the revision of the method for setting the reference and discount rates of 12 December 2007, minus any advantage received on loans that were used to cover the costs of fire brigade services and the costs for which the airport operator is entitled to reimbursement pursuant to §8(3) *Luftverkehrsgesetz*;
  - (e) in respect of the airport services agreement concluded between Germanwings and FZG on 15 September 2006: the amount of incompatible aid;
  - (f) in respect of the airport services agreement concluded between TUIFly and FZG on 1 April 2008: the amount of incompatible aid;
  - (g) in respect of the airport services agreement and marketing services agreements concluded between Ryanair and FZG on 22 September 2008 and between AMS and the *Land Rhineland-Palatinate* on 6 October 2008: the amount of incompatible aid.

5. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
6. Germany shall provide the exact dates on which the aid provided by the State was put at the disposal of the respective beneficiaries.
7. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 <sup>(113)</sup>.
8. Germany shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.

#### *Article 4*

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

#### *Article 5*

1. Within two months following notification of this Decision, Germany shall submit the following information:
  - (a) the total amount of aid received by the beneficiaries, and in particular:
    - (i) the amount of direct investment grants, capital injections, and the cash-equivalent of advantageous loans that covered the costs of fire brigade services and costs for which the airport operator is entitled to reimbursement pursuant to §8(3) LuftSiG;
    - (ii) information on the creditworthiness of FGAZ/FZG when the 100 % guarantee was issued and when each loan from the cash-pool was provided, with a view to enabling the Commission to determine the cash-equivalent of the guarantee and the advantageous conditions of the cash-pool loans in line with the Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees and Communication from the Commission on the revision of the method for setting the reference and discount rates of 12 December 2007, respectively;
  - (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
  - (c) a detailed description of the measures already taken and planned to comply with this Decision;
  - (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. Germany 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 1 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 beneficiaries.

#### *Article 6*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 2014.

*For the Commission*  
Joaquín ALMUNIA  
Vice-President

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<sup>(113)</sup> 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).

**COMMISSION DECISION (EU) 2016/153****of 2 July 2015****on the State aid SA.31883 — 2015/N, 2011/C which Austria implemented and is further planning to implement for ÖVAG and the Volksbanken Verbund and to amend Decision 2013/298/EU***(notified under document C(2015) 4635)***(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(s) cited above <sup>(1)</sup>,

Whereas:

**1. PROCEDURE**

- (1) On 9 December 2008 <sup>(2)</sup> ('the 2008 Decision'), the Commission approved the Austrian bank support scheme, which was subsequently prolonged four times <sup>(3)</sup> and expired on 30 June 2011.
- (2) In April 2009 Österreichische Volksbanken AG ('ÖVAG') received EUR 1 billion in fresh capital under the Austrian bank support scheme. In addition, ÖVAG placed three issues of debt instruments which were State guaranteed under that scheme in the market, each of EUR 1 billion, on 9 February, 18 March and 14 September 2009 respectively. Austria provided those aid measures on the assumption that ÖVAG was a sound financial institution, and submitted a viability plan on 29 September 2009.
- (3) Further analysis by the Commission led it to conclude that the application of the criteria laid down in the Annex to the Commission Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition <sup>(4)</sup> ('the Recapitalisation Communication') indicated that the bank could not be considered sound within the meaning of that Communication at the time of the recapitalisation. Austria maintained its position that the bank was sound, but submitted a restructuring plan for ÖVAG on 2 November 2010.
- (4) By letter dated 9 December 2011 <sup>(5)</sup>, the Commission informed Austria 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 the recapitalisation of EUR 1 billion and the guarantee of EUR 3 billion granted by Austria to ÖVAG, and requested Austria to submit an amended restructuring plan, the final version of which was submitted on 4 September 2012 ('the 2012 restructuring plan').

<sup>(1)</sup> OJ C 46, 17.2.2012, p. 3.

<sup>(2)</sup> Commission Decision of 9 December 2008 in State aid case N 557/2008 — *Maßnahmen nach dem Finanzmarktstabilitäts- und dem Interbankmarktstärkungsgesetz für Kreditinstitute und Versicherungsunternehmen in Österreich* (OJ C 3, 8.1.2009, p. 2).

<sup>(3)</sup> The first extension of the scheme, including certain amendments, was approved on 30 June 2009 (OJ C 172, 24.7.2009, p. 4), the second extension on 17 December 2009 (OJ C 28, 4.2.2010, p. 6), the third extension on 25 June 2010 (OJ C 250, 17.9.2010, p. 4) and the fourth extension on 16 December 2010 (OJ C 20, 21.1.2011, p. 3).

<sup>(4)</sup> See point 13 and the Annex to the Commission Communication (OJ C 10, 15.1.2009, p. 2).

<sup>(5)</sup> Commission Decision of 9 December 2011 in case SA.31883 (2011/C) (ex N516/10), *Restructuring of Österreichische Volksbanken AG* (OJ C 46, 17.2.2012, p. 3).

- (5) On 19 September 2012, the Commission concluded the formal investigation procedure by adopting a compatible restructuring aid decision concerning ÖVAG ('the 2012 Decision') <sup>(1)</sup>, including the measures referred to in recital 2 above as well as a EUR 250 million capital injection by the State in the form of ordinary shares and an asset guarantee with the effect of increasing the capital by EUR 100 million. That Decision was based on the 2012 restructuring plan and the commitments in the Annex to the 2012 Decision ('the 2012 commitments').
- (6) The 2012 Decision was based on a plan to reorganise the Volksbanken-Verbund in Austria ('the Verbund') as an association with joint liability (*Haftungsgemeinschaft*). The group encompassed 51 independent Volksbanken ('primary banks') and ÖVAG. The primary banks had only limited liability in relation to ÖVAG, while ÖVAG had full liability in relation to the Verbund <sup>(2)</sup>.
- (7) On 26 October 2014 the results of the Comprehensive Assessment carried out by the European Central Bank and the European Banking Authority ('the ECB/EBA Comprehensive Assessment') revealed a capital shortfall in core equity tier 1 ('CET1') in both baseline and adverse scenarios at the level of the Verbund, which included ÖVAG.
- (8) The Austrian authorities publicly announced that they would not provide any further aid to the Verbund. The measures identified at the time by the Verbund to close the capital shortfall (notably the sale of non-core subsidiaries and further reduction of risk-weighted assets ('RWAs')) would not on their own have been sufficient to close the capital shortfall in the timeframe required by the Single Supervisory Mechanism ('the SSM').
- (9) On 23 December 2014 ÖVAG held an extraordinary general meeting where it was decided to take the necessary steps to put ÖVAG into wind-down (*Abbaugesellschaft*), subject to approval from the national regulators, the SSM and the Commission. The core functions of ÖVAG as the central organisation for the Verbund would be transferred to one of the primary banks as part of a new restructuring plan ('the new restructuring plan') for the Verbund which included a system of fully joint and several liability.
- (10) The new restructuring plan represents a fundamental change to the 2012 restructuring plan, which renders necessary an amendment decision from the Commission.
- (11) During the period from October 2014 to June 2015, the Commission, the Austrian authorities, the SSM, ÖVAG and the Verbund discussed the new restructuring plan in a succession of telephone conversations and written correspondence. The Commission met representatives of ÖVAG and Austria on 18 December 2014 and representatives of the Verbund on 7 May 2015.
- (12) On 28 May 2015, a meeting of ÖVAG shareholders approved the transfer of its core functions to Volksbank Wien-Baden ('VBWB') and the establishment of a liquidation unit for residual functions pursuant to Section 162 of the Austrian Act on the Recovery and Resolution of Banks (*Bundesgesetz über die Sanierung und Abwicklung von Banken*, 'BaSAG').
- (13) On 29 May 2015, a meeting of VBWB shareholders approved the transfer of ÖVAG's core functions and a capital increase of EUR 113 million.
- (14) Also on 29 May 2015, primary banks representing 97,83 % of the Verbund's RWAs signed a banking association agreement (*Verbundvertrag*) and a cooperation agreement (*Zusammenarbeitsvertrag*).
- (15) The Verbund submitted the final version of the new restructuring plan on 23 June 2015.
- (16) On 25 June 2015, Austria submitted commitments, which are set out in the Annex to this Decision.
- (17) Since the present Decision is taken on the basis of the Commission's State aid powers, it is without prejudice to any merger control obligations to which the different parties involved in the transactions may be subject.

<sup>(1)</sup> Commission Decision 2013/298/EU of 19 September 2012 on the State aid SA.31883 (2011/C) (ex N516/10) which Austria implemented and is planning to implement for *Österreichische Volksbanken AG* (OJ L 168, 20.6.2013, p. 30).

<sup>(2)</sup> The Verbund is further described in recitals 18 et seq.

## 2. DETAILED DESCRIPTION OF PAST AND FUTURE MEASURES

### 2.1. THE RECIPIENT AND ITS DIFFICULTIES

- (18) The Verbund currently encompasses: (i) 51 legally independent primary banks — 41 regional cooperative banks, 5 special banks, 4 credit unions and 1 building society (Bausparkasse); (ii) the central organisation, ÖVAG; and (iii) the legal deposit insurance scheme, Volksbank Haftungsgenossenschaft eG. ÖVAG is the central organisation of the Verbund and as such provides services for the primary banks in the form of centralised administration and liquidity management activities. The primary banks are small banking operations (balance sheet size between EUR 65 million and EUR 3 600 million) mainly providing banking services to local and regional private and corporate clients.
- (19) The Verbund has a market share of approximately 6 % in Austria, with around 900 000 private customers and 80 000 business customers. The primary banks have more than 500 branches, with 4 900 members of staff. The total volume of advances to customers amounts to around EUR 30 billion and the total volume of liabilities to customers amounts to around EUR 27 billion.
- (20) The members of the Verbund are bound together by an association agreement providing for joint liability and a transfer of liquidity. Under the current system, the central organisation, ÖVAG, has unlimited liability for the primary banks, whilst the liability of the primary banks for the central organisation is limited to the extent that the equity ratio of a primary bank cannot fall below the minimum regulatory requirements.
- (21) 51,6 % of ÖVAG is currently held by the primary banks through its holding company Volksbanken Holding. Austria holds 43,3 % of ÖVAG. Other significant shareholders are DZ Bank AG (3,8 %) and Raiffeisen Zentralbank (0,9 %), while 0,4 % is owned by other parties.
- (22) The Verbund's most significant geographic market is Austria. However, ÖVAG was previously active in several central and eastern European countries, although its market share was small there, except in Romania.
- (23) The sources of ÖVAG's difficulties were manifold: its exposure to central and eastern European countries through its retail banking subsidiaries, grouped in VB International AG ('VBI'); its engagement in public finance and infrastructure financing; real estate activities; an investment portfolio containing among others instruments issued by Lehman Brothers and Icelandic banks; and reliance on wholesale funding <sup>(1)</sup>. Those factors led to significant losses at ÖVAG in 2008 and resulted in the support measures granted to the bank by Austria in 2009 <sup>(2)</sup>. The magnitude of losses for 2011 led to further State aid measures <sup>(3)</sup>. Despite restructuring efforts, in 2014 the ECB/EBA Comprehensive Assessment in 2014 revealed an additional capital shortfall at the level of the Verbund (including ÖVAG), mainly driven by risks and weaknesses in ÖVAG <sup>(4)</sup>.

### 2.2. AID MEASURES OF 2009 AND THE SUBSEQUENT RESTRUCTURING

#### Aid measures

- (24) In April 2009, Austria underwrote participation certificates (*Partizipationsscheine*, 'PS') for ÖVAG amounting to EUR 1 billion ('the 2009 recapitalisation'). That PS instrument did not confer voting rights on the State but gave it a preferential coupon and a conversion option. The instrument is perpetual and is still treated as core tier 1 capital. The PS absorb losses in proportion to the total loss-absorbing capital. ÖVAG had the right to redeem all or tranches of the PS at any time. The State had the right to convert the PS into ordinary shares in ÖVAG, but did not do so.
- (25) ÖVAG also received government guarantees under the Austrian bank support scheme and issued EUR 3 billion of State-guaranteed bonds in 2009 that matured in 2012 and 2013.

<sup>(1)</sup> See recitals 13 and 14 of the 2012 Decision.

<sup>(2)</sup> See recitals 24 and 25.

<sup>(3)</sup> See recitals 27 to 30 and the 2012 Decision for more detail.

<sup>(4)</sup> The capital shortfall is further described in recital 33.

**Restructuring**

- (26) ÖVAG had already initiated a restructuring process in 2009, which among other things aimed at separating the bank from the activities which were the main source of its problems. Nevertheless, some of the risks stemming from the legacy portfolio affected the bank again in 2011. They included:
- (a) losses generated by the VBI subsidiaries and impairments on their book value in ÖVAG's accounts totalling EUR 380 million;
  - (b) impairments of EUR 300 million on ÖVAG's investments linked to the countries most affected by the sovereign crisis;
  - (c) a write-down by EUR 142 million of the remaining participation capital which ÖVAG held in Kommunalkredit;
  - (d) a downward revaluation of the book value of Investkredit ('IK') by EUR 323 million in the context of a merger by absorption by ÖVAG.

**2.3. AID MEASURES OF 2012 AND THE SUBSEQUENT RESTRUCTURING****Aid measures**

- (27) The magnitude of the losses reported by ÖVAG for 2011 led to further State aid measures, consisting of a EUR 250 million capital injection by the State in form of ordinary shares ('the 2012 recapitalisation') and an asset guarantee.
- (28) The 2012 recapitalisation was conducted in two steps. First, the bank's capital was reduced by 70 % to offset the accumulated losses. That reduction in capital also reduced pro rata the PS which Austria had injected in 2009, leaving EUR 300 million of State participation capital in ÖVAG. In a second step, ÖVAG received fresh capital totalling EUR 484 million, EUR 250 million of which was underwritten by Austria, the rest by the Volksbanken Holding. The price per share was EUR 2,181.
- (29) As a result, the State obtained a 43,4 % stake in ÖVAG and became the second-biggest shareholder after the Volksbanken Holding (then 50,2 %), thereby diluting the stakes of the other shareholders, which did not participate in the capital injection: DZ-Bank 3,8 %, ERGO 1,5 %, RZB 0,9 %, and free float 0,1 %.
- (30) The asset guarantee increased ÖVAG's capital by EUR 100 million through covering losses on the insured portfolio of non-performing loans. ÖVAG can draw on the asset guarantee only under certain conditions which will be verified on 31 December 2015 <sup>(1)</sup>. The asset guarantee is remunerated at 10 % p.a. (i.e. like a capital injection) and will expire on 1 January 2016.

**Restructuring**

- (31) In connection with the aid measures of 2012, ÖVAG revised its original restructuring plan and opted for a profound restructuring. The measures were approved in the 2012 Decision. The 2012 restructuring plan, which underpinned the 2012 Decision, included the following points:
- (a) ÖVAG created an internal resolution division within which certain assets, the so-called non-core segment, were to be liquidated.
  - (b) ÖVAG's balance sheet and risk-weighted assets had to shrink to EUR 18,4 billion and EUR 10,1 billion respectively by 31 December 2017. The greater part of the reduction was to be achieved in the non-core segment, whilst the balance sheet and risk-weighted assets in the core segment had to drop only slightly (target values of EUR 5,4 billion and EUR 4,5 billion respectively by 31 December 2017).
  - (c) In the core segment, ÖVAG was to maintain only its role as the central organisation of the Verbund and to offer products and services for the primary banks and their customers. ÖVAG was no longer authorised to carry out credit operations with third parties for its own account.

<sup>(1)</sup> For details, refer to recitals 24 to 29 of the 2012 Decision.

- (d) ÖVAG was to withdraw from certain business areas, in particular renewable energy and specific types of real estate financing ('Modellfinanzierung').
  - (e) ÖVAG was to sell its shares in VBLL, Malta/IK Malta Volksbank, Volksbank Romania and RZB to parties independent of the Verbund and the Austrian State.
  - (f) The shareholders DZ Bank, Ergo Gruppe and RZB were to take certain measures to boost the capital of ÖVAG.
  - (g) Until the end of the restructuring period on 31 December 2017, ÖVAG was to refrain from making any acquisitions, paying out dividends, leading on prices in its internet banking unit, Live Bank, and referring to State aid for advertising purposes, and to observe certain rules on the remuneration of its managerial staff.
  - (h) ÖVAG committed to pay back the entire remaining State participation of EUR 300 million by 31 December 2017, with at least EUR 150 million being paid in the first half of 2017. The primary banks were to play a part in realising that repayment, as far as the minimum regulatory capital adequacy requirements allowed.
- (32) Between 2012 and 2014 ÖVAG succeeded in reducing its balance sheet and its RWAs in both the non-core and core segments quicker than required under the 2012 Decision. At 31 December 2014 it had a balance sheet total of EUR 15,1 billion, RWAs of EUR 8,7 billion and a core equity capital ratio of 6,21 %.

#### 2.4. ECB/EBA COMPREHENSIVE ASSESSMENT

- (33) In 2014 the European Central Bank (ECB) and the European Banking Authority carried out the Comprehensive Assessment, scrutinising 130 of the biggest banks in the euro area for the quality of their balance sheets and their financial resilience. The results of the Comprehensive Assessment were published on 26 October 2014. The Verbund was assessed on a consolidated basis including ÖVAG, in accordance with Article 10 of the Capital Requirements Regulation <sup>(1)</sup> and Article 30 of the Austrian Banking Act <sup>(2)</sup>. The Verbund was one of the 25 banks that failed to meet the minimum own funds requirements in the projected scenarios. Its CET1 ratio for 2016 was 7,2 % (threshold: 8 %) in the baseline scenario and 2,1 % (threshold: 5,5 %) in the stress scenario. The maximum difference between the test result and the threshold corresponds to an additional CET1 capital requirement of EUR 865 million.
- (34) The ECB gave the Verbund until 26 July 2015 to cover that capital requirement and reach a CET1 ratio of 14,63 %.

#### 2.5. THE NOTIFIED NEW RESTRUCTURING PLAN 2015

- (35) As a result of the difficulties outlined above, the Verbund has embarked on a fundamental transformation, in agreement with the Austrian State. That transformation plan is underpinned by the following principles:
- (a) The central organisational function will be transferred from ÖVAG to VBWB.
  - (b) Once the central organisation has been transferred, ÖVAG will be deconsolidated from the Verbund.
  - (c) The deconsolidated ÖVAG will go into liquidation, and will relinquish its banking licence, so that it no longer has to meet the own funds requirements for banks.
  - (d) The 51 primary banks in the Verbund will be merged into 10 bigger institutions and will cooperate to a greater extent than in the past.
  - (e) The primary banks will henceforth have unlimited liability for the obligations of the Verbund and the central organisation. Until now they have been liable only insofar as this did not prevent them from meeting the regulatory requirements on minimum own funds.

<sup>(1)</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

<sup>(2)</sup> Bankwesengesetz ('BWG').

- (36) The measures set out in the transformation plan, in particular the liquidation of ÖVAG, the relinquishing of its banking licence and its deconsolidation from the Verbund, will enable the Verbund to achieve a CET1 ratio of [9-11] (\*) % immediately. Furthermore, the Verbund has set in motion a number of additional measures to free up capital. They include reducing its exposure in the corporate and real estate sector (with a cumulative effect on CET1 of EUR [100-200] million from January 2014 to December 2017), selling off product companies (EUR [100-200] million), and selling off securities (EUR [50-100] million). However, for the period up to the end of 2017 those measures will release capital of only EUR [450-550] million, which is not enough to offset a capital shortfall of EUR 865 million.

#### **Transfer of the central organisational function**

- (37) VBWB will take over the central organisational function of the Verbund, which has so far been performed by ÖVAG. The assets required for that function will be transferred to VBWB, together with the corresponding liabilities of ÖVAG, on 30 June 2015, with retroactive effect from 1 January 2015. The total assets and liabilities to be transferred each amount to just under EUR 8,6 billion. That sum encompasses all the activities assigned to the core segment in the 2012 Decision, except for three smaller subsidiaries — VB Factoring, VB Mobilienleasing and VB Investments — which will remain in ÖVAG making up less than 10 % of the overall sum.

#### **Deconsolidation and liquidation of ÖVAG**

- (38) After the central organisation and the relevant assets and liabilities have been transferred, ÖVAG will on 4 July 2015 be placed in liquidation and converted into a wind-down entity ('Abbaugesellschaft') under Section 162 of BaSAG. The name of the institution will be changed to immigon portfolioabbau ag ('Immigon'). The remaining assets of EUR 7,4 billion will be liquidated by 31 December 2017. They include all the activities assigned to the non-core segment in the 2012 Decision and the holdings in VB Factoring, VB Mobilienleasing and VB Investments mentioned in recital 37.
- (39) Under the current plan, the revenue from liquidating the assets will be sufficient to fully cover the remaining liabilities. In the process, ÖVAG's equity capital and the participation capital will be reduced by 96,65 %. That reduction also applies to the remaining State participation capital of EUR 300 million.
- (40) The existing asset guarantee will remain in ÖVAG/Immigon but will be modified. Currently, all assets giving rise to a claim under the guarantee need to be registered by 31 December 2015 and the sum of these claims will be settled by 31 July 2016. Under the modified guarantee agreement, the date for registering claims under the guarantee remains on 31 December 2015. However, settlement of the sum of these claims can be requested at any time between 31 December 2015 and the end of the wind-down period in 2017. At the same time, the capital threshold below which settlement can be requested will be reduced from below 10 % CET ratio to below zero capital, i.e. guarantee claims can only be settled if ÖVAG/Immigon would otherwise become insolvent during the wind-down process. The fee for the extended settlement period of the guarantee remains at 10 % per annum.
- (41) In order to realise a capital benefit from that transformation, the Verbund needs to implement two major steps:
- (a) The return of the banking licence by ÖVAG/Immigon in order to free the company from the obligation to fulfil the applicable capital requirements on a stand-alone basis.
  - (b) The deconsolidation of ÖVAG/Immigon from the Verbund in order to ensure that the Verbund will not have to fulfil capital requirements for ÖVAG/Immigon on a consolidated basis.
- (42) On 10 December 2014, ÖVAG signed a contract with the Romanian bank Banca Transilvania for the sale of its 51 % stake in Volksbank Romania SA, which removed the major obstacle to a return of its banking licence. The transaction was completed on 7 April 2015. That transaction also allowed ÖVAG to meet one of the conditions of the 2012 restructuring plan. In addition, ÖVAG has closed the sale of VB Malta in September 2014, and decided to wind down IK Malta, fulfilling the corresponding requirements of the 2012 Decision.
- (43) In order to deconsolidate Immigon, the Verbund must reduce its share in Immigon to a minority holding. It will do so by transferring 8,5 % of the share capital of 51,6 % held by the Volksbanken Holding to an independent third party, GPVAUBEOE Beteiligungen GmbH, a special-purpose vehicle.

(\*) Confidential information.

- (44) With the transfer of the central organisation, a substantial part of ÖVAG's liabilities to the Verbund will be transferred to VBWB. Nevertheless, after the break-up, the Verbund will retain an exposure to Immigon amounting to EUR [700-800] million in the form of various financial instruments used to provide funding to ÖVAG.
- (45) To neutralise the risk to the Verbund arising from this remaining exposure to Immigon, the Verbund has taken the following steps:
- (a) EUR [200-300] million of the Immigon exposure will be sold immediately in the market, reducing the remaining exposure to EUR [400-600] million. This transaction will result in losses to the Verbund of EUR [0-100] million.
  - (b) The remaining EUR [400-600] million will be covered by a commercial guarantee for an annual fee of [0-5] %. The guarantee will only become effective after a first loss piece of EUR [0-200] million has been consumed.
  - (c) The first loss piece of EUR [0-200] million will be fully provisioned, resulting in a further negative impact on the 2015 result of EUR [0-200] million.

### **The transformation of the Verbund**

- (46) The Verbund currently consists of 51 primary banks. Under the transformation plan those 51 institutions will merge to form 10 larger banks: 8 regional banks with balance sheet totals of EUR 1,9 billion to EUR 5,3 billion, operating in different parts of Austria, and two special banks — Sparda Bank Austria (EUR 0,8 billion) and the Ärzte-/Apothekerbank (EUR 1,1 billion). The relevant mergers will take place by the end of 2017. The start: bauparkasse grouping together the building societies (Bausparkassen) of the Verbund are likely to be sold off.
- (47) The relationships between the primary banks within the Verbund are governed by two agreements: the association agreement under Section 30a BWG (*Verbundvertrag*) and the cooperation agreement.
- (48) The association agreement is concluded between the central organisation in the form of VBWB, the primary banks of the Verbund, and Volksbank Haftungsgenossenschaft eG. Its main provisions are the following:
- (a) The central organisation ensures the supply of liquidity to the primary banks and compliance with the regulatory requirements on own funds. The members undertake to conclude agreements on fund transfer pricing for the allocation of own funds.
  - (b) As before, the central organisation has unlimited liability in relation to the payment of contributions to members. In the new association agreement the primary banks now also have unlimited liability.
  - (c) The central organisation receives greater powers and can now also issue instructions that affect the interests of individual banks in the Verbund. It can impose penalties in the event of infringements. The greater powers cover in particular administrative, financial and technical supervision, Verbund planning and control, compliance with supervisory rules, internal control mechanisms for members, risk analysis, risk assessment and risk control procedures, and criteria for the ongoing business of members.
  - (d) Capital withdrawals and reductions are, as before, allowed only with the approval of the central organisation.
- (49) The cooperation agreement (*Zusammenarbeitsvertrag*) regulates those areas that are not covered by the association agreement. The contracting partners are the primary banks of the Verbund and Volksbank Haftungsgenossenschaft eG. The aim of the cooperation agreement is to realise synergies in the Verbund by implementing the planned mergers and stepping up cooperation between members. The decision-making powers in the areas covered by the cooperation agreement are transferred to Volksbank Haftungsgenossenschaft. Decisions by the management board of Volksbank Haftungsgenossenschaft are binding on the contracting partners. The cooperation agreement regulates in particular the areas of marketing, a single sales strategy, product policy including framework contracts with third-party suppliers, sales control, optimisation and standardisation of business processes, IT procurement and legal representation.
- (50) In the event of a dispute, the central organisation decides whether a measure under the cooperation agreement constitutes an inadmissible encroachment on its responsibilities under the association agreement. Should the regulator require amendments to the association agreement, the cooperation agreement contains a clause enabling it to be adjusted accordingly as well.

- (51) The aim of the transformation plan is to establish a structure consisting of eight strong regional banks, together with a central organisation, and two special banks. The local offices will focus on sales and local customer service, while administration is concentrated in the regional banks and the central organisation.
- (52) The Verbund will focus on customers in Austria, with a particular emphasis on small and medium-sized businesses, the self-employed, private customers, housing finance and wealthy customers.

### **Financial planning**

- (53) On the basis of the new restructuring plan, the Verbund has sent the Commission forecasts of the expected trend in key financial indicators in the next five years. Those forecasts have been made for two scenarios — a baseline scenario and a stress scenario.
- (54) The financial planning as delivered takes into account the impact of the neutralisation of the Immigon exposure <sup>(1)</sup> as well as the projected payment flows by the Verbund on the profit participation right (*Genussrecht*) provided to Austria under the commitment catalogue.
- (55) The baseline scenario assumes moderate economic growth in the core market, Austria, amounting to a nominal 0,8 % in 2015, 1,5 % in 2016 and 1,7 % in subsequent years up to 2019, an annual inflation rate of between 1,1 % and 2,2 %, and a three-month Euribor rising from 0,1 % in 2015 to 1,9 % in 2019. On those assumptions the Verbund forecasts losses for 2015 but a positive return on equity (RoE) of [8-9] % in 2019. The CET1 ratio is expected to increase from [9-11] % in 2015 to [11-13] % in 2019. Trends in further key figures can be seen from the following profit and loss calculation and balance tables.

Table 1

### **Key financial data in baseline scenario**

[...]

- (56) The stress scenario is based on the assumption of a credit crunch caused by weaknesses in the European banking sector which foreign funders (donors) and the ECB cannot resolve. Real economic growth is slightly negative, with a slow recovery as from 2017. In 2015 and 2016 the rate of inflation is negative, and in the subsequent years marginally positive. Interest rates remain extraordinarily low and the value of the Swiss franc rises further against the euro. On the basis of those assumptions, the Verbund predicts that the RoE will remain negative in 2015 and 2016 and rise subsequently to [5-8] % in 2019, and the CET1 ratio will rise from [8-10] % in 2015 to [10-12] % in 2019. Trends in further key figures can be seen from the following profit and loss calculation and balance tables.

Table 2

### **Key financial data in stress scenario**

[...]

### **New commitments and compensatory measures on the part of Austria**

- (57) The Austrian authorities have undertaken a number of commitments relating to the implementation of the new restructuring plan. Those commitments by the Austrian authorities are set out in a separate document annexed to this Decision.
- (58) Under Section 5 of the Restructuring Communication, reports must be submitted regularly so that the Commission can check whether the new restructuring plan is being properly implemented. Austria will employ a monitoring trustee to support the Commission in meeting its task of ensuring that the decision is implemented correctly. The monitoring trustee will submit a monitoring report every six months. The first report should be submitted no later than six months after the Restructuring Plan has been approved. In the Commission's view, that commitment ensures proper monitoring of implementation of the Restructuring Plan.

<sup>(1)</sup> See recital 45.

**Supervisory approval of the plan**

- (59) The new restructuring plan notified to the Commission corresponds to the capital raising plan submitted to the ECB/SSM and has the main objective of transforming the Verbund in such a way that the capital shortfall identified in the Comprehensive Assessment by the ECB/EBA will be addressed.
- (60) The SSM has set a prudential capital requirement of 14,63 % to be achieved from 26 July 2015. On that day, the SSM will review the prudential capital requirement also taking into account the implementation of the capital raising plan. The implementation of the plan has been initiated by the entry of measures (a) to (c) in recital 35 in the Austrian corporate register. In order for the national Austrian courts to approve the entry into the corporate register, the SSM has approved these measures.

**3. THE FORMAL INVESTIGATION PROCEDURE**

- (61) The Commission recalls that it has opened a formal investigation procedure in consequence of which the 2012 Decision was adopted. It has become necessary to amend that decision pursuant to Article 7(3) of Council Regulation (EC) No 659/1999 <sup>(1)</sup>.

**4. POSITION OF AUSTRIA**

- (62) In public statements Austria has excluded any new aid for the Verbund. Austria takes the view that the restructuring plan submitted does not constitute new aid.
- (63) However, Austria acknowledges that the new restructuring plan significantly changes the 2012 restructuring plan so that an amendment decision by the Commission is necessary before it can be implemented. It has accordingly notified the new plan to the Commission.
- (64) Austria similarly acknowledges that the Verbund must be seen, in terms of State aid rules, as the successor to ÖVAG and is therefore also the object of this amendment decision.
- (65) At the same time, Austria maintains that the new restructuring plan, with its list of commitments, preserves the balance of the 2012 Decision and therefore the original compatibility of the aid.

**5. ASSESSMENT OF THE MEASURES****5.1. STATE AID****Presence of existing State aid and economic succession**

- (66) With regard to the measures approved by the Commission as restructuring aid in favour of ÖVAG in 2009 and 2012, the Commission has already concluded that those measures constituted State aid. As a consequence, it is not necessary to reassess the State aid nature of these measures in this Decision.
- (67) A central element of the 2012 restructuring plan on which the 2012 Decision was based was refocusing ÖVAG on its function as a central organisation integrated in a joint liability scheme with the primary banks. In that setup, ÖVAG as central organisation assumed liability for the entirety of obligations of the Verbund, whereas the individual primary banks were only liable as long as it would not breach their own individual capital ratio.
- (68) Some of the 2012 commitments provided by Austria also concerned the primary banks, protecting particular revenue streams of ÖVAG as the central institution (commitment 9) and obliging the primary banks to participate in the repayment of the participation capital in ÖVAG 'as far as the minimum regulatory requirements allow' (commitment 11.2). Those commitments were necessary because of the particular liability arrangement in the Verbund to find the aid compatible. Moreover, those commitments in combination with the particular liability arrangement allowed the Commission to treat ÖVAG separately from the Verbund.

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

- (69) Under the new restructuring plan, the core economic activity of ÖVAG will be carried out by one of the primary banks, VBWB. More specifically, VBWB will take over ÖVAG's role as the central organisation of the Verbund, with all relevant necessary functions and assets being transferred from ÖVAG to VBWB. In total, EUR 8,6 billion in assets and liabilities will be transferred, including all core functions of ÖVAG, as defined in the 2012 Decision, with the exception of three minor subsidiaries, VB Factoring (with a balance sheet of EUR 86 million), VB Mobilienleasing (EUR 700 million) and VB Investments (EUR 30 million), which will remain in the wind-down entity Immigon.
- (70) In contrast with the asymmetric liability structure between primary banks and central organisation, the Verbund will be integrated into a fully joint and several liability arrangement under the new restructuring plan. In conjunction with the further structural changes in the Verbund (recital 49), the new central organisation, VBWB, can no longer be considered separately from the primary banks. That view is supported by the consolidated approach that the SSM took in the Comprehensive Assessment, and the fact that the capital requirement was formulated at aggregated (Verbund) level.
- (71) For those reasons, the Commission considers the Verbund to be the economic successor of the entity aided under the 2012 Decision, ÖVAG. Therefore, the Verbund is the beneficiary of the existing State aid.

#### **No new State aid to ÖVAG, Immigon, VBWB or the Verbund**

- (72) In addition to the question of the transfer of the existing State aid to the economic successor, the Commission also has to assess whether any new aid is involved in the new restructuring plan.
- (73) The Commission observes that, according to Austria, no additional State aid will be granted as part of the new restructuring plan.
- (74) According to Article 107(1) TFEU, State aid means '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, in so far as it affects trade between Member States'. A measure constitutes State aid within the meaning of that provision if all of the following conditions are met: (a) the measure must be imputable to the State and financed through State resources; (b) it must confer an advantage on its recipient; (c) that advantage must be selective; and (d) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.
- (75) The new restructuring plan does not confer any new advantage on ÖVAG or Immigon. ÖVAG ceases to exist, with all its core assets and liabilities being transferred to VBWB, and the remainder being wound down in Immigon. According to the current plan, it is expected that the wind-down of Immigon will consume its capital almost entirely however without recourse to the asset guarantee. This implies that the risks immanent in the CET1 instruments of ÖVAG are expected to materialise, including the loss of Austria's equity share in ÖVAG of EUR 250 million as well as the outstanding participation capital in the nominal amount of EUR 300 million.
- (76) The asset guarantee continues to cover ÖVAG/Immigon. Under the current contractual arrangement, the guarantee can only be exercised on 31 December 2015 on claims registered up to that date and to the amount necessary to support a CET1 ratio of 10 %. According to information provided by Austria, securities eligible for compensation under the guarantee have already been registered exceeding in sum the maximum guarantee amount of EUR 100 million. While the eligibility of registered claims will be decided only on 31 December 2015, the Immigon management has no choice under its legal obligation to protect the interests of the owners but to register all possible claims for settlement at the end of 2015.
- (77) At 31 December 2015, Immigon as a wind-down entity will no longer have to fulfil capital requirements. Accordingly, it is difficult to assess the guarantee settlement condition linked to a CET1 ratio. However, given that this assessment is entirely a question of national law, the Commission accepts Austria's position according to which the continuation of ÖVAG in the form of a wind-down entity according to Article 162 BaSAG has no influence on the continuing validity of the guarantee. On the basis of this position and because Immigon will at that date have suffered a capital reduction of 96,65 %, the settlement condition of less than 10 % CET ratio will be fulfilled and all at 31 December 2015 eligible claims will have to be settled.

- (78) Under those conditions, the changes in the guarantee agreement — (a) prolonging the settlement period of the guarantee payment without allowing further claims to be registered beyond 31 December 2015 and (b) making the settlement payment exercisable only in the case that the capital would otherwise fall below zero — actually reduce the risk to the guarantee provider of the guarantee being exercised. Moreover, the applicable fee payments of 10 % per annum will continue to apply for a further two years. Therefore, the new conditions of the asset guarantee only strengthen the position of the guarantee provider and do not provide a further advantage to ÖVAG/Immigon.
- (79) The new restructuring plan also confers no new advantage on the Verbund, including its new central organisation, VBWB. As explained above <sup>(1)</sup>, the Verbund is the beneficiary of the existing aid. More specifically, under the 2012 Decision, the primary banks had to participate in realising the repayment of the outstanding EUR 300 million of participation capital by the end of 2017 as far as their minimum regulatory requirements allowed. It has to be recalled that in the Comprehensive Assessment the capital shortfall was assessed not at the level of ÖVAG alone but at the level of the Verbund as a whole.
- (80) While the risk-bearing participation capital is being consumed in the wind-down of ÖVAG/Immigon, the new commitments presented by Austria include a payment by the Verbund to Austria in the amount of EUR 300 million, through the granting of a profit participation right to Austria. The Verbund commits to a payment schedule amounting to a cumulative EUR 300 million by the end of [2020-2025], subject to intermediary payment thresholds in [...], [...] and [...].
- (81) By providing a new commitment to pay EUR 300 million to the State, the Verbund reinstates a claim equivalent in amount to the original repayment required. That original claim would be lost in the liquidation of ÖVAG as immanent risks would materialise. While the new payment schedule will result in a significant payment delay compared with the original commitment, it must be considered that under a simple liquidation for ÖVAG (as well as the counterfactual scenario of the resolution of the entire Verbund), all State claims, equity and participation capital would cease to exist.
- (82) In addition, that new commitment is binding on the Verbund, although the payments relating to the profit participation right remain profit-dependent. At the same time, the commitment ensures that Austria's claim to those payments is senior to any dividend payments. Moreover, for any dividend distribution to parties outside the consolidated Verbund, Austria will receive a compensation payment of equal amount and in addition to the payment from the profit participation right.
- (83) Furthermore, Austria will receive a stake of 25 % plus one share in VBWB as collateral for the payments on the profit participation right. If the Verbund fails to make payments according to the thresholds set in the payment schedule, VBWB shareholders will transfer further shares to Austria for free, increasing Austria's stake in VBWB to [26-40] %. In addition, Austria will also be able to seize the collateral at that moment.
- (84) As such, the new commitment, although it differs in some features from the original commitment, is equivalent to the latter and cannot therefore be considered to confer an advantage on ÖVAG, Immigon, VBWB or the Verbund.
- (85) Apart from the new commitment to pay an amount equivalent to the original value of the participation capital in ÖVAG on a newly instated profit participation right in VBWB, the new restructuring plan makes no other substantial modifications in relation to the Austrian State that could be interpreted as conferring an advantage on VBWB or the Verbund.
- (86) As the new restructuring plan does not confer an advantage on ÖVAG, Immigon, VBWB or the Verbund, there is no need to pursue the assessment of the cumulative State aid criteria. On that basis, the Commission considers that the measures provided for in the new restructuring plan do not fulfil the conditions of Article 107(1) TFEU and, therefore, do not constitute new State aid to ÖVAG, Immigon, VBWB or the Verbund within the meaning of that provision.

## 5.2. ASSESSMENT OF THE LEGAL COMPATIBILITY OF THE MEASURES

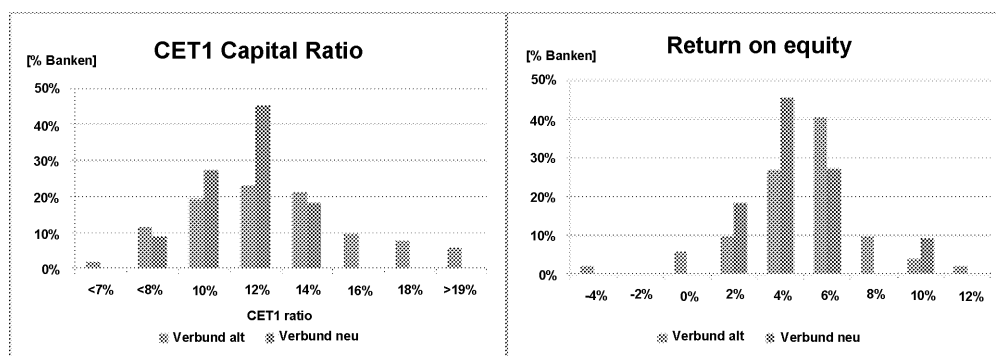
- (87) As explained in Section 5.1, the new restructuring plan contains no new aid, while the aid for ÖVAG approved in the 2012 Decision is transferred to the Verbund as the economic successor of ÖVAG.

<sup>(1)</sup> See recitals 66 to 71.

- (88) On the basis of the 2012 Decision, therefore, the Commission needs to establish whether the 2012 aid measures remain compatible with the internal market under the new restructuring plan and catalogue of commitments. That assessment must take place on the same legal basis that applied in the 2012 Decision, i.e. on the basis of the Recapitalisation Communication and the 2011 Prolongation Communication <sup>(1)</sup> and also the Restructuring Communication <sup>(2)</sup>.
- (89) Recitals 83 to 92 of the 2012 Decision regarding the compatibility of the 2012 aid assessed on the basis of the Recapitalisation Communication and the 2011 Prolongation Communication continue to apply without any change. The recapitalisation granted to ÖVAG in the amount of EUR 250 million and the remaining participation capital in the amount of EUR 300 million will remain with Immigon and will, according to the plan, be completely consumed in the liquidation by 2017.
- (90) As explained in recital 93 of the 2012 Decision, the Restructuring Communication provides that the restructuring of a financial institution in the context of the current crisis is compatible with the internal market under Article 107(3)(b) TFEU only if it will restore the profitability of the bank, includes a sufficient own contribution and appropriate burden-sharing, and also contains sufficient measures to limit the distortion of competition. With regard to those three elements, the Commission must check to what extent the changes submitted in the restructuring plan and in the catalogue of commitments preserve the compatibility of the measures established in the 2012 Decision.

#### Viability under the baseline scenario

- (91) As explained in recital 71, the 2012 aid is transferred to the Verbund, which is also fully covered by the new restructuring plan. Here it is necessary to examine whether the long-term profitability of the Verbund in its new form under the restructuring plan will be re-established by 2019.
- (92) To that end, Austria has submitted a financial plan running up to 2019, which includes a baseline scenario and a stress scenario for the entire Verbund, on the basis of which the Commission carried out its analysis.
- (93) The transformation of the structure of the Verbund itself through the merging of the local primary banks into regionally organised institutions can be assessed as beneficial in so far as the existing differences in the Verbund with regard to capital contribution and profitability will be somewhat equalised and economies of scale and potential synergies can be exploited. The graph below clearly shows that in a comparison between the old and new Verbund the spread in the CET1 capital ratio and RoE is reduced.



- (94) The Commission welcomes the fact that potential synergies have influenced financial planning only in the area of costs which are more easily quantifiable than revenues and have been included at only [70-80] % of the potential that has already been identified. With less than [10-20] % per annum in staffing costs and less than [5-10] % per annum in non-staffing costs, the Commission is of the opinion that a rather cautious approach has been adopted and that further synergies might be available than those already included into the plan.
- (95) The business strategy of the Verbund in its new form remains essentially unchanged. The focus is clearly placed on local and regional clients both in the private and commercial customer segments and on business with small and medium-sized companies. Those business activities already make up the bulk of the portfolio, are profitable,

<sup>(1)</sup> See recital 82 of the 2012 Decision.

<sup>(2)</sup> See recital 93 of the 2012 Decision.

and were not considered to be problematic in the 2012 Decision. In the baseline scenario, the interest-bearing assets in those areas increase by around [5-7] % until 2019 and thus by less than half of the predicted real economic growth of around 15 % over this same period <sup>(1)</sup>. It is only in special business areas, such as, for example, securities investment services, that higher growth rates are envisaged. Given the very limited initial size of those businesses, higher growth assumptions are justified.

- (96) On the liabilities side, the particular relevance of business with private clients' deposits must be stressed (around 80 % of all liabilities). That type of funding is rated under Basel III as especially reliable and counts correspondingly highly in funding indicators such as the Liquidity Coverage Ratio and the Net Stable Funding Ratio. The Verbund has also supplied proof of the particular stability of the deposit business even during the crisis, so that the Commission finds the Verbund's funding situation to be a particular strength. In the deposit business too, growth by 2019 is at around [5-7] % and over 50 % lower than predicted real economic growth.
- (97) Risk assumptions with regard to the various credit portfolios appear plausible. In the baseline scenario, the planned values for risk provisioning and impairments correspond to standard risk cost rates of approximately [7-15] basis points for private client business and [30-45] basis points for commercial client business. Those assumptions seem appropriate for the economic situation in the Austrian credit business, although not conservative.
- (98) The plan according to the baseline scenario will bring the Verbund from a negative after-tax RoE with a CET1 of [9-11] % in 2015 to an after-tax RoE of [8-9] % with a CET1-ratio of [11-13] % in 2019. In view of the moderate risk profile of the Verbund's business model, the planned after-tax RoE can be assessed as an appropriate remuneration of capital.
- (99) The considerations in recitals 94 to 98 on the financial planning with regard to growth, liquidity, costs, risk management and profitability allow the Commission to conclude that the planning is solid, that it has been calculated on the basis of essentially cautious assumptions, and that it is likely to ensure the long-term profitability of the Verbund and thus its ability to access the capital market.

#### **Viability under the stress scenario**

- (100) That assessment of long-term profitability and of viability is also confirmed by the stress scenario provided at the same time. Here, the assumption is that there will be simultaneous stress through (a) a longer-lasting low-interest environment than is currently envisaged and (b) a credit crisis. While longer-lasting low interest rates exert pressure on the interest margin, the credit crisis also has to be simultaneously financed through higher risk provisioning and impairments as well as a generally higher risk weighting of loan stocks resulting in higher capital requirements.
- (101) Given the reduced yields and the higher risk provisioning and impairments, the Verbund would make significant losses in 2015 and further light losses in 2016. However, it is clear that even without taking countermeasures such as a cost saving programme or adjusting pricing margins accordingly the resulting losses can be met out of the core capital ratio at the time, and will affect the Verbund's long-term yield position only to a limited extent. In that scenario the core capital ratio does not sink below [8-10] %, and the Verbund still achieves after-tax profitability of [5-8] % in 2019.

#### **Supervisory requirements**

- (102) Following on from the capital shortfall identified in the supervisory authority's Comprehensive Assessment of 2014, the Verbund has currently been given the objective of achieving a CET1 core capital ratio of 14,63 % by 26 July 2015. The current financial planning will not deliver such a capital ratio.
- (103) Moreover, the Commission notes that the measures taken to neutralise the Verbund's risk stemming from the exposure to Immigon <sup>(2)</sup> have a detrimental impact on the CET1-ratio roughly equivalent to [0-2] %. In addition, the submitted planning is based on the assumption that the Immigon exposure can be reduced in [...] and [...] through further sales. These sales would lead to an overall expected loss from the exposure of EUR [0-200] million with an additional downside risk of a further EUR [0-100] million if sales cannot be achieved and the EUR [0-200] million first loss piece is fully consumed. Additional losses of EUR [0-100] million would further reduce the CET1-ratio by [0-2] percentage points.

<sup>(1)</sup> All assumptions regarding economic growth and inflation are taken from the Commission's Spring 2015 Report.

<sup>(2)</sup> See recital 45.

- (104) On the other hand, the Verbund has also identified measures to further reduce its RWA beyond the measures already included in the financial planning. Further possible measures include a securitisation structure for a credit portfolio of small and medium-sized enterprises and the sale of start:bausparkasse and IMMO-Bank, which would increase the core capital ratio to up to [10-15] % when taking into account the necessary threshold payment on the Austrian profit participation right. Here, the Commission notes that the simultaneous implementation of all these measures — if required — could have a detrimental impact on the future profitability of the bank.
- (105) However, given the limited size of downside risks and the scope of the already identified RWA measures, the Commission considers that there is a sufficient buffer in the plan to limit the impact on viability. This view is further strengthened by the positive decision the supervisor has taken regarding the approval of measures (a) to (c) in recital 35 with a view to allowing their entry into the Austrian corporate register. That positive decision by the SSM has been based on the same restructuring plan underlying the present Decision, suggesting to the Commission that the SSM will also consider that the Verbund — even when taking into account the risks inherent in the plan — will be capable of fulfilling the necessary prudential capital requirements applicable after the supervisory review on 26 July 2015.

### **Own contribution and burden-sharing**

- (106) The Commission has to assess whether the new set of commitments can adequately replace the 2012 commitments to guarantee the compatibility of the existing aid for the Verbund, the economic successor of ÖVAG. Accordingly, it must be examined whether the Verbund's own contribution and burden-sharing are adequate.
- (107) In relation to own contribution and burden-sharing, the list of commitments annexed to the 2012 Decision included provisions on remuneration and repayment of (a) the asset guarantee and (b) the participation capital, as well as a dividend ban.
- (108) With regard to the changes to the asset guarantee, the current wind-down plan does not rely on any cash payment from the guarantee for a solvent wind-down. If all assumptions materialise as predicted and the wind-down remains solvent without the guarantee, then a windfall payment from the guarantee corresponding to the settlement of all eligible claims in July 2016 will actually only serve to increase the final liquidation mass of Immigon available to participation capital and equity holders. The current plan of limiting the guarantee payment to the case of preventing the insolvency of Immigon serves to limit to a minimum the risk of State aid being used to compensate the holders of own fund instruments.
- (109) With regard to participation capital, pursuant to the list of commitments annexed to the 2012 Decision <sup>(1)</sup>, ÖVAG had to repay EUR 300 million by the end of 2017, with the Verbund having to contribute as far as the minimum regulatory requirements allow. Its wording made it clear that, in the case of the Verbund, that commitment was a declaration of intent rather than a legally binding requirement.
- (110) The new set of commitments introduces a legally-binding requirement for the Verbund. More specifically, the Verbund undertakes to make available to Austria a new financial instrument, a profit participation right (*Genussrecht*). On the basis of that instrument, which has a small nominal value, Austria will receive profit-dependent distributions which will be senior to all other hybrid or dividend distributions. By [2020-2025], distributions on a profit participation right will amount to EUR 300 million, minus any payments received from the winding down of ÖVAG.
- (111) The cash flow corresponding to the profit participation right will be further ensured by the fact that Austria will receive (a) a shareholding in VBWB of 25 % and one share (a blocking minority) as collateral and (b) the right to appoint a half of supervisory board members of VBWB.
- (112) The profit participation right has the following cumulative payment thresholds: EUR [0-50] million in [...]; EUR [0-100] million in [...]; EUR [0-200] million in [...]; and EUR 300 million in [2020-2025]. Should a threshold not be adhered to, Austria receives the title right to the shareholding held as collateral, which otherwise, after receipt of the full amount of EUR 300 million, returns to the ownership of the Verbund. In addition, in the case of non-adherence to payment thresholds, Austria would get a further [1-15] % of all shares as well as the right to seize this collateral. Furthermore, there is an obligation for the Verbund in this event to present a new restructuring plan which Austria would then have to notify to the Commission.
- (113) The Commission has assessed the influence of the new repayment arrangement on the restructuring plan and has concluded that the latter is sufficiently robust for the repayment to be made as planned, without placing an

<sup>(1)</sup> Point 11.2 of the list of commitments annexed to the 2012 Decision.

undue burden on the core capital ratio. The threshold of EUR [0-50] million in [...] remains feasible even in the stress scenario. However, the Commission has noted that simultaneous implementation of all identified RWA-reduction measures <sup>(1)</sup> would have a negative influence on the bank's profitability which could also jeopardise the repayment plan.

- (114) The Commission considers that the new commitment on aid repayment ensures the continued compatibility of the existing aid for the following reasons:
- (a) By means of that commitment Austria receives a new claim that adequately replaces the defaulted claim on ÖVAG. As a wind-down entity, ÖVAG is not expected to repay participation capital beyond residual surpluses from its wind-down.
  - (b) The combination of the cumulative threshold values and voluntary distributions of dividends described below <sup>(2)</sup> is an adequate compromise between ensuring aid repayment and restoring the Verbund's viability.
  - (c) On that basis, the extension of the repayment schedule can be accepted.
  - (d) Austria has the possibility to use its blocking minority to amend the new restructuring plan if necessary.
- (115) With regard to the dividend ban, the relevant commitment <sup>(3)</sup> annexed to the 2012 Decision continues to apply in a modified manner. Under the new commitment, dividends can be distributed to external investors provided that
- (a) the total of all the distributions is less than EUR [5-8] million;
  - (b) the profit participation right has been exercised as a priority in at least the same amount in accordance with the agreed thresholds and in the same year;
  - (c) Austria receives an additional compensatory payment of the same amount as the proposed dividends; and
  - (d) fresh external core capital has been generated of at least the sum of any dividend and additional compensatory payments.
- (116) The Commission considers that the combination of the priority nature of the repayment obligation, the compensatory payment and fresh external core capital generation are sufficient to ensure that aid does not serve as a return on capital, and that any dividends are paid solely from surplus revenues.
- (117) Overall, the Commission considers that the new set of commitments ensures the compatibility of the existing aid with regard to own contribution and burden-sharing.

#### **Measures to limit distortions of competition**

- (118) The Commission has to assess whether the new set of commitments can adequately replace the 2012 commitments to guarantee the continuing compatibility of the existing aid for the Verbund. Accordingly, it must be examined whether distortions of competition due to aid to the Verbund are limited as far as possible.
- (119) The 2012 commitments included the following measures with respect to ÖVAG, to limit distortions of competition: (i) reduction of balance sheet and RWAs; (ii) restriction of activities to the 'association-related business' of ÖVAG, as the Verbund's central organisation; (iii) a ban on acquisitions; (iv) a ban on price leadership, applicable to ÖVAG's online banking subsidiary, Live Bank; (v) a ban on referring to State aid for advertising purposes; and (vi) behavioural measures relating to remuneration and risk management systems.
- (120) The new set of commitments, annexed to this Decision, maintains the original balance in terms of limiting distortions of competition. In particular, the issues of balance sheet and RWA reduction are addressed by the wind-down of ÖVAG, whilst the issue of focusing on the functions of the Verbund's central organisation is addressed by the transfer of those functions to VBWB. The new set of commitments also maintains the bans on price leadership, acquisitions and State aid advertising as well as the existing behavioural measures.

<sup>(1)</sup> Those measures are further described in recital 100.

<sup>(2)</sup> See recital 115.

<sup>(3)</sup> Point 9.3 of the list of commitments annexed to the 2012 Decision.

- (121) In relation to price leadership, Live Bank will not be allowed to offer customers interest rates, relating to any maturity, higher than those offered by the third-best competitor in the direct online banking market.
- (122) In relation to acquisitions, the Verbund will not be allowed to acquire controlling or minority stakes and any asset bundles. The only exceptions to that ban are (a) acquisitions necessary to preserve financial or Verbund-level stability, or those carried out in the interests of effective competition, provided that they are approved beforehand by the Commission, and (b) acquisitions that belong, in terms of management of existing obligations of customers in financial difficulty, to the Verbund's normal ongoing business.
- (123) In relation to advertising, the Verbund will not be allowed to advertise the granting of the State aid measures or any advantages arising therefrom.
- (124) In relation to behavioural measures, the Verbund will maintain adequate remuneration and risk management systems. More specifically, the Verbund's remuneration systems will be transparent, based on incentives preventing inappropriate risks, and aligned with sustainable long-term business objectives. The Verbund's risk management system will be further developed, with the aim of pursuing a prudent, sound and sustainable business policy.
- (125) Considering the above the Commission believes that the new set of commitments adequately limits distortion of competition brought about by the existing State aid to the Verbund,

HAS ADOPTED THIS DECISION:

*Article 1*

1. The measures contained in the restructuring plan of 23 June 2015 and the corresponding set of commitments do not constitute new State aid.
2. The measures contained in the restructuring plan of 23 June 2015 and the corresponding set of commitments are such that the measures referred to in Article 1(1) of Decision 2013/298/EU remain compatible with the internal market.

*Article 2*

1. Article 2 of Decision 2013/298/EU is replaced with the following:

*'Article 2*

Austria shall ensure that the restructuring plan submitted on 23 June 2015 is implemented in full, including the commitments set out in the Annex to this Decision.'

2. The Annex to Decision 2013/298/EU is replaced with the Annex to the present Decision.

*Article 3*

This Decision is addressed to the Republic of Austria.

Done at Brussels, 2 July 2015.

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

## ANNEX

## ‘ANNEX

**LIST OF COMMITMENTS IN STATE AID PROCEDURE SA.31883 ÖSTERREICHISCHE VOLKSBANKEN AG****PREAMBLE**

By Commission decision of 19 September 2012, State aid SA.31883 (2011/C) which Austria granted to Österreichische Volksbanken AG (ÖVAG) was found to be compatible with the internal market.

Owing to the renewed need for restructuring of the Volksbanken sector, the present list of commitments has been drawn up taking into account the earlier set of commitments and the underlying restructuring and liquidation plan of ÖVAG (“the restructuring plan”). The provisions of the earlier set of commitments annexed to the Commission decision of 19 September 2012 thereby cease to have effect.

The modified restructuring plan makes no provision for additional State support measures for ÖVAG. The reduction in ÖVAG’s share capital including the Republic of Austria’s share in the amount of 43,3 % (corresponding to approximately EUR 250 million) and the simultaneous reduction in the Republic of Austria’s participation capital in the amount of EUR 300 million by 96,65 % do not constitute new aid within the meaning of Article 1(c) of Council Regulation (EC) No 659/1999 <sup>(1)</sup>.

The Republic of Austria hereby provides the following commitments concerning Österreichische Volksbanken-Aktiengesellschaft (“ÖVAG”) and the Volksbanken-Verbund, represented by Volksbank Wien-Baden AG (“VBWB”) in its capacity as the new central organisation of the Verbund, in order that the European Commission, by decision under Article 107(3)(b) of the Treaty on the Functioning of the European Union (“TFEU”), may find the aid granted to ÖVAG compatible with the internal market.

This text should be interpreted within the general framework of EU law and with reference to Regulation (EC) No 659/1999, as well as with regard to the decision, to which the commitments are attached as commitments and/or conditions and obligations.

**1. General**

- 1.1. The Republic of Austria undertakes to ensure that the restructuring for ÖVAG submitted end of June 2015 is correctly and fully implemented.
- 1.2. The Republic of Austria undertakes to ensure that the commitments listed below (“the commitments”) are fully observed during the implementation of the restructuring plan.
- 1.3. The restructuring phase will end on the date of the general meeting of VBWB which decides on the annual accounts for the fiscal year 2019, but at the latest on 30 June 2020. The following commitments will apply during the restructuring phase unless otherwise provided.

**2. Restructuring and liquidation plan**

- 2.1. ÖVAG’s share capital of EUR 577 328 623,46 (including the Republic of Austria’s share in the amount of 43,3 %) will be reduced to EUR 19 335 951,23. The State’s participation capital in the amount of EUR 300 million will be reduced in the same proportion by 96,65 %.
- 2.2. The central organisation and central institution function of ÖVAG will be transferred retroactively with effect from 31 December 2014 by it as transferor company to VBWB as transferee company subject to the continued existence of the transferor company, in exchange for the issue of shares.
- 2.3. With effect from 4 July 2015, ÖVAG will with the agreement of the competent supervisory authority (ECB) withdraw from the Verbund, after supervisory approval operate henceforth as a wind-down entity in accordance with Section 162 of the Federal Act on the Recovery and Resolution of Banks (Bundesgesetz über die Sanierung und Abwicklung von Banken — BaSAG) and as such will no longer hold a banking licence in accordance with Section 1 of the Banking Act (Bankwesengesetz, BWG). The name of the wind-down entity will be changed to “immigon portfolioabbau ag”.

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

- 2.4. Drawing on the federal Republic as provider of an asset guarantee to the amount of EUR 100 million in line with the agreement on an asset guarantee from 15 March 2013 as amended by the draft agreement from 25 June 2015 ("the guarantee amendment agreement") is allowed at any time between 31 December 2015 up to and including the day of the approval of the annual accounts of ÖVAG for the financial year 2017.
- 2.5. Conditions for an eventual drawing on the asset guarantee are either the partial or entire uncollectibility of the assets concerned or the formal insolvency of the debtor in addition to the necessity of the payout from the guarantee to prevent over-indebtedness of ÖVAG in accordance with insolvency law and subject to all other applicable conditions in the guarantee amendment agreement. Reference date for the evaluation of guaranteed claims in the pool according to Annex 1 to the guarantee agreement from 15 March 2013 as amended by the guarantee amendment agreement is 31 December 2015. No further claims from the guarantee will be accepted after that date.
- 2.6. The aim of the liquidation plan of ÖVAG is to fully liquidate all assets by 31 December 2017. It also follows from ÖVAG's liquidation plan that a positive residual value will remain. As partial compensation for the reduction in the share capital held by the Republic of Austria in ÖVAG, the Verbund and Volksbanken Holding eGen will assign their claims to the liquidation proceeds of ÖVAG to the Republic. Moreover, the Verbund has given a best endeavour commitment to the effect that other shareholders in ÖVAG will also assign their claims to the Republic of Austria.

### 3. **Sale of ÖVAG holdings**

In implementation of the provided draft of the restructuring agreement with the Republic of Austria from 23 June 2015 ("the restructuring agreement"), ÖVAG will sell off all shares in RZB completely ("signing") by 31 December 2017.

### 4. **Measures by RZB**

Austria undertakes that the measures planned by Raiffeisen Zentralbank Österreich AG (RZB) to reduce ÖVAG's equity capital as laid down in the restructuring agreement of 26 April 2012 with a current residual amount of EUR [0-20] million will be implemented by [...].

### 5. **Future profit distribution by the Verbund**

- 5.1. Profit distributions by entities consolidated in the credit institution association (Kreditinstituteverbund) of the Volksbanken in agreement with Section 30a(1) BWG, as amended, to third (natural or legal) persons will in principle be admissible only if the conditions set out in points 5.2 to 5.6 of this agreement are fulfilled.
- 5.2. The exercise of the Republic of Austria's profit participation right will take place in agreement with the restructuring agreement; in particular, non-observance of the thresholds laid down therein will entitle the Republic of Austria to dispose of the shares in VBWB transferred to it pursuant to the restructuring agreement.
- 5.3. The exercise of the Republic of Austria's profit participation right in accordance with the restructuring agreement will take place preferentially in at least the amount of the distribution.
- 5.4. The total amount of all distributions will be limited to EUR [5-8] million p.a.
- 5.5. The Republic of Austria will receive a compensation payment independent of point 5.3 in the amount of the distribution. Profit distributions on own-fund items designated after 29 June 2015 to strengthen and aid the recovery of the Verbund will not give rise to any compensation payment to the Republic of Austria.
- 5.6. The Verbund will raise fresh external common equity tier 1 capital (net, after the deduction of repayments) in at least an amount corresponding to the annual sum of the distributions and compensation payments (compensation for retained earnings).

### 6. **ÖVAG dividend ban**

ÖVAG will not pay dividends in the period up to the end of the liquidation. In so far as they are legally separable, payments for remunerating the aid measures will remain unaffected.

### 7. **Ban on price leadership**

In the area of deposit services, Live Bank is prohibited in the period up to the end of the liquidation from offering interest rate conditions (for all maturities) better than its competitor with the third-best conditions in the Austrian market for direct online banking without the Commission's prior approval.

**8. Representation of the Republic of Austria in Volksbank Wien-Baden AG in its capacity as central organisation of the Verbund**

- 8.1. With effect from the splitting-up of ÖVAG and the transfer of the function as central organisation of the Verbund to VBWB the Republic of Austria will have transferred to it a share of 25 % plus one share ("25 % + 1") free of charge by the Verbund.
- 8.2. If the Verbund fails to fulfil its repayment commitments in accordance with point 9.3, the Republic of Austria will have transferred to it additional shares in VBWB free of charge by the Verbund up to a total stake of Austria of [26-40] %. In addition, the Republic of Austria will receive the right of disposal over its entire shareholding in accordance with the provisions of the restructuring agreement.
- 8.3. The Republic of Austria will be granted by the Verbund a right of representation of half of the members of the VBWB supervisory board to be appointed by the owners.

**9. Remuneration of the aid measures**

- 9.1. The asset guarantee of EUR 100 million provided by the Republic of Austria to ÖVAG will be remunerated with a non-profit-related bonus of 10 % p.a.
- 9.2. VBWB grants the Republic of Austria a profit participation right as compensation for the reduction under the restructuring agreement in the State's EUR 300 million participation capital in ÖVAG during the course of the split-up. From the entire payment to be made on the profit participation right will be deducted any participation capital held by the State which is retained during the course of the split-up and is duly repaid.
- 9.3. The payment on the profit participation right has to reach at least EUR [0-50] million by the time of approval of the [...] annual accounts of VBWB and at least EUR [0-100] million by the time of approval of the [...] annual accounts of VBWB. In the event of one of these two thresholds not being reached, a new restructuring plan will have to be notified. It should be noted that the restructuring agreement provides for a payment threshold of at least EUR [0-200] million by the time of approval of the [...] annual accounts of VBWB and for a complete payment by the time of approval of the [2020-2025] annual accounts of VBWB.

**10. Other behavioural obligations**

- 10.1. ÖVAG and the Verbund commit to refrain from acquisitions. This applies to both the purchase of companies with their own legal structure, and shares in companies, as well as asset bundles that represent a commercial transaction or a branch of activity. This does not apply to acquisitions that must be made in order to maintain financial and/or association-related stability, or in the interests of effective competition, provided that they have been approved beforehand by the Commission. This does not apply either to acquisitions that belong, in terms of the management of existing obligations of customers in financial difficulty, to a bank's normal ongoing business.
- 10.2. ÖVAG and the Verbund must not use the granting of the aid measures or any advantages arising therefrom for advertising purposes.
- 10.3. ÖVAG and the Verbund must verify the incentive effect and appropriateness of their remuneration systems and ensure, using the possibilities under civil law, that they do not result in exposure to undue risks, are oriented towards sustainable, long-term company objectives, and are transparent.
- 10.4. The Verbund is to continue expansion of its risk-monitoring operations and to conduct a commercial policy that is prudent, sound and oriented towards sustainability.

**11. Monitoring trustee**

- 11.1. The Republic of Austria is to ensure that the full and correct implementation of the restructuring plan of ÖVAG and the Verbund and the full and correct implementation of all commitments within this commitments document are continuously monitored by an independent, sufficiently qualified monitoring trustee who is obliged to maintain confidentiality.
- 11.2. The appointment, duties, obligations and discharge of the monitoring trustee must follow the procedures set out in the "Trustee" Annex.

- 11.3. The Republic of Austria is to ensure that, during the implementation of the Decision, the Commission or the trustee has unrestricted access to all information needed to monitor the implementation of this Decision. The Commission or the trustee may ask ÖVAG and the Verbund for explanations and clarifications. The Republic of Austria, ÖVAG and the Verbund are to cooperate fully with the Commission and the monitoring trustee with regard to all enquiries associated with monitoring of the implementation of this Decision.'
-

**COMMISSION DECISION (EU) 2016/154****of 22 July 2015****on State aid SA.13869 (C 68/2002) (ex NN 80/2002) — reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network (RAG) implemented by France in favour of EDF***(notified under document C(2015) 4959)***(Only the French text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having called on interested parties to submit their comments pursuant to that Article <sup>(2)</sup>,

and having regard to their comments,

Whereas:

- (1) By decision of 16 October 2002 the Commission initiated the formal investigation procedure under Article 108(2) of the TFEU ('the opening decision') into the advantage resulting from the non-payment by Établissement Public à Caractère Industriel et Commercial 'Électricité de France (E.D.F.), Service National' ('EDF', which became the public limited company Électricité de France SA towards the end of 2004) of the corporation tax due, when it restructured its balance sheet in 1997, on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network (*réseau d'alimentation général* — RAG) and reclassified as capital.
- (2) The French authorities, in their comments submitted to the Commission by letter dated 11 December 2002, denied that EDF had received a tax concession and argued that the additional capital contribution corrected an under-capitalisation and was therefore justified.
- (3) By letter dated 21 January 2003, the Commission forwarded to France the only observations received from one interested third party and invited the French authorities to submit their comments. France did not present any comments on these observations.
- (4) A technical meeting between the Commission and the French authorities was held on 12 February 2003, followed by a request for information by the Commission dated 4 July 2003.
- (5) On 11 November 2003, France provided additional information. On 17 November 2003, a further technical meeting was held between the Commission, the French authorities and representatives of EDF. The French authorities provided additional information on 20 November 2003.
- (6) By decision of 16 December 2003 <sup>(3)</sup>, the Commission declared the aid measure in favour of EDF incompatible with the internal market and requested recovery of the aid with interest. The aid was repaid in February 2004.

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

<sup>(2)</sup> OJ C 280, 16.11.2002, p. 8.

<sup>(3)</sup> OJ L 49, 22.2.2005, p. 9.

- (7) By judgment of 15 December 2009, the General Court annulled the Commission's decision <sup>(1)</sup>. France repaid to EDF the amount of aid which had been reimbursed in 2004.
- (8) By judgment of 5 June 2012, the Court of Justice rejected the appeal lodged by the Commission against the judgment of the General Court <sup>(2)</sup>.
- (9) By decision of 2 May 2013, the Commission extended the formal investigation procedure ('the extension decision') <sup>(3)</sup>.
- (10) The French authorities submitted their comments to the Commission on 1 July 2013.
- (11) By letter dated 13 August 2013, the Commission forwarded to France the observations dated 29 July 2013 received from one interested third party, namely EDF, and invited the French authorities to submit their comments. On 11 October 2013, France submitted its comments on the observations by EDF.
- (12) On 18 October 2013, EDF sent to the Commission a study prepared by a consultant (Oxera) dated 15 October 2013. On 22 October 2013, the Commission sent this study to France and invited the French authorities to submit their comments. However, the invitation was subject to the reservation that the study had been submitted more than two and a half months after the deadline set by the extension decision and, furthermore, it had been drawn up after the decision to invest in EDF on which France was relying. On 6 November 2013, France submitted its comments on the study.
- (13) A meeting between the Commission and the French authorities was held on 14 November 2013. On 15 November 2013, the Commission asked for further information and clarifications on the observations by France, which were submitted on 23 December 2013.
- (14) On 22 November 2013, EDF sent to the Commission a legal opinion commissioned by EDF further to and in support of its observations of 29 July 2013.
- (15) At the request of EDF, a meeting with the Commission in the presence of the French authorities was held on 12 March 2014.
- (16) On 13 May 2014, the Commission requested comments on the legal opinion submitted by EDF and clarifications and additional information from France, which the latter provided by letter dated 19 June 2014.

## 1. DETAILED DESCRIPTION OF THE MEASURE

### 1.1. THE BENEFICIARY: EDF, CHANGES IN ITS STATUS AND ITS CAPITAL

- (17) EDF was set up by Act No 46-628 of 8 April 1946 on the nationalisation of electricity and gas ('Act No 46-628'), which, in its first article, nationalised the production, transport, distribution, and import and export of electricity in France. This Act entrusted the management of the nationalised electricity enterprises to a national public industrial and commercial establishment called 'Électricité de France (E.D.F.), Service National'.
- (18) Article 16 of Act No 46-628 provided that the net balance of the assets, rights and obligations transferred to EDF constituted its capital, belonged to the nation, was inalienable and, in the event of operating losses, had to be reconstituted using the results of subsequent years. Under Article 1 of Decree No 56-493 of 14 May 1956 on capital contributions to EDF, those contributions were subject to the rules laid down by Article 16 of the above Act. Article 2 of the same Decree stipulates that the capital contributions give rise to payment to the state of interest and a dividend.

<sup>(1)</sup> Judgment of the General Court in Case T-156/04 *EDF v Commission* [2009] ECR II-4503.

<sup>(2)</sup> Judgment in *Commission v EDF* C-124/10 P, EU:C:2012:318.

<sup>(3)</sup> OJ C 186, 28.6.2013, p. 73.

- (19) By virtue of Act No 46-628, EDF had been since its creation, and still was in 1997, a national public industrial and commercial establishment that was not governed by the provisions applicable to public limited companies. A national public industrial and commercial establishment does not have any share capital, unlike a limited company governed by public law, which is owned by its shareholders <sup>(1)</sup>. Despite the terms 'capital' and 'capital contribution' used in the relevant instruments, EDF, because of its status as a legal person governed by public law, did not have any share capital. Act No 2004-803 of 9 August 2004 on the public electricity and gas service and on electricity and gas enterprises ('Act No 2004-803') provided for a future change to this status. Article 24 of Act No 2004-803 stipulated that EDF, in which the state had to hold more than 70 % of the capital, would be governed by the laws applicable to public limited companies, save as otherwise provided by statute. Article 47 of the Act also provided for the subsequent conversion of the public establishment EDF into a public limited company, subject to the publication of a decree on its new status. Article 46 laid down that the balance sheet of the company EDF at 31 December 2004 would be based on the balance sheet at 31 December 2003 and the income statement of the public establishment EDF for the 2004 financial year.
- (20) The conversion of EDF into a public limited company became effective by application of Decree No 2004-1224 of 17 November 2004 on the statutes of the public limited company Électricité de France. The statutes annexed to the Decree provided that EDF would now be a public limited company governed by the laws and regulations applicable to commercial companies, in particular the Commercial Code, unless otherwise specified by more detailed provisions, including the statutes themselves.
- (21) Article 6 of the EDF statutes provides that the company's share capital, which was initially wholly owned by the state, is set at EUR 8,129 billion, divided into 1 625 800 000 shares of EUR 5 each. The share capital of the new public limited company EDF was set in November 2004 at the same amount as the cumulated capital and capital contributions of the publicly owned industrial and commercial establishment EDF at that time, i.e. EUR 8,1 billion. This amount of capital and capital contributions had been reached under application of Act No 97-1026 of 10 November 1997 on various economic and commercial measures ('Act No 97-1026') and had remained unchanged since 1997.
- (22) As stipulated by Act No 2004-803 and the EDF statutes, the state had — and has — to hold more than 70 % of the company's capital at any time. In November 2005, new EDF shares accepted for listing on Euronext were offered at an open price, thereby effectively opening EDF's capital to shareholders other than the state.

#### 1.2. THE CREATION OF ACCOUNTING PROVISIONS FOR THE RENEWAL OF THE HIGH-VOLTAGE TRANSMISSION NETWORK (RAG)

- (23) Article 36 of Act No 46-628 transferred all the nationalised electricity concessions to EDF. Under Article 37 of the Act, the concessionaire is required to comply with a standard set of terms and conditions in relation to the concessions. In 1958, the various electricity transmission concessions that had been transferred to EDF by the state were converted into a single concession known as the '*réseau d'alimentation générale*' (RAG) (high-voltage transmission network).
- (24) In the absence of specific accounting rules for concessions, as early as 1946 EDF considered that it was the owner of the assets comprising the RAG and included those assets in its balance sheet. Pursuant to Article 8 of the terms and conditions approved by Decree No 56-1225 of 28 November 1956, EDF was required to carry out, at its expense, all the maintenance and renewal work needed to keep the concession structures in good working order.
- (25) In 1987, following a 1982 amendment to the general accounting plan that laid down specific rules for the assets to be returned to the state at the end of the concession, EDF changed its accounting practice for the assets constituting the RAG, which had until then been considered to be own assets, and classified them under the balance sheet item 'Assets under concession'. EDF applied to those assets the special accounting rules established in France for assets under concession that have to be returned to the state at the end of the concession period, and created tax-free provisions for the renewal of the RAG.
- (26) In a 1994 report <sup>(2)</sup>, the French Court of Auditors considered that, in the presence of a sole and permanent concessionaire from the state, nominated by law, such as EDF, it was difficult to regard the assets constituting the RAG as having to be returned to the state at the end of the concession, as opposed to the RAG's own assets

<sup>(1)</sup> Reply by the French authorities dated 23 December 2013, points 71 and 72.

<sup>(2)</sup> *Rapport particulier sur les concessions d'EDF* No 1993, 10 October 1994.

belonging to EDF. In other words, the Court of Auditors took the view that the accounting change introduced by EDF in 1987, which was reflected in the setting-up of tax-free provisions, was not justified. Work to regularise EDF's situation was started rapidly between the undertaking and the supervising authorities.

- (27) In 1997, EDF's accounts contained two types of tax-exempt provisions for the renewal of the RAG: unused provisions amounting to FRF 38,5 billion, and grantor rights corresponding to renewal operations already carried out, amounting to FRF 18,345 billion.

### 1.3. RECLASSIFICATION OF THE ACCOUNTING PROVISIONS

- (28) Act No 97-1026 clarified the status of the assets constituting the RAG. Article 4 of the Act provides:

- I. The structures of the high-voltage electricity transmission network are deemed to have been owned by Électricité de France (EDF) from the time that it was granted the concession for that network.
- II. For the purposes of applying the provisions of paragraph I, as at 1 January 1997, the value of the assets in kind allocated under concession to the high-voltage transmission network appearing as liabilities on EDF's balance sheet is to be entered, net of the corresponding revaluation differences, under the item "Contributed capital" ...

- (29) Reference to the Act was necessary for any operation relating to EDF's capital. Article 16 of Act No 46-628, in the version in force in 1997, provided that EDF's capital was inalienable and belonged to the nation. Therefore, under French law, the capital contributions to EDF resulting from the reclassification of the provisions for the renewal of the RAG were a matter for the law.
- (30) Act No 97-1026 establishes the ownership of the assets constituting the RAG. EDF's balance sheet was therefore reorganised by Act No 97-1026. The provisions set up by EDF between 1987 and 1996 for the renewal of the RAG with a view to returning those assets to the state, whether or not they had been used, would become superfluous if EDF were deemed to own the assets constituting the RAG.
- (31) Annex 1 to a letter addressed to EDF on 22 December 1997 by the Minister for Economic Affairs, Finance and Industry, the Secretary of State for the Budget and the Secretary of State for Industry ('the letter from the Minister for Economic Affairs') explained the restructuring of the upper part of EDF's balance sheet pursuant to Article 4 of Act No 97-1026 of 10 November 1997:

'— Reclassification of "Grantor rights" (FRF 18 345 563 605):

Consolidation as capital contributions of the value of assets in kind allocated under concession to the RAG, amounting to FRF 14 119 065 335.

Amalgamation of the revaluation reserves for the RAG in 1959 (FRF 2 425 million) and 1976 (non-depreciable fixed assets: FRF 97 million) with the item "Revaluation reserves RAG", which is thus increased from FRF 1 720 million to FRF 4 145 million.

Amalgamation of the statutory provisions for the revaluation of depreciable fixed assets in 1976 (FRF 1 704 million), the item thus increasing from FRF 877 million to FRF 2 581 million.

Reclassification of the renewal provisions which have become unwarranted (FRF 38 520 943 408) as retained income, in accordance with National Accountancy Council Opinion No 97-06 of 18 June 1997 on accountancy changes.'

- (32) In reorganising EDF's balance sheet, the French authorities followed National Accountancy Council Opinion No 97-06 of 18 June 1997 on changes to accounting methods, changes to estimates, changes to tax options and corrections to errors ('the National Accountancy Council Opinion'), which states that corrections to accounting errors, which by their very nature relate to the posting of past transactions, 'should be posted in the accounts for the financial year in which they are discovered'.
- (33) In accordance with Act No 97-1026 of 10 November 1997 and the letter from the Minister for Economic Affairs, the revaluation reserves were transferred to the item 'Own funds' without incurring any tax since they corresponded to revaluation surpluses realised free of tax or under a tax neutrality arrangement pursuant to the 1959 and 1976 Revaluation Acts.

#### 1.4. TAX IMPLICATIONS OF THE RECLASSIFICATION OF THE ACCOUNTING PROVISIONS

- (34) Annex 3 to the letter from the Minister for Economic Affairs also sets out the tax implications of the reorganisation of EDF's balance sheet. A net asset variation results from the reclassification of the unused renewal provisions amounting to FRF 38,5 billion as retained income and is subject to corporation tax at the rate of 41,66 % applicable in 1997. The unused provisions amounting to FRF 38,5 billion were thus correctly taxed by the French authorities. However, the part of the tax-free provisions consolidated as a capital contribution corresponding to the grantor rights was not taxed.
- (35) A memorandum by the Directorate-General for Taxation dated 9 April 2002, sent to the Commission by the French authorities, stated that 'the grantor rights in respect of the RAG represent an unowed debt which was unjustifiably exempted from tax by being incorporated into the capital' and that 'before this reserve was incorporated into the capital, it should have been transferred from the enterprise's liabilities, where it was incorrectly posted, to a net assets account, thereby resulting in a positive variation in net worth that was taxable under Article 38(2)' of the General Tax Code. They noted that 'the tax concession thus obtained [by EDF in 1997] can be estimated at FRF 5,88 billion ( $14,119 \times 41,66 \%$ )'.

#### 2. OPENING DECISION

- (36) In its opening decision, the Commission concluded that the irregular creation of additional provisions for the renewal of the RAG between 1987 and 1996 had favoured EDF within the meaning of Article 107(1) of the TFEU. This operation had conferred on EDF a selective economic advantage resulting from the difference between the capitalised value of the unpaid corporation tax on the provisions during the same period and the amount of corporation tax paid by EDF in 1997, following the entry into force of Article 4 of Act No 97-1026.
- (37) Despite the fact that EDF engaged in activities in France on a series of markets subject to monopoly rights before the entry into force of Directive 96/92/EC of the European Parliament and of the Council <sup>(1)</sup> liberalising the electricity sector, the Commission considered that the aid measures in question in favour of EDF had distorted or threatened to distort competition and affected trade between Member States within the meaning of Article 107(1) of the TFEU. This resulted in particular from the fact that, despite the exclusive rights enjoyed by EDF in engaging in certain activities in France, there was nevertheless a degree of trade between Member States on those markets. Moreover, free competition also existed on related markets where EDF had already diversified its activities beyond its exclusive rights in both geographic and sectoral terms. These effects already existed well before the liberalisation of the electricity sector.
- (38) The Commission also concluded that it was new aid which did not appear, at that stage, to meet the requirements that must be fulfilled for finding that the conditions laid down in Article 107(2) and (3) of the TFEU were fulfilled. Furthermore, the French authorities did not rely on the application of Article 106(2) of the TFEU.

#### 3. COMMENTS BY AN INTERESTED PARTY

- (39) By letter dated 6 January 2003, the National Association of Independent Thermal Electricity Producers (SNPIET) submitted comments to the Commission in the context of the formal investigation procedure. In relation to the non-payment in 1997 of corporation tax on some of the tax-free provisions created for the renewal of the RAG, SNPIET alleged that EDF had not complied in its operations with normal practice in industrial and commercial enterprises, contrary to the provisions of Act No 46-628 of 8 April 1946.

#### 4. COMMENTS BY FRANCE ON THE DECISION TO INITIATE THE FORMAL INVESTIGATION PROCEDURE

- (40) The French authorities submitted their comments to the Commission by letter of 11 December 2002. They challenged the classification as State aid of the non-payment in 1997 of corporation tax on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network.

<sup>(1)</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997, p. 20).

- (41) First of all, they disputed the amount of the provisions created for the renewal of the high-voltage transmission network (RAG) advanced by the Commission. Second, the French authorities claimed that, even if EDF had not set aside provisions for the renewal of the RAG, it would still not have been liable for the payment of corporation tax between 1987 and 1996 because of the carry-over of large tax losses. Furthermore, since the state was both the owner of EDF and the grantor of the concession on the RAG, they considered that the grantor rights did not provide it with a genuinely enforceable claim. Consequently, when the balance sheet was restructured in 1997, they assigned those rights to EDF's capital and reserves in order to correct its under-capitalisation, but without subjecting them to corporation tax.
- (42) The French authorities took the view that the restructuring of EDF's accounts in 1997 could be interpreted as a capital contribution of an amount equivalent to the partial tax exemption, the aim of which was also to correct under-capitalisation. EDF and the state would have liked to allocate the quasi-own assets to capital, leaving aside the question of corporation tax. It was thought that it would be more efficient and more neutral to allocate the grantor rights directly, and in their full amount, to own funds, rather than to carry out the equivalent transaction, which would have entailed assigning to capital a net amount after corporation tax, requesting EDF to pay corporation tax in an amount equal to the variation in net worth and, finally, making an additional capital contribution in an amount equal to the tax paid.
- (43) The French authorities took the view that an additional contribution was justified by EDF's projected profits in 1997, which were in fact achieved during subsequent years. According to the French authorities, in comparable circumstances, a private investor in a market economy would have made such a capital contribution.
- (44) They also denied that the remuneration of the state had been unduly reduced between 1987 and 1996 as a result of the creation of the provisions in question. They argued that, even if the net result had been higher, the remuneration of the state would not have been increased since, during that period, the level of that remuneration did not correspond to a predetermined percentage of EDF's net result. The level was determined freely by the state in absolute terms and did not necessarily depend on EDF's financial situation. Nor did the remuneration have to be deducted from the net profits for each year. In view of the foregoing, and given the losses carried over by EDF, the French authorities stressed that between 1987 and 1996 the state had in fact taken a dividend considerably in excess of the limits laid down by company law.
- (45) The French authorities also considered that, even if the creation of provisions for the renewal of the RAG had resulted in an advantage, that advantage had to be regarded as cancelled out by the increase in corporation tax paid in 1997. They claimed that, over the period from 1987 to 1996, EDF paid more to the state overall than the corporation tax that would have been paid by a commercial company which did not create provisions for the renewal of the RAG and which paid its shareholder a dividend equal to 37,5 % of its net result after tax.
- (46) The French authorities also argued that, if EDF were found to have benefited from an undue advantage, it would constitute existing aid and not new aid on account of the expiry of the 10-year limitation period laid down in Article 15 of Council Regulation (EC) No 659/1999 <sup>(1)</sup>, which started to run from the date on which the initial aid was granted. Since the Commission's first request for information was made on 10 July 2001, any aid granted before 1991 would be time-barred. The French authorities took the view that the legislative measures adopted in 1997 did not suspend the limitation period since only action by the Commission could have that effect. The French authorities argued finally that the measure would constitute existing aid in any event since it was granted prior to the liberalisation of the electricity market.
- (47) In their letter dated 20 November 2003, the French authorities reiterated their arguments concerning the revaluation reserves included in the amount of the grantor rights appearing in the accounts and concerning application of the limitation rule. Moreover, they claimed that the rate of corporation tax that should have been applied when EDF's balance sheet was restructured was the 1996 rate (36,67 %) and not the 1997 rate (41,66 %). They considered that the restructuring was carried out on the basis of a tax return filed on 23 December 1997, after closure of the accounts for 1996 but before the 1997 accounts were finalised.
- (48) The French authorities thus disputed the Commission's claim that EDF benefited from an advantage in 1997 on account of the non-payment of corporation tax on some of the provisions created free of tax for the renewal of the high-voltage transmission network.

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

## 5. JUDGMENTS BY THE EU COURTS

- (49) By its judgment of 15 December 2009, the General Court annulled the Commission's decision of 16 December 2003 on the ground that it was incumbent on the Commission to determine whether a private investor would have invested a comparable amount in similar circumstances. The General Court took the view that the Commission should have checked whether the operation satisfied the private investor test. The General Court therefore considered that the Commission had committed an error of law and infringed Article 107 of the TFEU.
- (50) In its judgment of 5 June 2012, the Court of Justice dismissed the appeal brought by the Commission against the judgment of the General Court. The Court of Justice considered that the finding made by the General Court, to the effect that the obligation for the Commission to verify whether the capital had been provided by the state in circumstances corresponding to normal market conditions existed regardless of the way in which that capital had been provided by the state, was not vitiated by an error of law. The Court of Justice also took the view that the General Court did not err in law either in finding that the private investor test may be applicable even where fiscal means have been employed.

## 6. DECISION TO EXTEND THE FORMAL INVESTIGATION PROCEDURE

- (51) As a result of the annulment of the decision of 16 December 2003, the Commission had to adopt a new decision under Article 266 of the TFEU and Article 13 of Regulation (EC) No 659/1999 terminating the procedure by complying with the points of law established definitively by the judgment of the General Court. Since the decision of 16 December 2003 had been annulled, the Commission had to re-examine the questions relating to Articles 3 and 4 of that decision.
- (52) On the one hand, neither the Court of Justice nor the General Court had found that the opening decision was irregular. It could therefore form the basis for a new final decision. On the other hand, the General Court clearly laid down the conditions governing the applicability and application of the private investor test. These criteria were based on the existence of objective and verifiable evidence showing that the decision by the Member State was to make an investment in the public undertaking on the basis of economic evaluations comparable to those which a rational private investor would have had carried out, before making the investment, in order to determine its future profitability <sup>(1)</sup>.
- (53) In the decision to extend the formal investigation procedure, the Commission noted that, at that stage of the administrative procedure, there was no evidence, demonstration or document to support the statement by the French authorities that the accounting reform of 1997 could be interpreted as a capital contribution of an amount equivalent to the partial tax exemption. Contrary to the observations by the French authorities, nor was such a capital contribution an investment rather than an aid measure which a rational private investor in a market economy would have made in comparable circumstances, justified by EDF's projected profits in 1997, which were in fact achieved during subsequent years.
- (54) Accordingly, in the extension decision, the Commission set out, in the light of the available information and documents, its preliminary analysis of the potential economic advantage arising from the non-payment by EDF in 1997 of corporation tax on the part of the provisions corresponding to the FRF 14,119 billion in grantor rights which were reclassified as capital contributions.
- (55) In that regard, the overall assessment of the facts of the case seemed to indicate that that measure involved the public authorities, thereby precluding the applicability of the principle of the private investor. In support of their claim, the French authorities had not provided any information or business plan preceding or contemporaneous with the decision not to levy the tax on EDF demonstrating the profitability of such an operation. From a substantive perspective, having regard to the criteria laid down by the General Court, the Commission noted that it was for France to duly establish the date of the documents provided and the evidence that they had been examined by the relevant ministers and officials and the Houses of Parliament before the contested decision was adopted.
- (56) In the absence of this information, however, it was in the exercise of its powers of taxation that France appeared to have reserved a more favourable tax treatment for the restructuring of the upper part of EDF's balance sheet, in relation to the reclassification of the grantor rights provided for in Article 4 of Act No 97-1026. No specific budgetary provision earmarked this tax resource to EDF, just as the rules and checks relating to investments had not been implemented to provide a legal basis for the alleged investment.

<sup>(1)</sup> Judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 84.

- (57) Likewise, in its extension decision, the Commission noted in the alternative that, even if the principle of the private investor in a market economy had been applicable, application of the principle resulted in the conclusion at that stage that a private investor would not have invested FRF 5,88 billion in the capital contribution to EDF in 1997. In the absence of information provided by the French authorities, it seemed excluded that a private shareholder under normal market conditions would have gone ahead with the alleged investment without previously examining objective and reliable studies, preferably carried out by an impartial independent investment adviser, rather than, for example, by the beneficiary enterprise, which stated, in particular, the return on capital invested, the return period on the investment and the inherent risks in absolute terms and in relation to the remuneration arrangements linked to such an investment.
- (58) In that regard, the Commission added to the factors which a rational private investor would have examined before committing funds the uncertainty about the amount and the future course of the pension financing costs facing EDF in 1997, under its specific pension scheme, and the assessment that an investor would make at that time.
- (59) Under those conditions, the partial exemption from corporation tax in 1997 was not a productive investment by the state shareholder but rather a tax exemption measure likely to have conferred an economic advantage on EDF.
- (60) Furthermore, it appeared that the failure to levy the corporation tax owed by EDF involved state resources and was likely to distort competition and affect trade between Member States, thereby fulfilling the conditions for the application of Article 107(1) of the TFEU.
- (61) In the absence of a legal basis justifying the compatibility with the internal market of operating aid that strengthened EDF's position in relation to its competitors, the Commission, in its decision of 2 May 2013, doubted whether the aid was compatible with the internal market. Similar doubts had already been raised in the opening decision.

#### 7. COMMENTS BY THIRD PARTIES

- (62) By letter dated 29 July 2013, EDF submitted its comments on the extension decision. EDF levelled three main criticisms at the arguments set out in that decision: (i) the decision ignored the lessons of the judgment of the General Court and failed to recognise the true nature of the recapitalisation of EDF carried out by the state; (ii) the decision was excessively formalistic in that it wrongly postulated the need for a business plan linked to the investment, whereas the recapitalisation was the fruit of a lengthy reflection process, as attested by many documents from that period; and (iii) the decision argued, without any demonstration, that no investor in a situation as close as possible to that of the state would have made a comparable investment, contrary to the information provided by EDF in support of its observations.
- (63) EDF took the view that the Commission was therefore continuing to analyse the measure adopted by the French state in 1997 from the sole perspective of its alleged tax implications, even though the General Court had clearly rejected that approach. As the General Court had confirmed, the measure implemented by the state when it reclassified the grantor rights as capital contributions constituted a recapitalisation of EDF intended to correct the imbalance on EDF's balance sheet with view to the opening-up of the energy markets to competition. The letter from the Minister for Economic Affairs dated 22 December 1997 did not contain a tax decision that departed from the 1997 Act but served to point out the tax implications. It was that this single and indivisible recapitalisation measure that should be examined, not the alleged tax implications, which were artificially dissociated in the decision to extend the formal investigation procedure.
- (64) According to EDF, a business plan specific to the investment was not required by the case-law, which did not establish any formalism on that question but requires objective and verifiable evidence pre-dating or contemporaneous with the measure under examination. Incidentally, such a business plan would not have been essential for the state in 1997. The state had five representatives on EDF's management board, had held all of EDF's capital since 1946 and, at the time, had detailed knowledge of the enterprise and was involved in its management and in setting its strategic objectives, with a long-term time horizon. According to EDF, such a long-term time horizon was particularly relevant in the case of EDF because of the capital intensiveness of its activity and the decades-long useful life of its installations, ranging from 30 to 75 years in some cases.

- (65) EDF took the view that it was as a shareholder and not as a public authority that the state, as attested by many contemporary documents, had carried out an investment on the basis of precise forward-looking analyses and assessments. Thus, as early as 1995 discussions had begun between EDF and its line ministries in order to draw the conclusions from the opinion of the Court of Auditors referred to in recital 26. These discussions focused on the reorganisation of the balance sheet of the undertaking and the return on capital. They resulted in the signature, on 8 April 1997, of the contract for services between the state and EDF for the period 1997-2000 and the concomitant tabling, on 2 April 1997, of a draft law on various economic and financial measures, Article 45 of which was identical to Article 4 of Act No 97-1026. According to EDF, the preparatory work in the National Assembly and the Senate, and even the Act itself, demonstrated that the nature of the intervention by the state was that of a shareholder: a capital contribution recapitalising EDF.
- (66) As attested by some 40 contemporaneous documents that EDF attached to its accounts, the state had been guided in its analyses and reflections by four main concerns:
- taking into consideration the new competitive context of the gradual opening-up of the markets following Directive 96/92/EC,
  - normalising its financial relations with EDF on the basis of ordinary law by putting an end to the ambiguities which had existed in the past,
  - rectifying the significant imbalance which was affecting the structure of EDF's balance sheet by strengthening its own funds,
  - facilitating international comparisons to increase the credibility of the enterprise within the financial community.
- (67) Lastly, for EDF, the criterion of the prudent private investor in a market economy was not only applicable because of the considerations referred to above but was also satisfied in this case since the state had acted as a private investor would have done. In the view of EDF, according to the Court of Justice (paragraphs 78 and 89 of the judgment), the question was one of determining whether EDF, in circumstances which corresponded to normal market conditions, could have obtained the same advantage as that which had been made available to it through state resources and whether the advantage, because of its effects, distorted or threatened to distort competition.
- (68) Here again, many contemporaneous documents demonstrate that the state had indeed examined and quantified the profitability of its investment, as would have done an investor who was the sole shareholder in the undertaking operating to a long-term time horizon. It was on that basis that the remuneration of the state had been set in the contract for services between the state and EDF for the period 1997-2000. At the time, the remuneration was consistent with the remuneration of shareholders in comparable companies. The estimates of the amounts that EDF would have to pay to the state from 1997 to 2000 had therefore been examined by the latter before the contract was concluded.
- (69) Moreover, in its comments of July 2013, EDF had anticipated a study commissioned from Oxera, which had not yet been finalised when EDF made its submission. EDF had claimed that the Oxera study would compare the internal rate of return expected on the investment by the state in 1997 with that required by the capital markets for a similar investment and would show that a private investor would have made the investment under the conditions set in the contract for services for 1997-2000.
- (70) On 18 October 2013, EDF had sent to the Commission the study by Oxera, which was dated 15 October 2013 <sup>(1)</sup>, without further comment. As EDF had anticipated in its comments in July 2013, the study by Oxera concluded that a prudent private investor in a market economy would have invested in the increase in the amount of capital in EDF. This conclusion resulted from the fact that the profitability (internal rate of return) that an investor could have expected in 1997 lay somewhere between 35 % and 15 %, with an average of 27 %, over five years, which in any event was higher than the return of 12,7 % that such an investor would have required. The return was calculated by taking into account the value, at the start and end of the period, of the sale of the rights in EDF held by the state.

<sup>(1)</sup> Does the 1997 recapitalisation of EDF by the French State meet the private investor test? Final Report of 15 October 2013.

- (71) EDF took the view that, apart from the weakness in own funds, its economic fundamentals were healthy in 1997, as analysts had commented at the time, without expressing any concerns about its financial viability or its commercial prospects at the time the state made its investment. EDF's credit rating was excellent (Aaa for Moody's between 1992 and 1997, AAA for Standard & Poor's in 1996-1997) and remained so despite it having been necessary to lower it by one or two notches to take account of the state guarantee available to EDF as a public industrial and commercial establishment. Several contemporaneous documents showed that the level of remuneration of the French state by EDF was comparable to the rate of return from dividends from companies listed on the French stock exchange (CAC 40) (4,5 % to 5 % on capital) and from undertakings active in the energy sector in Europe (estimated at 4,7 % and 5,27 % for 1996 and 1997 respectively). Moreover, this demonstrated that EDF could have obtained the same amount of capital on the capital market, so the measure, because of its effects, had not been of such a nature as to distort competition.
- (72) In particular, EDF took the view that a private investor holding the entire share capital in a subsidiary would have been able to make, under comparable conditions, a similar investment in that subsidiary by converting any type of claim held against the subsidiary into capital. This analysis was supported by a legal opinion issued at the request of EDF. In seeking to rectify a financial structure that was distorted by the weakness of its own capital compared with the financial indebtedness, the state would also have allowed the undertaking to compete with other leading operators in the sector in the EU. The same shareholder would not, therefore, have left untouched a significant imbalance in the balance sheet of its subsidiary with sound economic fundamentals, while it had an easy method of correcting the imbalance by converting a claim into capital.
- (73) In the view of EDF, it was therefore reasonable to think that a private investor in a situation as close as possible to that of the state, i.e. the sole shareholder in the company, operating to a long-term time horizon, in a highly capital-intensive market on the verge of being opened up to competition, would have made the same investment.

#### **8. COMMENTS BY FRANCE ON THE DECISION TO EXTEND THE FORMAL INVESTIGATION PROCEDURE**

- (74) The French authorities considered, first, that the state had acted as a prudent investor in a market economy when it reclassified, free of corporation tax, the grantor rights as capital contributions to EDF. They took the view that, contrary to the presentation in the decision to open the investigation procedure of 16 October 2002 and in the decision to extend the procedure of 2 May 2013, the measure that the Commission should analyse was a single measure to recapitalise EDF through the adoption of Article 4 of Act No 9-1026 and not the measure to grant a tax exemption on the reclassification of the grantor rights as a capital contribution, which was separable under the said Act. They relied on the information presented in a number of documents dating from 1996 and 1997 annexed to their comments, which they believed supported and corroborated that argument. These documents are referred to in recitals 87 to 108. As far as the French authorities were concerned, other documents submitted by EDF backed up their comments.
- (75) In the alternative, the French authorities pointed out that they disputed the amount of aid and reiterated their comments of 20 November 2003 to the effect that the rate of the relevant tax to be applied should be the 1996 rate and not the 1997 rate, as set out in recital 47.

#### **On the applicability of the principle of the private investor in a market economy**

- (76) The French authorities disputed that France had granted the tax exemption at issue in its capacity as a public authority, which made the principle of the prudent private investor in a market economy inapplicable. They considered that the General Court did not require the Member State to submit a genuine business plan relating to the contested measure.
- (77) In that regard, first, they pointed out that in 1997 EDF was a public industrial and commercial establishment placed under the supervision of the state, which, therefore, had a detailed knowledge of the undertaking and of its industrial strategy and financial prospects. Accordingly, they took the view that the submission of the information and evaluations available to the state before it took the contested measure, which demonstrated the profitability of the investment, was admissible. The Commission had to carry out an overall analysis, including in particular this information and any other relevant information.

- (78) Second, given the nature and purpose of Article 4 of Act No 97-1026, the French authorities took the view that the state had acted in its capacity as shareholder by granting a tax exemption on the reclassification of the grantor rights. Thus, this Act had been preceded by the signature on 8 April 1997 of the contract for services between the state and EDF for the period 1997-2000, the performance of which involved the adoption of legislative measures to restructure EDF's balance sheet. Previously, in a letter dated 12 July 1996, the supervisory authorities had informed EDF that the contract should set it an ambitious target for the remuneration of the state. Title III of the contract provided for a remuneration of the state comprising two elements: (i) a remuneration on the capital contributions at a fixed rate of 3 %; and (ii) an additional remuneration equal to 40 % of EDF's net income, whereby the combined amount of the two elements could not, however, exceed 6 % of the amount of the capital contributions.
- (79) The state had examined this remuneration in the form of prospective dividends and quantified the additional remuneration at FRF 3,5 billion, which could reach FRF 6 billion over the period, as documented by a letter dated 22 April 1997 from the supervisory authorities to EDF. This estimate was based on the economic-financial prospects that EDF had sent to the Ministry of Finance on 19 February 1997 and on the assumptions underlying the contract for services. The report from September 1997 by the rapporteur to the Senate on Act No 97-1026 also included analyses by the Ministry's departments of the expected impact on the remuneration of the state as shareholder for 1998, i.e. FRF 2,6 billion, of which FRF 1,5 billion was fixed interest and FRF 1,1 billion was additional remuneration. The state had therefore estimated the projected remuneration before adopting the measure at issue, as would any shareholder wishing to take part in a capital increase in their company.
- (80) Third, the French authorities considered that the reclassification of the grantor rights and, more broadly, the restructuring of EDF's balance sheet and the strengthening of own funds had rectified the weakness in the financial structure of the enterprise. If this weakness had persisted, EDF would probably have had to face an increase in the interest rate on its debt and a difficulty with its commercial partners because of a negative perception of the counterparty risk. That the state as shareholder had had such a concern emerged from the explanatory memorandum to Article 4 of the draft law which then became Act No 97-1026 and from the speech by the minister responsible when he tabled the draft law before the Senate on 2 October 1997.
- (81) Furthermore, the reports by the deputy and senator who acted as rapporteurs on the draft law before the National Assembly and the Senate respectively had stressed the positive effect of restructuring EDF's balance sheet on the debt-equity ratios: the first report had judged the equity (FRF 24,2 billion) to be insufficient in relation to the loan debts (FRF 131,9 billion) and the net assets (FRF 696,4 million); the strengthening of own funds had given EDF a balance-sheet structure that better reflected its economic reality, while enabling more relevant comparisons with its European competitors; the second report, moreover, had stressed the positive effect for EDF of greater credibility among the financial community and with its potential partners. The French authorities took the view that strengthening the financial structure of an enterprise was a concern of a prudent private investor in a market economy in a comparable situation.
- (82) According to the French authorities, the outcome was that the prudent private investor in a market economy test was indeed applicable since the state had acted as shareholder in reclassifying, free of tax, the provisions for grantor rights as capital contributions to EDF.

#### **On the applicability of the principle of the private investor in a market economy**

- (83) First of all, the French authorities pointed out that the contract for services between the state and EDF had provided for a remuneration of the state resulting from two elements: (i) a fixed rate of 3 % on its capital contributions; and (ii) additional remuneration of 40 % of EDF's net income, which demonstrated that the state had information on the expected yield on the invested capital. As attested, moreover, by the report by the member of the National Assembly referred to above, given the existence of a fixed rate on the capital contributions, the reclassification of the grantor rights as capital had had the effect of increasing in absolute terms the value of the remuneration of the state, because of the broadening of the capital base.
- (84) Next, the French authorities considered that the profitability of the investment in EDF in 1997 should be looked at from a long-term perspective, having regard to the future payments to the state and to the increase in the value of the enterprise. Substantial generation of resources between 1997 and 2000, of almost FRF 70 billion, as forecast by the contract for services, had to be added to the positive net results after taxation and remuneration of the state (FRF 1,4 billion in addition to FRF 2,5 billion remuneration of the state in 1998). As underlined by the letter from EDF dated 19 February 1997, the state had indeed set a target for the increase in the asset value of the enterprise of this amount, resulting from debt reduction, asset formation and investments in development, providing prospects for growth in the capital value of EDF.

- (85) Lastly, in assessing the risks of the investment, the state as shareholder had taken into account the characteristics of EDF's main activity, which was conducted principally in France, on the basis of a principle of regulated tariffs which would have to cover the company's costs. These characteristics reduced the risk associated with the investment and, consequently, the profitability requirement. Furthermore, a memo from EDF dated 27 July 1996, which was sent to the Senate on 15 September 1997, showed that the shareholder remuneration in foreign companies differed markedly, depending on the institutional and regulatory environment in the sector in each country.
- (86) According to the French authorities, the result was that the state had behaved as a prudent private investor in a market economy when it reclassified the provisions for grantor rights as capital contributions without levying corporation tax. Furthermore, this conclusion was also confirmed by EDF's comments, including the studies and analyses on which it relied, as set out in recitals 62 to 73. In particular, as regards the economic study by Oxera submitted by EDF, the French authorities took the view that the Commission should carry out the same analysis in order to determine whether or not the recapitalisation of EDF by the state in 1997 was a prudent investment.

#### **Documents submitted by France in support of its comments**

- (87) In support of their reply to the extension decision, the French authorities sent the Commission nine documents in attachment to their comments of 1 July 2013. They submitted these nine documents in support of the argument they had already put forward in their comments of 11 December 2002 to the effect that an additional capital contribution equivalent to the revenue from the uncollected tax was justified by EDF's projected profits in 1997, which were achieved in the subsequent years. Without prejudice to the documentary evidence cited by France in its comments, a systematic analysis of the evidence contained in these documents is required.
- (88) The documents relate either to the preparation or implementation of the contract for services for 1997-2000 between EDF and the French state or to debates on the draft law which became Act No 97-1026. They date from 1996 to 1997 and thus from the same period as the supposed investment decision. The documents concerned are the 1997-2000 contract for services <sup>(1)</sup>, letters from the line ministers responsible for supervising EDF <sup>(2)</sup>, letters from EDF to the Ministry or the Senate <sup>(3)</sup> and documents and two reports from the National Assembly and the Senate in preparation for debates on the draft law <sup>(4)</sup>. Their content is outlined in more detail below.
- (89) In a letter of 12 July 1996 to the Chairman of EDF, the line ministers welcomed the results of the 1993-1996 Plan contract between EDF and the state and, as it was due to expire on 31 December 1996, launched the preparation of the next Plan contract for 1997-2000. They explained that the financial equilibrium in the 1997-2000 contract would be determined as part of a new tax and accounting framework for EDF, following work conducted since 1995. They asked for discussions to start between the relevant departments and EDF and outlined the three primary objectives for the future contract:
- first, the ministers wanted: 'the productivity gains achieved by the undertaking [to] allow it to continue its price reduction policy, thereby helping to boost the competitiveness of French industry and the purchasing power of domestic consumers',
  - at the same time EDF was to continue its debt reduction efforts and to set an ambitious target for the remuneration of the state, with an income-growth incentive mechanism for EDF,
  - lastly, the contract was to set strategic guidelines for developing EDF worldwide, in order of priority.

<sup>(1)</sup> 1997-2000 State-EDF contract for services, signed on 8 April 1997.

<sup>(2)</sup> Letter of 12 July 1996 from the Minister for Economic and Financial Affairs and the Minister for Industry, Posts and Telecommunications to the Chairman of EDF, letter of 22 April 1997 from the Minister for Economic and Financial Affairs, the Deputy Minister for the Budget and the Minister for Industry, Posts and Telecommunications to the Chairman of EDF.

<sup>(3)</sup> Letter dated 19 February 1997 from EDF's finance director to the Head of Financing and Holdings at the Treasury Department; EDF memo dated 27 July 1996 on the shareholder's remuneration, sent to the Senate on 15 September 1997.

<sup>(4)</sup> Explanatory memorandum to Article 45 of the draft law laying down various economic and financial rules, adopted by the Council of Ministers on 5 April 1997; report by the National Assembly's Committee on Finance, the General Economy and the Plan, submitted by Member of the National Assembly Didier Migaud on 10 September 1997, on draft law No 201 on urgent tax and financial measures; report by Member of the Senate Alain Lambert on the draft law on urgent tax and financial measures submitted on 24 September 1997; speech by the Minister for Economic Affairs, Finance and Industry presenting the draft law on urgent tax and financial measures to the Senate on 2 October 1997.

- (90) As part of the ongoing preparatory work on the contract, on 19 February 1997 EDF's finance director sent the Treasury Department a memo dated 18 February 1997. It contained the main hypotheses regarding the financial scenario underpinning the contract for services between EDF and the state for 1997-2000, including in particular the projected annual income statements and cash flow statements for the period.
- (91) The memo forecast a price reduction each year (– [...] (\*) %, – [...] %, – [...] %, – [...] %), industrial investment of FRF [...], of which FRF [...] for international development, and investment of FRF [...] in the core business over the period 1997-2000. It also mentioned a tax-deductible remuneration for capital contributions of 3 % on an estimated base of FRF 50 billion after restructuring of the balance sheet and of 40 % of income after the fixed remuneration component and corporation tax. Debt at end of year was expected to go from FRF [...] at end 1996 to FRF [...] at end 2000. Similarly, outstanding debt less assets was expected to go from FRF [...] at end 1996 to FRF [...] at end 2000.
- (92) Of the documents submitted in annex to their comments by the French authorities, the EDF memo of 18 February 1997, sent to the supervising authorities the following day, is the only one to contain systematic quantified projections for EDF's economic and financial operating income. On the basis of these projections dating from February 1997, the state as shareholder could expect a return on the invested capital of FRF 2,1 billion in 1997, FRF 2,5 billion in 1998, FRF 2,4 billion in 1999 and FRF 2,4 billion in 2000, or an annual average of FRF 2,35 billion. EDF's projected income statement for 1997-2000 as set out in the memo was as follows:

Table 1

**F projected income statement 1997-2000 (FRF billion current value)**

|                                         | 1997  | 1998  | 1999  | 2000  |
|-----------------------------------------|-------|-------|-------|-------|
| Revenue                                 | 186,3 | 184,2 | 185,7 | 187,5 |
| Expenses                                | 177,0 | 177,2 | 179,1 | 180,9 |
| of which fuel and energy purchases      | 36,9  | 36,8  | 37,8  | 38,5  |
| of which operating expenses             | 88,3  | 91,2  | 93,6  | 95,7  |
| Income from core business               | 9,3   | 7,0   | 6,6   | 6,6   |
| Income before remuneration of the state | 6,8   | 6,5   | 6,1   | 6,1   |
| Remuneration for capital contributions  | 1,5   | 1,5   | 1,5   | 1,5   |
| Additional remuneration                 | 0,6   | 1,0   | 0,9   | 0,9   |
| Corporation tax                         | 3,9   | 2,6   | 2,4   | 2,3   |
| Net income                              | 0,9   | 1,4   | 1,3   | 1,4   |

Source: EDF memo of 18 February 1997 'Contract for services — economic and financial prospects'.

- (93) As mentioned in the EDF memo, the remuneration paid to the state was tax deductible. This marked a departure from the principle of corporation tax being levied on income after interest and depreciation, thereby reducing net income and thus the amount that could potentially be paid out in dividends. This ad hoc departure potentially increased the state's remuneration as shareholder but decreased by the same amount the tax to be paid to the state as revenue collector. In their reply of 23 December 2013, the French authorities stated that the remuneration for the capital contributions was treated as a standard dividend from 2001 onwards, as a result of which it ceased to be tax deductible. This treatment was used for the group contract between EDF and the state for 2001-2003, which replaced the 1997-2000 contract.

(\*) Business secret..

- (94) On 8 April 1997 a contract for services between EDF and the state for the 1997-2000 period was agreed and signed by the line ministers and the EDF Chairman and CEO. The contract set out the main direction EDF's medium-term action should take and contained reciprocal commitments by the parties, stating that these commitments had been entered into in the light of broad reference hypotheses and could be called into question only if there was a significant change in the business environment. The contract contained various commitments under three headings: reaffirming the core tasks of a public undertaking (Title I), preparing the undertaking's future today (Title II) and a new financial and institutional framework for the undertaking (Title III). Two annexes to the contract set out performance indicators used for implementation (Annex I) and price movements forecast per year between 1997 and 2000 (Annex II).
- (95) The main commitments and guidelines laid down in the contract which relate to the scope of this Decision are described below:
- The state confirmed that it wanted the undertaking to retain its legal status, which had proved its effectiveness and should remain a stable point of reference for future developments; this was in compliance with the EU Directive on the internal market in electricity <sup>(1)</sup>. For its part, EDF was to contribute to spatial planning and national solidarity through an ambitious policy to support economic activity and employment by helping local authorities to create jobs and by improving the situation of its poorest customers (Title I).
  - EDF's development was intended to 'boost the competitiveness of French business'; the productivity gains to which it was committing were to be allocated as a priority to a reduction in the average level of its prices. The price adjustments should result in an average reduction at constant prices of [...] % in April 1997, [...] % in April 1998 followed by [...] % in April 1999 and [...] % in April 2000. At the same time, EDF's development should be geared towards winning new markets, particularly in Europe (Title II).
  - EDF's balance sheet was to be restructured with the two-fold aim of strengthening its net assets and stabilising its financial relationship with the state on a basis more akin to ordinary law. To this end the Government undertook to present to Parliament a legislative measure restructuring EDF's balance sheet in 1997, with an effective restructuring date of 1 January 1997. The contract provided for a remuneration of the state as shareholder comprising two elements: a remuneration on the capital contributions at a rate of 3 % and an additional remuneration equal to 40 % of net income, whereby the combined amount of the two elements could not exceed 6 % of the amount of the capital contributions, though no estimate of the absolute amounts involved was included. In addition, for the period 1997-2000 EDF undertook to allocate FRF [...] to industrial investment worldwide, to cut its gross debt by FRF [...] to bring it to FRF [...] at end 2000, with a view to an ultimate objective of zero debt by the time the generation system was renewed. Lastly, the contract provided that, if targets were exceeded and a surplus resulted, this should be allocated 'as a priority to additional price reductions' before paying out any dividends to the state as shareholder or profit-sharing bonuses to staff (Title III).
- (96) A letter dated 22 April 1997 to the EDF Chairman from the ministers who co-signed the contract for services confirmed that the reference hypotheses and financial projections contained in the EDF memo of 18 February 1997 and which underpinned the 1997-2000 contract for services were consensual and fixed. The letter made express reference to the prior concertation between EDF and the public authorities in preparing the financial scenario. It mentioned the target of an average [...] % reduction in EDF's prices in four years.
- (97) The letter of 22 April 1997 referred to the provisions of the Decree of 14 May 1956, as amended, and the arrangements for the remuneration of the state included in Title III of the contract for services. In accordance with these provisions, the letter stated that 'the reference scenario gave an additional remuneration amount of FRF 3,5 billion over the period' 1997-2000 and that in these circumstances it would be possible to achieve a total value of payments to the state of FRF 5,1 billion in 1997, including the fixed interest rate and the advance on corporation tax. These amounts are consistent with those contained in the EDF memo of 18 February 1997. The consistency between the amounts of additional remuneration calculated on the basis of income demonstrates that all the amounts (revenue, expenses, net income, etc.) included in EDF's projected income statement for the period 1997-2000 were examined, validated and approved by the supervising authorities.

<sup>(1)</sup> The contract refers to Directive 96/92/EC. This Directive, like those which have succeeded it, did not contain any rules on the legal form to be taken by companies generating, transmitting or distributing electricity in the internal market.

- (98) The letter of 22 April 1997 from the ministers also stressed that the means of achieving equilibrium in the contract came under the accounting and tax framework accompanying the restructuring of EDF's balance sheet, which was to take effect, subject to the necessary legislative provisions, on 1 January 1997. The letter stated, 'the detailed arrangements for implementing this restructuring, on both the accounting and the tax fronts, will be the subject, on the basis of the plan now adopted, of further discussions between the line ministries and the undertaking'.
- (99) Not long before this letter, the Government had tabled a draft law before the National Assembly. The draft law on various economic and financial measures was adopted by the Council of Ministers on 5 April 1997. Article 45 provided for the reclassification of EDF's accounting provisions. The explanatory memorandum to the draft law stated that the planned accounting adjustments would give EDF a balance sheet that better reflected its real economic circumstances, with a level of own funds proportionate to its volume of activity. The draft law was not examined on account of the National Assembly's being dissolved on 21 April 1997.
- (100) After the transmission to Parliament of the draft law on urgent tax and financial measures, subsequently adopted as Act No 97-1026, the National Assembly and the Senate appointed their rapporteurs. National Assembly Report No 204 described the background to the need to clarify the ownership of EDF's transmission structures, which would nullify the accounting practices contested by the Court of Auditors in its special report on the EDF concessions, No 1993 of 10 October 1994. It explained the accounting changes needed and provided estimates of their effects on the various balance-sheet items as follows:

Table 2

**Effects of the reorganisation of EDF's own funds as a result of Article 4 of the urgent tax and financial measures Act on the accounts for 1996 (FRF billion)**

|                                        | End 1996 | Effect of Article 4 |
|----------------------------------------|----------|---------------------|
| Own funds                              | 24,2     | 79,8                |
| of which (liabilities):                |          |                     |
| Paid-in capital                        | 2,6      | 2,6                 |
| Contributed capital                    | 36,6     | 50,7                |
| Revaluation reserves                   | 2,1      | 6,2                 |
| Statutory reserves                     | 0,15     | 0,15                |
| Retained income <sup>(1)</sup>         | 20,2     | 18,3                |
| Income after remuneration of the state | 1,9      | 1,9                 |

Source: Ministry of Economic Affairs and Finance

<sup>(1)</sup> The changes to retained income are not a direct effect of Article 4, but a logical consequence.

- (101) The National Assembly report stressed the draft law's effects that made comparisons with the debt ratios of European competitors (Austria, United Kingdom, Sweden, Spain, Germany) more meaningful: after the restructuring of the balance sheet, EDF's net debt/equity ratio would go from 480 % to 148 %.
- (102) The report also stressed the changes in the financial relations between EDF and the state. It explained the legal regime and the remuneration for the capital contributions to EDF, governed by Decree No 56-493 of 14 May 1956, as amended by Decree No 86-1360 of 30 December 1986. This regime provided for a fixed-rate remuneration capped at 8 % and additional remuneration as a percentage of EDF's income after tax and fixed interest. The payments made by EDF from 1991 to 1996 as described in the report total FRF 3,41 billion per year on average during the period; proportional to own funds at the end of 1996, these payments gave an average operating profitability of 14,1 % for the state as shareholder <sup>(1)</sup>. They are summarised in the table below.

<sup>(1)</sup> The profitability for the State as shareholder is explained by the low capital contribution base of FRF 36 billion (denominator) and the size of the accounting provisions. Until 1996, once they had been entered into the accounts, EDF ended up with a negative annual net income. The loss carried over from the income statement was reflected in the balance sheet as depleting the own funds set at FRF 24,2 billion (see Table 2, 'End 1996' column, showing how EDF's own funds were slashed by negative retained income of FRF 20,2 billion before the amendment introduced by Article 4 of Act No 97-1026). As tax was not levied on negative income, the high profitability for the State as shareholder was at the expense of the State as revenue collector.

Table 3

**Financial relations between the state and EDF (FRF million current value)**

|                                                                  | 1991  | 1992  | 1993  | 1994  | 1995  | 1996  |
|------------------------------------------------------------------|-------|-------|-------|-------|-------|-------|
| Interest on capital contributions (GB — line 407)                | 1 816 | 1 816 | 1 816 | 1 816 | 1 816 | 1 816 |
| Additional remuneration on capital contributions (GB — line 116) | 500   | 665   | 965   | 1 938 | 1 500 | 4 002 |
| Total                                                            | 2 316 | 2 481 | 2 781 | 3 754 | 3 316 | 5 818 |

Source: National Assembly report, p. 77, Committee calculations for 'total'

- (103) The National Assembly report stated with respect to the changes envisaged for the EDF balance sheet that 'as the capital contributions form the base for the fixed interest, increasing them as a result of this Article would increase the payment burden on EDF. An amendment to the terms of remuneration was therefore included in the state-EDF contract for 1997-2000 signed on 8 April 1997. The fixed interest rate has been brought down to 3 % in order to offset the effect of the base'. The report pointed out that, despite the profits earned since 1990, EDF had not paid corporation tax and that moving the provisions linked to the RAG concessions up would wipe out in one go the accumulated tax and accounting deficit. The report noted that, according to the line ministry, this would leave the public establishment (EDF) owing corporation tax of FRF 3 billion in 1997 and FRF 2,5 billion in 1998.
- (104) The National Assembly report referred to a parliamentary amendment to the draft law, which was scrutinised and rejected by the Committee. The amendment specified that the reclassified accounting provisions should be converted to own funds by an accounting entry that bypassed EDF's income statement, in order to avoid showing a very high profit that the state might be tempted to tax in part. To this end, the amendment proposed that the Act should define the accounting process and stipulate that no additional revenue could be collected from EDF by the state on the ownership of the RAG assets being transferred. The report indicated that 'the inclusion of the accounting process for converting the provisions to own funds in the Act was ruled out at the request of the Council of State on account of its not being of a legislative nature'; in the discussion the report cited a number of parliamentary opinions to the effect that the state should be able to impose other charges on EDF, the undertaking should pay corporation tax on its profits and the real question was 'how much the Government was to collect from EDF and by what means'.
- (105) As for the Senate, its report preparatory to the debate on the draft law found that there was no justification for creating accounting provisions for the renewal of the RAG assets from 1987 onwards. When the draft law was presented to the Senate on 2 October 1997, the minister responsible stressed the 'fictitious' nature of EDF's losses from a tax point of view, as well as the non-payment of corporation tax resulting from the provisions. The minister reassured the Senate that the arrangements did nothing to call into question EDF's monopoly position. The Senate report outlined the consequences of the Article under scrutiny on the items in EDF's balance sheet before and after reclassification of the provisions, along similar lines to the National Assembly report, as set out in Table 2. It pointed out that cleaning up the balance sheet would make it easier to compare it with the balance sheets of EDF's competitors; this would make EDF more credible to the financial world, which was all the more important considering that the cost of debt renegotiation depended in particular on the debt/equity ratio.
- (106) As part of the 'clarification' of EDF's financial relations with the state, the Senate report stated that 'in exchange for the tax revenue that the public establishment would now pay to the state, the contract for services signed on 8 April 1997 for 1997 to 2000 provides for a slight reduction in EDF transfers to the state'. As a result of the writing back of the renewal provision of FRF 38,5 billion, making EDF liable for corporation tax, the Senate report stated that 'the financial relations between EDF and the state have been revised downwards'.

- (107) The other documents submitted by France include a cover letter dated 15 September 1997 from EDF's finance department to the Senate administration, to which were attached a table quantifying the effects of Article 4 of the draft law, and showing the effects on the balance sheet, a copy of the instruction of 27 July 1993 on the electricity distribution concessions and an internal EDF memo discussing foreign experiences of remunerating shareholders in the electricity sector, dated 27 July 1996. This memo explained the key principles applicable to remunerating shareholders, the disparity and return figures for certain undertakings in the sector: 60-80 % of profits in the US, 40 % for National Power and Power Gen, 78 % for Union Fenosa and 30 % for Endesa, giving the Spanish state a return of 28 % for the period 1991-1996 taking account of dividends and the increase in share price.
- (108) Despite the two further documents sent by EDF to the Senate with its letter of 15 September 1997, the principles, figures and their application to shareholder remuneration by EDF as set out in the memo of 27 July 1996 were not analysed or included in the Senate report. On the contrary, the Senate report, like that of the National Assembly, stated that the planned reduction in the remuneration on the capital contributions paid by EDF to the state as shareholder was: 'to take account of the increase in capital contributions brought about by this Article'.

#### 9. ASSESSMENT OF THE MEASURES: EXISTENCE OF STATE AID

- (109) Article 107(1) TFEU provides: 'Save as otherwise provided in the Treaties, 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'. The question whether these cumulative tests apply to the tax exemption granted by France to EDF is examined below.

##### 9.1. SELECTIVE ADVANTAGE TO AN UNDERTAKING

- (110) Since Act No 97-1026 established that EDF was deemed to have been the owner of the high-voltage transmission network (RAG) for which it had been granted the concession, it has to be ascertained whether the Act involved a transfer of ownership of the RAG.
- (111) According to the information provided by the French authorities, EDF can reasonably be regarded as the owner of the RAG before the entry into force of the Act. This finding is supported by the following considerations: the features of the different types of concession contract under French law; the special features of the original concession granted to EDF, which did not include an explicit retrocession clause; the procedure for the acquisition of the assets concerned, for which EDF had to pay a fee similar to compensation under a compulsory purchase procedure; and the conditions for the financing, maintenance and extension of the RAG at EDF's expense. The 'clarification' of the ownership of the RAG provided by Act No 97-1026 does not therefore in itself appear to confer an economic advantage on EDF.
- (112) It therefore has to be examined whether Act No 97-1026 addressed all the tax implications of the 'clarification' of ownership of the RAG and, if not, whether an economic advantage in the form of a tax concession was granted to EDF.

##### 9.1.1. *Waiving the tax owed by EDF constitutes prima facie a selective advantage*

- (113) During the period between 1987 and 1996, EDF created tax-free provisions for the renewal of the RAG, provisions which were identified as irregular by the French Court of Auditors. Article 4 of Act No 97-1026 declaring that EDF was deemed to be the owner of the RAG rendered those provisions superfluous and they therefore had to be reallocated to other items in the balance sheet.
- (114) The letter from the Minister for Economic Affairs setting out the tax implications of the restructuring of EDF's balance sheet shows that the unused provisions for renewal of the RAG were subjected by the French authorities to corporation tax at 41,66 %, the rate applicable in 1997.

- (115) On the other hand, the provisions corresponding to renewal operations already carried out, also called grantor rights, were reclassified as capital contributions amounting to FRF 14,119 billion without being subjected to corporation tax. The tax authorities acknowledge that this transaction was illegal, as can be seen from the memorandum dated 9 April 2002 addressed by the Directorate-General for Taxation to the Commission and quoted in recital 35.
- (116) In line with the National Accountancy Council opinion, corrections to accounting errors should be posted in the accounts for the financial year in which they are discovered. Moreover, since the unused provisions amounting to FRF 38,5 billion that had been created free of tax were subjected to corporation tax at the rate of 41,66 % in 1997, there is no objective reason why the rest of the provisions created free of tax should not have been taxed at the same rate.
- (117) The grantor rights should have been taxed at the same time and at the same rate as the other accounting provisions created free of tax. This means that the FRF 14,119 billion in grantor rights should have been added to the FRF 38,5 billion in unused provisions and taxed at the rate of 41,66 % applied to the restructuring of EDF's balance sheet. By not paying all the corporation tax due when it restructured its balance sheet, EDF made tax savings of FRF 5 882 849 762.
- (118) The tax measure was advantageous to EDF in 1997, as the amount of FRF 5,88 billion exempted from tax and included in the amount of FRF 14,119 billion was recorded in EDF's balance sheet as grantor rights reclassified by the state when it implemented Act No 97-1026 with retroactive effect from 1 January 1997. The tax implications of the Act are set out in the letter from the Minister for Economic Affairs with effect from the same date of 1 January 1997.
- (119) The French authorities claim that, even if EDF had not set aside provisions for the renewal of the RAG, it would still not have been liable for payment of corporation tax between 1987 and 1996 because of the tax loss carry-forward. That argument misses the point. The tax advantage dates from 1997, not from the preceding years. Moreover the irregular provisions were in part responsible for the tax loss carry-forward. The carry-forwards would have been gradually absorbed between 1987 and 1996 and the amount of tax payable by EDF would have been significantly higher, even without taking account of the non-payment of tax for the reclassification of the grantor rights.
- (120) The French authorities also take the view that, even if the creation of provisions for the renewal of the RAG resulted in an advantage, that advantage should be regarded as cancelled out by the increase in corporation tax paid in 1997. However, as the French authorities themselves acknowledged in their memorandum dated 9 April 2002 and quoted in recital 35, although the unused replacement provisions were correctly taxed, the grantor rights were reclassified as capital contributions without being subjected to corporation tax. The tax paid by EDF in 1997 is therefore lower than the tax normally due.
- (121) The French authorities also claim that, over the period from 1987 to 1996, EDF paid more to the state overall than the corporation tax that would have been paid by a commercial company which did not create provisions for the renewal of the RAG and which paid its shareholder a dividend equal to 37,5 % of its net income after tax. Moreover, the rate of corporation tax that should have been applied when EDF's balance sheet was restructured was the 1996 rate and not the 1997 rate.
- (122) First, as stated in recitals 32 and 116, the National Accountancy Council takes the view that corrections to accounting errors should be posted in the accounts for the financial year in which they are discovered. Since the provisions for renewal of the RAG became superfluous following Act No 97-1026 of 10 November 1997, they should have been reclassified in the accounts for the 1997 financial year and therefore taxed at the rate of corporation tax applicable to that year. Second, the French authorities themselves applied the 1997 rate of corporation tax to the share of the provisions that was taxed, as set out in recital 34.
- (123) The non-payment by EDF, in 1997, of FRF 5 882 849 762 in corporation tax constitutes an economic advantage for the undertaking. EDF was able to use this amount to increase its own funds without having to raise outside finance. If the tax had in fact been paid and the increase in own funds financed by the undertaking's operating profit, it would have had to cut costs, increase profit or refrain from investment expenditure. By having at its disposal amounts that should have been paid to the French state by way of corporation tax, EDF benefited from a selective measure which placed it at an advantage over French undertakings in a similar situation, and which had to pay corporation tax on the reclassification of irregular provisions under Article 38-2 of the General Tax Code in force in 1997, as set out in recital 35.

- (124) However, in its comments of 11 December 2002, France called for application of the principle of the prudent private investor in a market economy. As pointed out by the EU courts in their judgments referred to in recitals 7 and 8 in this case, a further capital contribution to EDF of an amount equal to the tax owed could not be regarded as conferring an economic advantage on the undertaking within the meaning of Article 107(1) TFEU, if it was established that a hypothetical private shareholder would have invested an equivalent amount in EDF, on similar terms and in similar circumstances, in accordance with the prudent private investor in a market economy test.
- (125) In paragraph 99 of its judgment of 5 June 2012, the Court of Justice stated that, by the judgment under appeal, the General Court had not prejudged the applicability of that test to the present case or the outcome of applying that test. The applicability and application of that test to the facts of the case must therefore now be examined in the light of the criteria set out by the Court of Justice.

#### 9.1.2. *Applicability of the principle of the prudent private investor in a market economy*

- (126) To determine whether the principle of the prudent private investor in a market economy is applicable, an overall assessment must be made of whether the French Republic granted the tax exemption in its capacity as shareholder or in its capacity as public authority. In its judgment of 5 June 2012, the Court of Justice set out a number of factors that should be taken into account in this overall assessment. These factors, examined in more detail below in relation to the circumstances of the case, are:
- the Member State must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the state acting as shareholder <sup>(1)</sup>; that evidence must show clearly that, before or at the same time as conferring the economic advantage, the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking <sup>(2)</sup>,
  - in that regard, it may have to produce evidence showing that the decision was based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability <sup>(3)</sup>; the Commission may refuse to examine evidence established after the decision to make the investment in question <sup>(4)</sup>,
  - the nature and subject-matter of the measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject <sup>(5)</sup>,
  - application of the private investor test must make it possible to determine whether, in similar circumstances, a private shareholder would have subscribed, to an undertaking in a situation comparable with that of EDF, an amount equal to the tax due <sup>(6)</sup>.
- (127) In their comments of 11 December 2002 referred to in recital 42, the French authorities argued that it was thought to be more efficient and more neutral for EDF to allocate the grantor rights directly, and in their full amount, to own funds, without paying corporation tax. However, none of the documents prior to or contemporaneous with the supposed decision not to levy tax, that were submitted by France or EDF in support of their comments on the decision to extend the formal investigation procedure, made any direct or indirect mention of the supposed decision to invest, with its implications, benefits or costs, or of the corresponding decision to increase the amount of contributed capital by not levying tax. The documents submitted by the French authorities as described in recitals 87 to 108 do not mention, still less analyse, the benefits or costs for the state of the decision not to levy corporation tax on the part of the grantor rights reclassified as capital under Act No 97-1026 of 10 November 1997.
- (128) It is for France, in the event of any doubts, such as those formulated by the Commission, about the applicability of the prudent private investor in a market economy test, to establish unequivocally and on the basis of objective

<sup>(1)</sup> Judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 82.

<sup>(2)</sup> Judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 83.

<sup>(3)</sup> Judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 84.

<sup>(4)</sup> Judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 104.

<sup>(5)</sup> Judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 86.

<sup>(6)</sup> Judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 95.

and verifiable evidence that the measure implemented falls to be ascribed to the state acting as shareholder. However, in the light of the evidence provided, the decision to make an investment by way of waiving the tax EDF should have paid must be deemed to have been taken tacitly, without a reasoned legal act that would reveal the precise content of the decision, its grounds and legal basis or by what authority and on what date it was taken. In the light of the factors set out by the Court of Justice for establishing the applicability of the prudent private investor in a market economy test, namely the need for objective and verifiable evidence, a measure that has actually been implemented or economic evaluations carried out in advance, the absence of references or material evidence must be regarded as an initial indication that the test is not applicable.

- (129) In the absence of any documentary evidence tracing the supposed decision, the investment measure that the French state might have taken needs to be described. In this case, the Court of Justice found that application of the private investor test must make it possible to determine whether, in similar circumstances, a private shareholder would have subscribed FRF 5,88 billion to an undertaking in a situation comparable to that of EDF. An investment by France would constitute waiving the collection of this amount with a view to making a profit greater than the resources initially invested. The analysis must therefore be made with reference to the amount of corporation tax due.
- (130) The absence of any specific studies, references or analyses of the profitability of the investment in the amount of the tax exemption makes it difficult to isolate the effects of the supposed investment in the information submitted by France or by EDF. This difficulty is not insurmountable if, for the purposes of analysing most of the factors relevant for determining the applicability and the application of the prudent private investor principle, the additional capital contribution to EDF equivalent to the amount of unpaid tax is regarded as benefiting from the rights attaching to all the capital contributions. So, if the capital contributions were remunerated at a certain rate, this rate had to be, and indeed was, applied to the amount of unpaid tax. If, on the other hand, the marginal or incremental effect is taken into account, the information provided by France or EDF does not at first sight demonstrate that the amount of contributed capital was increased by the amount of unpaid tax.
- (131) The non-collection of the tax had the effect of increasing the capital contribution to EDF, and thus EDF's own funds, by an additional FRF 5,88 billion, within the overall amount of FRF 14,119 billion of reclassified provisions. These provisions, which did not correspond to a prior injection of fresh capital by the state as shareholder, were reclassified as capital contributions and posted under the corresponding item in the upper part of EDF's balance sheet, together with the other equity items (paid-in capital, contributed capital, etc., see Table 2). Without the tax exemption, EDF's own funds, which were to reach FRF 79,8 billion in 1997, would have reached FRF 72,1 billion, according to the documents examined at the time (see Table 2, recital 100). Instead of FRF 50,7 billion, the state contributions to EDF's capital would have stood at FRF 44,8 billion.

#### Supposed investment decision: factors for analysis

- (132) First, as pointed out by the French authorities, given that the amount in unpaid tax was included in the capital contribution base, and that this was remunerated at a fixed rate (3 %), the absolute value of the remuneration to the state was increased by the tax exemption (or non-collection, see recital 83). However, the increase in the capital contribution by the amount of the tax exemption did not have the effect of increasing the state's remuneration in relative terms. It is common ground that the remuneration for the capital contributed to EDF by the state was laid down as from Decree No 56-1360 of 30 December 1956 (recitals 18 and 103). Different types of remuneration were therefore included in the contracts which preceded and succeeded the 1997-2000 contract for services, as set out in recitals 93 and 102. The principle of remuneration pre-dated the supposed decision and was maintained afterwards.
- (133) Moreover, an examination of the facts demonstrates that the tax exemption had the effect of reducing the state's return on its investment. The report produced by the National Assembly in September 1997 unequivocally shows that the increase in the total capital contribution was the reason for the reduction in the remuneration so as not to 'increase the payment burden on EDF' (recital 103). The Senate report confirms this deliberate reduction by the public authorities (recital 108).
- (134) Between 1991 and 1996, EDF gave the state a higher return for a lower capital contribution base compared with what was offered between 1997 and 2000 for a higher base. The average annual remuneration in absolute terms

of FRF 3,41 billion for 1991-1996, when the amount of the capital contribution came to FRF 36,6 billion, was well above the FRF 2,35 billion put in place for a base increased to FRF 50,7 billion during the 1997-2000 period (recitals 92 and 102-103, Table 3). It follows that the current marginal return on the FRF 5,88 billion increase in the amount of contributed capital expected in the 1997-2000 period by the state as shareholder was lower than in the period 1991-1996.

- (135) The French authorities saw to it that the remuneration paid to the state on its capital contribution fell, in absolute and relative terms, as the contribution base increased, as unequivocally established by the National Assembly and Senate reports. It follows that, by increasing the total capital contribution with a lower return than the contribution which pre-dated Act No 97-1026, the decision to grant a tax exemption did not necessarily constitute an investment.
- (136) Second, the way in which the remuneration on the increased capital contribution was determined is not what a prudent private investor in a market economy might have chosen.
- (137) As demonstrated by the references contained in the letters from the line ministers and the parliamentary reports referred to in recitals 97, 103 and 106, in making their 1997 scrutiny of the French state's remuneration after the restructuring of EDF's balance sheet, the French authorities took account both of the return on the capital contributions due to the state as shareholder in the strict sense, and of the expected amount of tax that the state, acting as a tax-raising public authority, would collect after 1997 following several years of tax loss carry-over. As set out in recital 93, the remuneration on the capital contributions was in its turn deductible from income tax, by way of exception to the ordinary law.
- (138) The concept examined and adopted by the French authorities in 1997 was therefore one of the overall amount collected from EDF, tax and shareholder remuneration combined. The overall amount of tax collected from EDF, above and beyond the contested exemption, under the state's tax-raising powers, and the remuneration paid to the state as shareholder, are mixed up together in the evidence submitted by the French authorities. Nevertheless, in their view, this evidence points to the existence of an investment decision. On the contrary, the fact that the payment of tax due by EDF to the state as revenue collector, including by the regularisation and discharge of the tax that had not been collected prior to Act No 97-1026, was constantly taken into account for the purposes of examining and setting the remuneration to the state as shareholder tends to indicate that the disputed tax exemption was adopted by the state acting as a public authority and not as an investor.
- (139) This impression is reinforced by the nature of the objectives set for EDF by the state in 1997 in the light of the concerns and goals of a public authority, not a shareholder. These concerns are reflected in the setting of EDF's tariffs, as agreed in the 1997-2000 contract for services, under which the state as shareholder was remunerated. The state asked EDF to help boost the competitiveness of French industry and the purchasing power of French households. Not only would such concerns have been alien to a prudent private investor in a market economy, they would have run counter to the hypothetical investor's financial interests. The same goes for the objective laid down for EDF in the 1997-2000 contract for services to put in place an ambitious policy to support economic activity and employment by helping local authorities (recitals 89 and 95).

#### Economic evaluations to determine the profitability of the supposed investment

- (140) The contract for services between EDF and the state signed on 8 April 1997 contained a prior evaluation of the financial scenario, including projections of the return for the state as shareholder on the investment in the form of contributions to EDF's capital (recital 92). The documents and analyses put forward by the French authorities relate to the expected effects of reclassifying all the provisions constituted by EDF, whether mandatory or not, whether resulting from Act No 97-1026 or not. The only systematic evaluation presented by the French authorities in the EDF memo of 18 February 1997 (recital 92) is general and confined to the statutory remuneration on the capital contributions, including those pre-dating the restructuring of EDF's balance sheet, but excluding, for example, remuneration on other capital or own funds.
- (141) None of the documents submitted by France or by EDF demonstrate that the supposed investment decision, namely to make a bigger capital contribution to EDF by waiving tax on the reclassification, was the subject of specific scrutiny, study or analysis. However, given the amounts involved, a prudent private investor in a market

economy would in all probability have conducted a financial and economic analysis of the investment before deciding whether, in view of the statutory return on the capital contributions, the amount of FRF 5,88 billion in tax exemption was needed for the undertaking to guarantee the long-term profitability of its overall investment and for the shareholder to be sufficiently remunerated. This type of prior economic study, cited by the Court of Justice in paragraph 84 of its judgment as one of the conditions for the private investor test to apply, is absent.

- (142) It is particularly striking that, apart from the remuneration to be paid to the state over the 1997-2000 period, no study of the remuneration or return in the longer term was carried out, although France claims precisely to have made a long-term investment. However, a prudent private investor in a market economy would not have neglected to conduct an analysis of the profitability of the investment for the period after the year 2000.
- (143) While it is reasonable to suppose that a prudent private investor in a market economy would have taken into account the effects of the reduction in EDF's debt ratio, it must be noted that the advantage to EDF of lower-cost borrowing on account of an improved debt/equity ratio is referred to in general terms in some of the documents furnished by France (recitals 101 and 105) and EDF. However, none of the documents mentions the advantages and the profitability for the state as shareholder of a reduction in EDF's borrowing costs or a lower debt ratio. According to the figures produced at the time as set out in recital 101, EDF's net debt/equity ratio was to drop to 148 % as a result of the new capital contribution overall, which came to FRF 50,7 billion, including the FRF 5,88 billion by way of the contested exemption. Without the tax exemption, the ratio would have been around 163 %, or some three times lower than the ratio of 480 % before Act No 97-1026. Considered separately from the other effects of the reclassification of the various provisions, the contribution of the tax exemption to the improvement in the ratio is negligible and it is very doubtful that it had a real effect in terms of reducing the cost of borrowing for EDF (recitals 170 to 172). In any event, the documents submitted by the French authorities do not mention or analyse in investment terms the return for the shareholder resulting from a ratio of 148 %, still less a ratio of 163 %. In this connection, there are no prior economic evaluations comparable to those which a rational private investor in a market economy would have had carried out, as referred to by the Court of Justice in paragraph 84 of its judgment.
- (144) The economic study submitted by EDF in support of its comments (recitals 69-70) does not find that France acted as an investor rather than a public authority. The study was produced after the supposed investment decision taken in 1997 and was not examined by the authorities responsible for taking such a decision. For this reason alone, the study is not admissible as evidence, as set out by the Court of Justice (recital 126, paragraph 104 of the judgment of 5 June). The fact that the study used authentic basic data available at the time does not invalidate this conclusion. The study was commissioned to support the case following the extension of the investigation procedure in May 2013 and the conclusions it would reach were apparently known to EDF in July 2013, although the study dates from October 2013. Other grounds also invalidate the quantified findings of the study, and consequently undermine the conclusions that EDF draws from it in support of its comments; these grounds are:
- The study uses basic data almost exclusively from the time and applies widely recognised methodological approaches for evaluating enterprise value, subject to the major reservations set out below. For all that, it constitutes a particularly complex economic evaluation, following relatively thorough data research, which took some three months to carry out and validate. This complex process comprised successive and various methodological choices, some of which are questionable. Without this process, it is quite impossible, from the basic data drawn from scattered and diverse sources, to form an overall view or make a quantified projection of the profitability that the French state could expect in 1997, as the study does. However, the Court of Justice requires the private investor test to be based on evaluations which were foreseeable at the time when the decision to make the investment was taken (paragraph 105 of the judgment of 5 June 2012). Contrary to what is claimed by EDF, the very fact that, with data available in 1996-1997, the relevant authorities of the French state did not themselves carry out or commission a study on this scale and with this level of complexity indicates that the profitability of the investment for the shareholder was not the sole relevant consideration for the French authorities when they took their decision.
  - The study analyses the conduct of the French state in the light of the private investor principle using information and hypotheses that are very different from those outlined in recitals 87 to 108 and which, according to the French authorities, formed the basis for the supposed decision. However, it is not EDF which took the investment decision, and, according to the Court of Justice (paragraphs 82 and 83 of its judgment of 5 June 2012), it falls to France to produce evidence of the nature and context of the decision taken. Since

France alleges that it was in the light of the information and data submitted by it that it took its decision, the study, and EDF, are *de facto* substituting themselves for the alleged investor and claiming to know better than the French state the concerns and information that supposedly underpinned the decision taken and the hypotheses used to reach it. As such, the study is based on speculation and conjecture with respect to the data, information and hypotheses that the French authorities might have taken into account (among other possible options) in 1997 and has no force as evidence in 2015 (or October 2013, when it was carried out) to explain the decision taken by the French authorities in 1997, which these authorities themselves explain with reference to different data and hypotheses.

- The study's value as evidence is undermined still further by the fact that, to reach the findings outlined in recital 70, the study relies on hypotheses which are arbitrary or random, or uncorroborated by the facts, or counter to the information contained in the evidence provided by the French authorities and which, according to them, illustrates that the private investor test is applicable and does in fact apply in this case. So, first, the study conjectures that after 2000, the remuneration paid to the state as shareholder would not be regulated by decree and contained in a contract between the state and EDF but would be set by reference to the dividends which other undertakings in the sector paid in 1996-1997 <sup>(1)</sup>. However, the remuneration on the capital contributions to EDF had been regulated by decree since 1956 (recital 102) and was statutory and reflected in the multiannual contracts before and after 1997, in the light of considerations unrelated to the dividends paid by undertakings in the sector operating in markets other than France (recitals 94 and 95). Likewise, and in second place, the study, with no good reason, reintroduced into EDF's income statement provisions from EDF's company accounts worth FRF 11,6 billion (before tax) and FRF 7,3 billion (after tax) <sup>(2)</sup>, artificially increasing EDF's value by that amount without taking account of the information which was available and the developments which were foreseeable in 1997 with respect to EDF's commitments under its staff pension scheme (recitals 168-169).
- Thirdly, the increase in the value of EDF resulting from the increase in return and results is calculated in the study on the basis of the 'market expectations' in 1997 <sup>(3)</sup>. However, the French authorities had specific and quantified projections for EDF's revenue and income for 1997 to 2000, validated as part of the process of drawing up the contract for services for the same period and stated that they relied on these projections and data to take their decision (recitals 78-79, 90, 94, 96); they also had in 1997 detailed knowledge of the undertaking and its financial prospects (recital 77). The use of 'market expectations' from third parties to estimate EDF's value in these circumstances is neither reliable nor consistent with the arguments put forward by France to explain the decision which its authorities are supposed to have taken, all the more so since the French authorities argue that most of EDF's business in 1997 was conducted in France subject to regulated tariffs (recital 85). Moreover, these tariffs were set at a low level with a view to boosting the competitiveness of French industry and the purchasing power of French households (recitals 89 and 95). The study fails to explain, still less to justify, why the remuneration, dividends and results of listed companies which had no significant presence in France and operated in markets subject to different competitive and regulatory constraints (such as Endesa, Gas Natural and Union Fenosa in Spain, RWE, EON and Verbund in Germany, Fluxys in Belgium, etc.) should determine the results, remuneration and dividends of EDF, which is one of the hypotheses on which the findings set out in recital 70 are based <sup>(4)</sup>.
- Lastly, and in fourth place, the study postulates with no justification that increasing the capital contribution to EDF in 1997 was, at least potentially, equivalent to acquiring a liquid financial asset <sup>(5)</sup>. However, in 1997 EDF was a public industrial and commercial establishment with no share capital (recital 19), with the French authorities and EDF affirming at the time that it would retain this status in the future (recitals 95, 105). The arbitrary nature of this postulation, on which the findings of the study none the less crucially depend, is demonstrated in more detail in recitals 179 to 181.

Nature and subject-matter of the measure, its context and the rules to which it is subject

- (145) The Court of Justice states that the nature of the measure is one of the relevant factors to take into account when ascertaining whether the private investor principle is applicable (paragraph 86 of its judgment). The decision to

<sup>(1)</sup> Oxera study, points 3.3, 3.24-3.25.

<sup>(2)</sup> Oxera study, Table A2.2.

<sup>(3)</sup> Oxera study, point 3.3.

<sup>(4)</sup> Oxera study, points 3.3, 3.15, Table 3.2, Table 3.8 for beta coefficient and Annex 5.

<sup>(5)</sup> Oxera study, points 3.5, 3.13, 3.20 to 3.23.

contribute additional capital to EDF by waiving the tax on the reclassification of the irregular RAG provisions is both an accounting decision on moving amounts between different items on EDF's balance sheet (recitals 100 and 105) and a tax decision, since the authorities responsible deemed that the corporation tax should be levied before reclassification (recital 35), even though tax was paid on other reclassified accounting provisions. Contrary to what is claimed by the French authorities, it has not been established that the two accounting and tax strands are indissociable within a single measure put in place by Act No 97-1026 of 10 November 1997.

- (146) Article 4(2) of the Act provides that the value of the assets in kind allocated under concession to the RAG and appearing as liabilities on EDF's balance sheet should be entered, net of the corresponding revaluation reserves, under the item 'contributed capital' (recital 28). It could be concluded that, under the Act, any revaluation reserves aside, no further accounting or tax treatment was to reduce the value entered as a capital contribution to EDF. However, in accordance with Article 34 of the French Constitution, the decision to levy tax or not is not a matter regulated by law, and Act No 97-1026 could not therefore legitimately settle this question. Under this Article, Parliament's legislative powers in tax matters are confined to setting the base, rates and collection procedures for tax of all kinds. EDF paid corporation tax on some accounting provisions and not on others following the same reclassification operation provided for in the Act.
- (147) Furthermore, the preparatory documents submitted by the French authorities and referred to in recital 104 show that the Council of State took the view in 1997 that non-legislative provisions should be eliminated from the draft law; a draft amendment designed to limit the amounts that the state could collect from EDF under the Act was also rejected. Lastly, the line ministers took the view in April 1997 that the detailed arrangements for implementing EDF's restructuring, on both the accounting and the tax fronts, should be the subject of further discussions between the supervising authorities and the undertaking (recital 98).
- (148) These implementation arrangements, detailed and quantified in the letter from the line ministries to EDF on 22 December 1997, following the adoption of the Act (recital 31), suggest that the tax elements were dissociable from the provisions of Act No 97-1026 of 10 November 1997. In their letter the ministers explain the restructuring of the upper part of EDF's balance sheet pursuant to Article 4 of Act No 97-1026 of 10 November 1997 and appear to reach a tacit decision on the tax implications of the restructuring, without there being any question of a profitable investment or of any mandatory requirements of the law.
- (149) As regards the context of the measure, this being one of the factors cited by the Court of Justice for the purposes of ascertaining the applicability of the private investor test, the preparatory meetings and supporting documents dating from the period, and which resulted in the contract for services between the state and EDF signed on 8 April 1997, demonstrate that the reclassification of the provisions took place in the light of the prospect of the partial liberalisation of energy markets in the EU, planned as from 1996. Hence the concern for EDF's activities to become more international evident in the 1997-2000 contract and the preparatory documents, as well as the parliamentary documents. The contract itself presupposes that its implementation will require a regularising legislative measure such as that laid down in Act No 97-1026, thereby establishing a *de facto* link between the objectives of the contract and of the legislator. However, neither the contract concluded in April 1997 nor the preparatory documents or exchanges with EDF's line ministries take a position on the precise amount of tax.
- (150) This context, outlined by the evidence cited by France in its comments, does not, however, establish beyond doubt that the measure could be ascribed to a shareholder making an investment. The need to correct the irregularities identified by the Court of Auditors in October 1994 is also part of the picture. While, on one side, there was a need to correct an accounting irregularity that had allowed EDF to avoid paying corporation tax for years, on the other, the French authorities stressed that the measure did not call into question EDF's monopoly (recital 105) and that the stable framework allowed by the liberalisation of the market should be maintained (recital 95). Although liberalisation opened up possibilities for expansion into the national markets of other Member States and some measures were included in the 1997-2000 contract for services so that EDF could become more international, the concern of the public authorities to place national undertakings at an advantage through financial support in the early stages of liberalisation was not confined to public undertakings; nor does it constitute typical behaviour by a prudent investor in a public undertaking.
- (151) Lastly, the Court of Justice states that the rules to which the disputed measure is subject are relevant for determining whether it constitutes an investment by the state as shareholder or a prerogative of a public authority. Classing the measure as one or the other may therefore take account of compliance with the rules governing it. The rules governing the investment of tax resources in undertakings like EDF must therefore be

examined. Without the measure, the revenue from the uncollected corporation tax would have been paid into the general revenue of the budget of the French state in 1997. Under Article 18 of Order No 59-2 of 2 January 1959 laying down an organic law for budget laws, which was in force at the time of the facts, as all revenue is used to implement all expenditure, all revenue and all expenditure of the state are posted to a single account, called the General Budget. So, tax revenue is posted to the budget for the benefit of the state, and not for the benefit of public undertakings.

- (152) The budget is subject to the constitutional principle of universality, whereby all revenue and all appropriations are posted as two separate blocks, with no specific link made, for example, between revenue from corporation tax and an allocation such as a capital contribution to a public undertaking like EDF. Of course, the pre-allocation of a tax resource to a legal person other than the state in the form of a subsidy or an investment is possible under French law, where expressly provided for. Article 18 of Order No 59-2 thus provided that, apart from in the case of loans and advances in particular, the allocation of state resources was exceptional and could take place only pursuant to a provision of a budget law, which was for the government to adopt.
- (153) However, Act No 97-1026 of 10 November 1997 was not a budget law and as such could not allocate a tax resource to EDF's capital. Moreover, there do not appear to have been any specific government initiatives to adopt budget-law provisions applicable to the 1997 budget with a view to pre-allocating the revenue from the tax owed by EDF to expenditure by the French state on any investment in EDF's capital as part of the same budget. The rule allowing the investment of a tax resource constituted for the benefit of the state in a legal entity distinct from the state, such as EDF, does not seem to have been applied here.
- (154) The vast majority of the evidence described above clearly shows that France did not, either before or at the same time as conferring the economic advantage resulting from the non-payment of the corporation tax, take a decision to make an investment in EDF by way of the tax exemption. Accordingly, the prudent private investor in a market economy principle does not appear to be applicable to this measure. The considerations set out below on the application of the private investor test are therefore provided in the alternative.

#### *9.1.3. Application of the principle of the prudent private investor in a market economy*

- (155) In its judgment of 5 June 2012 in the present case, the Court of Justice held that application of the private investor principle should make it possible to determine whether, in similar circumstances, a private shareholder would have subscribed, to an undertaking in a situation comparable to that of EDF, an amount equal to the tax due (paragraph 95 of the judgment). Any difference between the cost to the private investor and the cost to the state as investor may be taken into account when assessing whether the conditions laid down by that principle are met (paragraph 96 of the judgment).
- (156) The assessment must be carried out by reference to the objective and verifiable evidence which is available and the developments which were foreseeable, at the time when the decision to make the investment was taken (paragraphs 102 and 105 of the judgment). On that view, only the benefits and obligations linked to the situation of the state as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account (paragraph 79 of the judgment).
- (157) In view of the situation and the characteristics of EDF, which had existed as a public corporation fully controlled by the French state for over 50 years, it is advisable to keep in mind the benchmark of an investor pursuing an objective of long-term profitability and to examine in particular the information supplied by France as set out in recitals 87 to 108. It is this information that the French authorities relied on as the basis for their own decision in 1997.

- (158) First it is necessary to examine the rate of return that EDF gave its shareholder in 1997. This rate of return must be compared with reference values. In 1997, the average rate of return on French long-term bonds (30 years) was 6,35 %. Even for shorter maturities (10 years) — shorter than the life cycle of EDF's installations — the average interest rate on French Government securities was 5,58 % <sup>(1)</sup>. These values represent both the return on financial assets deemed to be low risk and the French state's long-term financing cost at the time. An investment in an undertaking such as EDF in 1997 was a riskier investment than holding government bonds during the same time period. As a result, a prudent private investor in a market economy would have required a better rate of return than the rate for government bonds.
- (159) Analysis of the current rate of return that the French state could expect in 1996-1997, as revealed by the documents submitted by the French authorities, does not justify the conclusion that the investment met the test of the prudent private investor in a market economy.
- (160) The French authorities forwarded EDF's projected income statement for the period subsequent to the restructuring of the balance sheet, as examined in 1997 by the authorities concerned (recital 92, Table 1). The estimates in the table are corroborated by other contemporaneous documents (recitals 96-97, 103). These EDF baseline scenario estimates for the following period had been validated by the state authorities (recital 97). From this income statement, and from the expected amounts of resources invested by the state in EDF (recital 100, Table 2), it is possible to calculate the rate of return that the state could have expected on contributions to capital, to total capital (initial capital plus contributions) and to EDF's equity (total capital, revaluation reserves, reserve requirements and retained income) <sup>(2)</sup>, as shown in Table 4.

Table 4

**Estimated remuneration from the capital on EDF's balance sheet 1997-2000 (billion FRF)**

|                                                            | 1997   | 1998   | 1999   | 2000   | 1997-2000 |
|------------------------------------------------------------|--------|--------|--------|--------|-----------|
| Portion fixed at 3 %                                       | 1,5    | 1,5    | 1,5    | 1,5    | 6,0       |
| Variable portion                                           | 0,6    | 1,0    | 0,9    | 0,9    | 3,4       |
| Fixed and variable portions                                | 2,1    | 2,5    | 2,4    | 2,4    | 9,4       |
| Return on equity (FRF 79,8 billion) (%)                    | 2,63   | 3,13   | 3,01   | 3,01   | 2,94      |
| Return on capital and contributions (FRF 53,3 billion) (%) | 3,94   | 4,69   | 4,50   | 4,50   | 4,41      |
| Return on contributions to capital (FRF 50,7 billion)      | 4,14 % | 4,93 % | 4,73 % | 4,73 % | 4,64 %    |

Source: Commission calculations based on Tables 1 and 2

<sup>(1)</sup> Annual average of the daily rate of the 30-year and 10-year French bellwether bond, source Bank of France: Benchmark rate of treasury bonds and fungible government bonds, <http://www.banque-france.fr/economie-et-statistiques/changes-et-taux>

<sup>(2)</sup> The relevance of a calculation of the rate of return on the total equity tied up in the undertaking in relation only to the capital invested in the form of capital contributions is confirmed by the fact that, in the contract between the State and EDF for the period 2001-2003, the State's remuneration calculated as a percentage (37,5 %) of net income was confined within a minimum (1,5 %) and maximum (4,5 %) range of the equity base. Reply by the French authorities of 23 December 2013, point 53.

- (161) It is clear from the documents referred to and submitted by the French authorities that in 1997 the remuneration the state as shareholder expected from EDF for the whole period 1997-2000 was FRF 9,4 billion, of which FRF 6 billion was in respect of the portion at the fixed rate of 3 % and EUR 3,4 billion for the whole period in respect of the supplementary portion, after the reclassification made by Act No 97-1026. On the basis of the estimates validated at the time, on average, the future current rate of return that the state as shareholder could expect was 2,94 % of EDF's total equity, 4,41 % of the total capital invested by the state in EDF and 4,64 % of the amount of the contributions to capital. This rate of return, applicable to the amount of the tax exemption reclassified as contribution to capital, was well below the 6,35 % paid on the bonds that the French Government issued in 1997 with a view to its own long-term financing. A prudent private investor in a market economy would have found that the expected current rate of return on an amount of FRF 5,88 billion corresponding to the tax exemption was insufficient to justify the investment.
- (162) Furthermore, the Court of Justice held in paragraph 96 of its judgment of 5 June 2012 that it is possible in the context of the application of the principle of the prudent private investor in a market economy to take into account the difference between the investment cost to a private investor and the cost to the state. This amounts to comparing the rate of return which, according to the French authorities, justified the reclassification of the grantor rights provisions at the amount of the tax exemption, with the rate that would have been obtained by a private shareholder on the same recapitalisation operation in an undertaking similar in every respect to EDF, except for the prerogative, which is not available to the private investor, to exempt the capital contribution from corporation tax.
- (163) Such an undertaking whose shareholder had FRF 5,88 billion available to recapitalise it under conditions identical to those of EDF would have had the prospect of an annual return of 4,64 % on the additional capital invested by the shareholder, i.e. FRF 272 million per year, without taking account of corporation tax. By applying the rate of corporation tax of 41,66 % applicable in 1997, the prospective rate of return would be FRF 159 million per year for the same capital contribution, or a nominal annual rate of return of 2,7 %. Such a rate for a share in the capital of a company with the risks associated with such an investment must be compared with 6,35 % paid on French bonds at that time. The low rate of return would have deterred a private investor who did not have the tax privileges of the state. With such poor prospects of return on the invested capital, it appears out of the question that a prudent private investor whose company is liable for corporation tax on contributions to capital would, instead of France, have participated in the increase in the capital of EDF in 1997.
- (164) It is therefore necessary to examine whether the evidence and information dating from the time of the decision to reclassify the provisions without levying the tax submitted by France contain additional information which would have convinced a prudent private investor to make the alleged investment notwithstanding the apparent very low rate of return. These details may relate in particular to the capacity of EDF (i) to increase its long-term operating income; (ii) to improve its operating results through efficiency gains; (iii) to increase the net value of the productive assets of the undertaking; or (iv) to provide a steady and adequate remuneration for its shareholder. These are factors which have the potential to create long-term value for the shareholder with a positive outlook, but destructive of value with a negative outlook.
- (165) In this respect, none of the documents forwarded by the French authorities contain a quantification, or even a qualitative assessment, of any potential creation of value for the shareholder that the French authorities examined and took into account for the period 1997-2000 or beyond. There are only general references to taking better account of the interests of the state as shareholder. This would indicate that the increase in the undertaking's value as an investment for the state as shareholder was not taken into account in deciding on the investment claimed. In any event, examination of four factors that potentially create value for the shareholder does not justify a conclusion of foreseeable growth on the basis of the data available in 1997, in particular EDF's forecast operating account 1997-2000 and the financial scenario forecasts used by the supervising authorities (recital 92, Table 1, recital 96).
- (166) In terms of EDF's total revenue, the state as shareholder could expect to receive a very small increase of 0,64 %. This virtual stagnation can be explained by the objective set by the state to contribute 'to the competitiveness of French industry and the purchasing power of domestic consumers', which resulted in an average reduction of [...] % in EDF's tariffs over four years (recitals 89, 95-96), which represents an annual decrease of [...] %. EDF conducted its business mainly in France since, for the period from 1997 to 2000, it was envisaged that more than 89 % of EDF's revenues would come from the French market. Therefore, the majority of its revenue depended on the choices the state made in setting electricity tariffs. A prudent private investor would not have failed to note that the setting of public policy objectives contrary to its interests as shareholder was prejudicial to its proprietary interests. No prudent private investor would have agreed to lower earnings from its investment to foster the competitiveness of French undertakings.

- (167) The item in the projected income statement 1997-2000 showing the income from EDF's core business was also set to decrease by 29 % during the period, from FRF 9,3 billion in 1997 to FRF 6,6 billion in 2000. Operating expenses were, for their part, set to increase by 2,2 %, mainly owing to the increase in day-to-day operating expenditure, since financial charges, depreciation and interest, excluding return on capital, were set to decrease. Adding depreciation and financial charges to the income from the core business, the outlook for the period 1997-2000 was also negative, because this aggregate was set to decrease from FRF 62,6 billion to FRF 53,9 billion, i.e. by 13,9 %. However, it is the trend in income from everyday operations before depreciation and interest that determines the future capacity of the undertaking to generate value and a positive cash flow. In addition to the projected deterioration, in pursuit of economic policy or regulatory objectives, the state had set EDF the objective of allocating any earnings from efficiency and productivity gains to further reducing tariffs, which was to take priority over a better return for the shareholder (recital 95). It follows that EDF's ongoing activities, weighed down by the state's economic policy objectives, would not have offered the prospect of satisfactory future earnings.
- (168) As the Commission pointed out in the extension decision, a prudent private investor would have taken account of the uncertainty about the amount and evolution of the pension financing charges facing EDF in 1997 under the specific scheme for the electricity and gas industries. In the case of EDF in 1997, the cost of pensions and, a fortiori, the related off-balance-sheet commitments represented an encumbrance in anticipation of additional drains on the undertaking's already poor net result.
- (169) Whereas EDF's pension bill amounted to FRF 12,2 billion in 1997, assuming no change in legislation, the pension bill for the entire scheme (including GDF and non-nationalised undertakings) was expected to grow significantly in the following years to reach FRF 20 billion in 2010 and FRF 25 billion in 2020 <sup>(1)</sup>. By applying an allocation key of 78,4 % for EDF, reflecting the weight of its wage bill in the industrial sector covered by the scheme, EDF's share would have been FRF 15,7 billion in 2010 and FRF 19,6 billion in 2020, without taking account of any provision made for future commitments, assuming no change in legislation <sup>(2)</sup>. The expected increase in pension costs was therefore bigger than net earnings, after remuneration of the state and tax, foreseen for the period 1997-2000, as illustrated in Table 1. Therefore, any appraisal by a prudent private investor in a market economy in 1997 with, like the French state, a thorough knowledge of the situation of the undertaking, would have led the investor to accentuate the future liabilities of the undertaking and to downplay accordingly the profitability prospects of the investment.
- (170) In addition, the prudent private investor could expect a considerable reduction in EDF's debt, which was set to fall from FRF [...] to FRF [...] over four years (recitals 91 and 95). However, it has been shown that between 1992 and 1996 EDF kept its Aaa credit rating by the credit rating agency Moody's with a debt ratio of 480 %. The French authorities also refer rather vaguely to the generation of resources of FRF 70 billion by EDF for the period 1997 to 2000 (recital 84). However, EDF's debt reduction and its automatic effect on the undertaking's net asset value was not to result in improved remuneration of the French state during the same period, but rather in a marked deterioration compared with the period between 1991 and 1996 (recital 134).
- (171) As indicated by EDF, despite a deterioration in the rating assigned to EDF by credit rating agencies such as Moody's or Standard & Poor's, EDF still retained an excellent rating (recital 71). Moreover, one of the objectives set between 1997 and 2000 was to reduce EDF's indebtedness to FRF [...]. A substantial reduction in the total interest charges incurred by EDF was therefore expected to follow. Consequently, neither the reduction in EDF's total debt nor its cost, nor any advantages arising for the state as shareholder would have been compromised by a lesser contribution to capital of FRF 44,8 billion instead of FRF 50,7 billion. A debt-to-equity ratio of 163 % instead of the 148 % foreseen as a result of the tax exemption would not have been detrimental to the interests of the shareholder. In this area, there is no optimal financial structure, and the report of the National Assembly (recital 100) shows ratios in the sector ranging from 250 % (Verbund, Austria) to 10-15 % (Veba, Germany and PowerGen, UK).
- (172) Indebtedness enabled EDF to finance its growth and its results without additional funds from the shareholder, using the leverage effect of the debt to increase the rate of return on the funds already invested by the state. However, priority was given to debt reduction, even though EDF's credit rating was excellent before the envisaged debt reduction (recital 71). Moreover, the excellent credit rating before 1996, reflecting EDF's capacity to repay its

<sup>(1)</sup> EDF Annual Report 1997, p. 103.

<sup>(2)</sup> By Article 2 of the Decision of 16 December 2003 (C(2003) 4637 final) (OJ L 49, 22.2.2005, p. 9), the Commission decided not to raise any objections to the reform of the pension scheme for the electricity and gas industries to which EDF was subject. The effect of the reform was to transfer to the general social security scheme the pension liabilities and commitments of the specific scheme for the staff of EDF and other participating companies.

creditors, is not incompatible with poor remuneration of the shareholder. On the contrary, the less drawn down by its shareholder, the better the credit rating of the debt instruments that EDF issued. Within the time-frame put forward in the projections submitted by the French authorities, the foreseeable reduction in the leveraging effect and, in any event, the low impact of the amount of tax on the debt ratio would have led a prudent private investor in a market economy either to reduce the profitability prospects of its investment or to not consider that the equity investment equivalent to the amount of tax was justified by the need to improve the debt situation of EDF in 1997.

- (173) Finally, a prudent private investor would likely have based its investment decision on an assessment of the undertaking's capacity to provide it with stable and adequate remuneration. In this regard, the remuneration for the state as shareholder for the period 1997-2000 described by the French authorities was well below the 6,35 % paid on French bonds during the same period. In addition, this remuneration could in practice be reduced to take account of the tax paid to the state as revenue collector (recitals 103 and 106). The remuneration of the shareholder was also considerably reduced at the very time the state was making the alleged investment. Any shareholder would have taken into account negatively the sudden and very significant reduction in the return on contributions of capital. This return was to decrease from an actual average of 9,32 % over the period 1991-1996 to 4,64 % for the period 1997-2000, which is a reduction of more than half. In terms of equity capital, the rate of return fell from an average of 14,1 % at the end of 1996 to 2,94 % in the same period (recitals 92 and 102, Tables 1 and 3).
- (174) Admittedly, a prudent private investor may accept a reduction in its current return in the expectation that the growth of the undertaking will result either in better future earnings or in an increase in the undertaking's value which is likely to generate a value-added on the sale of its asset reflecting an ownership right over the undertaking. In that regard, first, the current rate of return that could be expected in 1997 would not have been sufficient to offset the sharp reduction in the past rate of return. Secondly, analysis of the four factors with the potential to create value for the shareholder identified in recitals 164 to 173 does not support the conclusion that growth in the value of the company was foreseeable by the shareholder from the data available in the documents forwarded by the French authorities.
- (175) Moreover, the available evidence does not support the conclusion that a prudent private investor acting in the place of the French state in 1997 could have counted on a capital appreciation to offset the low current rate of return paid to the state, in the light of the information available. The French authorities did not carry out any assessment of the value of EDF before and after reclassification of the provisions in 1997.
- (176) Moreover, in 1997, EDF had, for more than fifty years, been a public industrial and commercial establishment and not a public limited company. Under Article 16 of Act No 46-628, its capital belonged to the French nation and could not be alienated (recital 18). Furthermore, it should be pointed out that, even after the restructuring of EDF's balance sheet under Act No 97-1026, in 1997 EDF's total net debt of FRF 118 billion far exceeded the value of its equity capital, which stood at FRF 79,8 billion (recital 101, Table 2).
- (177) None of the documents shedding light on the alleged investment decision of the French authorities records a plan for a possible privatisation of EDF through the sale of all or part of the capital held by the state. This would have required the prior adoption of the status of public limited company and the abandonment of the status of publicly owned industrial and commercial establishment. On the contrary, the only reference to the status of EDF contained in those documents was the reaffirmation by the state of its intention to maintain the specific status of EDF 'which should remain a stable point of reference for future developments' within the internal market for electricity (recital 95). It is on the basis of this information that France claims the investment decision was taken. These facts must therefore remain the reference framework for analysis of the alleged decision.
- (178) Accordingly, it would not have been reasonable or wise for an investor to expect a capital gain which depended on the action by the legislature contrary to both the provisions of law adopted by the French authorities in 1946

and applied unfailingly and the express intention of the state, affirmed by the Minister responsible for state holdings at the material time in 1997, to maintain the specific legal status of EDF in a liberalised internal market for energy at EU level. The assumptions underpinning EDF's conclusions as to the return on investment that a prudent private investor would have expected, based on the initial and future value of EDF's shares in 1997 (recitals 69 and 70), do not take account of the status of EDF in 1997, and are contradicted by the evidence submitted by the French authorities referring thereto.

- (179) As the French authorities emphasise, as a public industrial and commercial establishment, in 1997 EDF had no share capital, unlike, for example, a public limited company whose capital is owned by the shareholders (see recital 19), who may sell their shares at any time. Thus, in 1997 the reference investor would have had in particular to determine a number of factors or make assumptions that were necessarily open to question; namely: (i) the amount at which the state would set the share capital of a future public limited company, and in particular the inclusion or otherwise of quasi-own assets, which determines the company's capacity to provide a stable dividend; (ii) the number of shares into which this capital would be divided, bearing in mind that a greater or lesser number partially determines their attractiveness in the market; (iii) the form of any share flotation and the amount to be raised, which determines the potential level of dilution of its holding; finally (iv) when the operation would be implemented, which, owing to the poor recovery prospects offered by EDF's projected income until 2000 (recital 167), could be envisaged only in the distant future. There is nothing in the information submitted by the French authorities for the period preceding the alleged investment to suggest that these unknowns could have been cleared up in 1997.
- (180) Accordingly, any increase in the value of the right held by the state in the capital of EDF resulting from the contested capital contribution, assuming the increase was established — which is manifestly not the case — would have involved a prudent investor speculating about at least four key factors over which, unlike the legislator and the regulator, it had no influence or, in any event, no valid information available in 1997. A prudent private investor would not have ignored the virtual absence of liquidity of its investment. It follows that a prudent private investor would have taken that fact into account when deciding whether or not to invest. This lack of liquidity is likely to reduce the benefit of any increase in the value of the company.
- (181) Furthermore, as mentioned in recital 144, the test of the prudent private investor in a market economy must be based primarily on the information and evidence submitted by the Member State in a situation where the decision has already been taken, since it is the Member State that is arguing that these are the elements that the Member State has taken into account, and not others which are more hypothetical or even contradictory in relation to those submitted. However, the Court of Justice requires the application of the principle of the prudent private investor in a market economy to be based on assessments foreseeable at the time the decision was taken (paragraph 105 of the judgment of 5 June 2012). Thus, the French authorities claimed in 1997 that the status of EDF, which did not allow the creation and disposal of EDF shares, would be maintained as a stable point of reference, including in the liberalised European market (recital 95). Adopting assumptions which contradict the assertion of the French authorities amounts to placing the test in a situation which is not as close as possible to that of the Member State, contrary to what the case-law requires (recital 126).
- (182) However, even assuming for the purposes of the analysis that a prudent private investor could have taken into account a future increase in the value of its investment at an uncertain date in addition to the regular returns offered, in deciding on the alleged investment the investor would have borne in mind the capacity of the undertaking to generate dividends over the long term, thereby following the time horizon of the French state, which had been controlling EDF since 1946. In estimating the value of its ownership interest in EDF, the prudent private investor would have disregarded the book value of the undertaking's net assets, even if it was counting on the debt reduction and generation of resources underlined by the French authorities (recital 84). The value of the assets, the amounts of investment or debt reduction do not necessarily coincide with the real economic value with a view to fixing a transaction price. One should therefore not focus on the fact that full repayment of EDF's debts in 1997 would have required amounts far exceeding the equity capital of EDF (recital 177). In the long term, an undertaking's value is a function of its capacity to generate value for its shareholders in the form of dividends or capital appreciation rather than in terms of the book value of its assets.

- (183) Among the various methods used in finance to estimate the opportunity cost or the rate of return required of an ownership interest transferable against consideration in the capital of an undertaking, the most common is that of the capital asset pricing model (CAPM) <sup>(1)</sup>. As shown in Table 5, application of the CAPM model to an investment in the capital of EDF in 1997 gives a target value for the required rate of return of approximately 12 %, and as high as 13,4 %, for a liquid asset such as an EDF share. However, this target value must be seen as a minimum. It presupposes not only that an ownership right in EDF such as a share is possible and transferable but also that there is a liquid market, whereas the state held 100 % of the capital and EDF could not issue shares. A premium of between 0,5 and 1,5 % <sup>(2)</sup> must be added to the required rate of return on a liquid asset to reflect the great uncertainty resulting from the factors examined in recitals 179 and 180 as regards the liquidity of the EDF securities that a prudent private investor could entertain in 1997.
- (184) In any event, the validity of the order of magnitude of 12 %, excluding a liquidity premium, is close to, although lower than, the current rate of return on equity capital of 14 % used by EDF to remunerate the French state between 1991 and 1996 (recital 102, Table 3). The actual rate of return obtained is normally the starting point for the expected rate of return in the future. The validity of this order of magnitude of 12 % is also corroborated by the use of other parameters based on figures available at the time, including those used in the study carried out for EDF referred to in recital 70, which gives a target value in a range of between 11,9 % and 13,5 %, with an average of 12,7 %. Since the results of the analysis do not change when a liquidity premium is added to the target rate of return of around 12 %, or when the 14 % actual rate of return in the recent past is applied from 1997, it is not necessary to take this premium and the actual rate of return into account.

Table 5

**Target rate of return required for an investment in EDF shares in 1997: calculation values**

| Parameter               | Value              | Source                                                                                                                                                                                                                                                                                                                                    |
|-------------------------|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Risk-free rate          | 6,35 — 5,58        | Annual average in 1997 of the daily rate of the 30-year and 10-year French bellwether bond, source Bank of France: Reference rate treasury bills and fungible government bonds, <a href="http://www.banque-france.fr/economie-et-statistiques/changes-et-taux">http://www.banque-france.fr/economie-et-statistiques/changes-et-taux</a> ) |
| Beta of EDF (leveraged) | 0,45 — 0,54 — 0,62 | 1. Beta of EDF — Vernimmen et al. op cit., graph p. 427. 2. and 3. Oxera Study, Table 3.8, Beta of EU companies in the sector.                                                                                                                                                                                                            |
| Indebtedness (%)        | 60                 | Capital structure of EDF after 1997 restructuring                                                                                                                                                                                                                                                                                         |
| B of EDF (deleveraged)  | 0,84 — 0,89 — 1,36 | 1. and 2. Commission calculation. 3. Oxera Study, Table 3.8                                                                                                                                                                                                                                                                               |

<sup>(1)</sup> The model estimates the target rate of return required by an investor in an undertaking's capital ( $k$ ) as the result of an addition to the rate of return on a financial asset deemed to be risk free or low risk, namely, a sovereign bond in the reference financial market ( $r_f$ ), a market-risk premium reflecting the higher risk of an investment in shares ( $K_m - r_f$ ) multiplied by a risk coefficient specific to the share of the undertaking concerned ( $\beta$ ) which can be, preferably, that of the undertaking itself or, failing this, that of comparable undertakings used as a reference. Parameter  $\beta$  must be estimated for an undertaking with no debt (gearing) in order to measure the inherent risk of (the share of) the undertaking in relation to the market. The model is  $k = r_f + \beta \times (K_m - r_f)$ . The Commission has applied the CAPM model to estimate the required rate of return on capital investments in an undertaking, endorsed by the General Court of the European Union: T-319/12 — *Spain v Commission*, 'Ciudad de la Luz', EU:T:2014:604, paragraphs 48 to 66. For a fuller description, see Vernimmen et al. *Corporate Finance* John Wiley & Sons ed. 2nd edition, 2009, Chap. 22; for the findings of surveys of the frequency of use of estimation methods, see p. 460. The theoretical bases and a numerical application of the CAPM model to the present case are also contained in the study carried out by Oxera on behalf of EDF (recital 70), in particular Annex I.

<sup>(2)</sup> Vernimmen et al. *Corporate Finance* John Wiley & Sons ed. 2nd edition, 2009, pp. 433-4.

| Parameter           | Value              | Source                                                                                                                                                                                                                                                                                                         |
|---------------------|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Market risk premium | 6,3 — 7,3          | 1. Vernimmen op cit. p. 423, citing Mehra Prescott 2/2003 T.2 FR 1973-98. 2. Forward risk premium in France on average 1988-1996 (this premium was 10,1 % in 1996). 'An examination of Equity Risk Premium Forecasts in the G-6 Countries', Khorana, Moyer & Pattel, I/B/E/S Working Paper, August 1997, p 25. |
| Target return range | 11,7 — 12,1 — 13,4 | Commission calculation                                                                                                                                                                                                                                                                                         |
| Median return       | 12                 | Commission calculation                                                                                                                                                                                                                                                                                         |

- (185) In making its investment decision in 1997, a prudent private investor in a situation as close as possible to that of the French authorities would have used the regular estimates of EDF's future earnings validated by the competent authorities and used as a financial scenario, as contained in the EDF's projected income statement 1997-2000 (recitals 90-92, Table 1, recital 97). The tax exemption represented 11 % of the FRF 53,3 billion of EDF's capital and capital contributions in 1997, after the restructuring of the balance sheet. It can therefore be assumed that the investment conferred a right to receive 11 % of the dividends (remuneration of the capital contributions as estimated in Tables 1 and 4) and of the value of EDF. In order to determine this value, a model for calculating the long-term value of an undertaking should be applied, i.e. the dividend discount model (DDM) <sup>(1)</sup>.
- (186) The results of the DDM analysis of an investment of FRF 5,88 billion based on the dividends foreseen in EDF's projected income statement 1997-2000 (remuneration for capital contributions and additional remuneration in Table 1) are presented in Table 6, noting the internal rate of return (IRR) of financial flows and the net present value (NPV) for the target rates of return of 12 %, 6,35 % and 5,58 % <sup>(2)</sup>. These results are calculated for a baseline scenario based on standard analysis practice (Table 6.1), with three less plausible sensitivity analyses which loosen the assumptions of the baseline scenario and thus simulate a higher rate of return for the shareholder than the reference scenario (Tables 6.2, 6.3 and 6.4).

Table 6

**Estimate of the return (NPV) on an investment of FRF 5,88 billion using the MDD model based on the projected income statement of EDF 1997-2000 (Table 1) (billion FRF)**

6.1. Baseline scenario (Growth of dividends foreseen for end of period 1999-2000)

|               | 1.1.1997   | 31.12.1997 | 31.12.1998 | 31.12.1999 | 31.12.2000 | 31.12.2000 |
|---------------|------------|------------|------------|------------|------------|------------|
|               | Investment | Dividend   | Dividend   | Dividend   | Dividend   | DDM value  |
|               | - 5,88     | 0,23       | 0,28       | 0,26       | 0,26       | 2,21       |
| NPV at 12 %   | - 3.43     |            |            |            |            |            |
| NPV at 6,35 % | - 3.17     |            |            |            |            |            |
| NPV at 5,58 % | - 3.12     |            |            |            |            |            |
| IRR           | - 13 %     |            |            |            |            |            |

NB: The table reads as follows: For financial flows between 1.1.1997 and 31.12.2000, the NPV with a discount rate of 12 % is FRF - 3,43 billion (...) and the IRR is - 3 %

<sup>(1)</sup> The DDM model gives the value of the undertaking from the (last) dividend paid ( $D_t$ ), the growth rate of the dividends ( $d'D$ ) and the target return, or opportunity cost of the capital ( $K$ ), applying the formula  $V_r = D_t (1 + d'D) / (K - d'D)$ . The MDD model is also used in the Oxera study on behalf of EDF (points 3.27-3.31, Table 3.4), but with different and sometimes highly unrealistic values. The Oxera study uses a dividend growth rate of 9,3 % per year. In a perpetuity formula such as the DDM model, dividend growth rates are associated with the growth of the undertaking. Growth rates of 9,3 %, which are well above inflation and the long-term growth rate of gross domestic product (GDP), mean that, ultimately, EDF would monopolise the entire GDP of France.

<sup>(2)</sup> A negative net present value for a given interest rate (updating-financing) indicates that the investment is not viable at that interest rate. The internal rate of return (positive — IRR-) indicates the effective interest rate at which the expected financial flows remunerate an investment.

## 6.2. Sensitivity 1 (d' dividends = 4,51 % annual rate 1997/2000)

|               |         | 1.1.1997   | 31.12.1997 | 31.12.1998 | 31.12.1999 | 31.12.2000 | 31.12.2000 |
|---------------|---------|------------|------------|------------|------------|------------|------------|
|               |         | Investment | Dividend   | Dividend   | Dividend   | Dividend   | DDM value  |
|               |         | – 5,88     | 0,23       | 0,28       | 0,26       | 0,26       | 3,69       |
| NPV at 12 %   | – 2,68  |            |            |            |            |            |            |
| NPV at 6,35 % | – 2,14  |            |            |            |            |            |            |
| NPV at 5,58 % | – 2,05  |            |            |            |            |            |            |
| IRR           | – 4,7 % |            |            |            |            |            |            |

## 6.3. Sensitivity 2 (Base scenario + additional 11 % quasi-equity capital)

|               |        | 1.1.1997   | 31.12.1997 | 31.12.1998 | 31.12.1999 | 31.12.2000 | 31.12.2000 |
|---------------|--------|------------|------------|------------|------------|------------|------------|
|               |        | Investment | Dividend   | Dividend   | Dividend   | Dividend   | DDM value  |
|               |        | – 5,88     | 0,23       | 0,28       | 0,26       | 0,26       | 4,93       |
| NPV at 12 %   | – 2,06 |            |            |            |            |            |            |
| NPV at 6,35 % | – 1,29 |            |            |            |            |            |            |
| NPV at 5,58 % | – 1,16 |            |            |            |            |            |            |
| IRR           | 0,3 %  |            |            |            |            |            |            |

## 6.4. Sensitivity 3 (Sensitivity 1 + additional 11 % quasi-equity capital)

|               |        | 1.1.1997   | 31.12.1997 | 31.12.1998 | 31.12.1999 | 31.12.2000 | 31.12.2000 |
|---------------|--------|------------|------------|------------|------------|------------|------------|
|               |        | Investment | Dividend   | Dividend   | Dividend   | Dividend   | DDM value  |
|               |        | – 5,88     | 0,23       | 0,28       | 0,26       | 0,26       | 6,41       |
| NPV at 12 %   | – 1,30 |            |            |            |            |            |            |
| NPV at 6,35 % | – 0,26 |            |            |            |            |            |            |
| NPV at 5,58 % | – 0,08 |            |            |            |            |            |            |
| IRR           | 5,2 %  |            |            |            |            |            |            |

(187) The estimates from Table 6 show that, if the amount of FRF 5,88 billion allegedly invested had conferred entitlement to a proportional percentage of the dividends and the value of EDF, the operation would have produced a large negative net present value (FRF – 3,43 billion). In order for the investment to be financially advantageous for a private market economy investor, on the most widely used assumption (Table 6.1), it would have been necessary for the prudent private investor to be satisfied by a rate of return well below an opportunity cost of capital of 12 % for an investment in liquid EDF shares, and indeed also below the rate paid on French Government bonds with maturities of 30 years (6,35 %) and 10 years (5,58 %) in 1997. Clearly, a prudent private investor would not have made the investment in those circumstances.

- (188) These conclusions do not change qualitatively if, as sensitivity test, other assumptions are used which, although less plausible, value the alleged investment more (Tables 6.2 to 6.4) <sup>(1)</sup>. In any event, the rate of return provided is below 12 %, and indeed also even lower than the return on French Government 30-year and 10-year bonds in 1997. Finally, examination of other variables available in EDF's projected operating results, such as the revenue estimates, core business income or the net income (recitals 166 to 168) would not have allowed the prudent private investor to expect a complete trend reversal leading to a better return or the creation of value for the state as shareholder down the line. These developments, which were foreseeable and foreseen in 1997, further corroborate the conclusions and their extension to the period after 2000, as foreseeable by a prudent private investor in 1997 on the basis of the information supplied by the French authorities.
- (189) Even supposing that the prudent private investor would have expected a capital gain in addition to a regular return from EDF, which nothing in the information and data sent by the French authorities indicates, and which moreover would be too risky to expect having regard to the status of EDF in 1997, it can be ruled out that it would have made the alleged investment. Accordingly, the application of the test of the prudent private investor in a market economy shows that, even if the tax exemption of FRF 5,88 billion was in fact an investment decision on the part of the state as shareholder, the operation would not have been carried out by a prudent private investor in possession of the information put forward by the French authorities.
- (190) In this connection, the comments by EDF reproduced in recital 71, according to which the tax exemption had no detrimental effect on competition and did not provide an advantage since EDF could in any event have found equivalent financing on the capital markets, are contradicted by the facts. It is common ground that EDF could not have issued shares on the markets to obtain this amount. Even if EDF would probably have been able to find a lender, the corresponding loan or bond issue would have had to be remunerated, in all likelihood, at a higher rate than the rate that the French state anticipated for capital contributions to EDF for the period 1997-2000 and higher than the refinancing cost equivalent to the government bonds in 1997. If EDF could have had an equivalent amount in principal, the financing costs would have been greater than that of the alleged investment. Even then, without taking into account a repayment of principal, which EDF was not required to make, in the amount of the tax exemption or the equivalent amount in capital contributions in 1997, the measure would have provided an economic advantage to EDF by reducing its financing costs.
- (191) Even if the principle of the prudent private investor in a market economy were applicable, in the light of the documents provided by the French authorities shedding light, according to them, on the profit expectations and risks attached to the alleged investment in the form of a tax exemption, application of the test of the private investor in a market economy leads to the conclusion that a prudent private investor would not have invested an amount equal to the tax due in the EDF capital increase in 1997.
- (192) The non-payment by EDF of FRF 5,88 billion in corporation tax does not appear to be a productive investment by the state as shareholder in application of the principle of the prudent private investor in a market economy. It appears rather to be an ad hoc derogating tax exemption that provided an economic advantage to EDF equal to the amount of tax not paid. Such an advantage necessarily strengthens the position of EDF vis-à-vis its competitors, since the amount of equity capital determines, among other factors, the external financing capacity and conditions of an undertaking while, moreover, the resources saved in this way could be used for other purposes such as, for example, investment in France or in other Member States where competitors conducted their business in 1997.

<sup>(1)</sup> The assumption that the EDF dividend would increase by 4,51 % (sensitivity 1, Table 6.2) appears optimistic; it is obtained by smoothing the forecast growth rate for the four forecast years 1997-2000. Besides the fact that in usual practice the dividend growth used is the end-of-period growth (baseline scenario), in actual fact the dividends to be paid by EDF were to decrease in 1997-2000 compared with 1991-1996, and in 1999 and 2000 compared with 1998. In any event, a rate of 4,51 % in perpetuity is high in absolute terms. The assumption (sensitivity 2, Table 6.3) that the shareholder would add — or the buyer would pay for — (a pro rata) quasi-equity capital of EDF as estimated in 1997 to the objective value of EDF as calculated, does not take into account the regulatory character of certain types of equity capital (reserves). This assumption combined with the MDD model is also optimistic as it amounts to allocating to the shareholder (a pro rata of 11 %) quasi-equity capital (excluding subscribed capital) which allows the undertaking to absorb possible losses and, in the long term, to be able to provide regular dividends and remuneration for the shareholder. It presupposes that the quasi-equity capital of EDF set in 1997-2000 would be permanently available, whereas the MDD disregards sources of remuneration other than the dividend. It is therefore an unjustifiable assumption. The combination of the two assumptions (sensitivity 3, Table 6.4) magnifies their respective disadvantages or weaknesses and makes the results of the calculation even more unlikely and arbitrary.

- (193) The economic advantage therefore distorts competition within the meaning of Article 107(1) of the TFEU. The advantage is selective, since the non-payment of corporation tax on some of the accounting provisions constitutes an exception to the tax treatment normally applicable to such an operation and, in the present case, this exception was applied only to EDF.

## 9.2. STATE RESOURCES

- (194) The concept of aid embraces not only positive benefits, such as subsidies, but also interventions by the public authorities which mitigate the charges that are normally included in the budget of an undertaking and which have the same effect as subsidies <sup>(1)</sup>. The EU Courts have consistently held <sup>(2)</sup> that the non-collection by the state of a tax which should normally have been collected is equivalent to the consumption of state resources.
- (195) The non-collection of the full amount of corporation tax due in respect of the 1997 financial year derived directly from a measure adopted by the state, namely Act No 97-1026 of 10 November 1997.

## 9.3. DISTORTION OF COMPETITION AND EFFECT ON TRADE BETWEEN MEMBER STATES

- (196) From its creation in 1946 to the entry into force of Directive 96/92/EC, EDF enjoyed a monopoly position in the French market with exclusive rights for the transmission, distribution, and import and export of electricity. However, EDF competed with other producers in other Member States already ahead of the entry into force of Directive 96/92/EC. Moreover, free competition existed in related markets not subject to exclusive rights where EDF had already diversified its activities beyond its exclusive rights in both geographic and sectoral terms. Effects on competition did therefore exist well before the liberalisation provided for by Directive 96/92/EC.
- (197) Electricity was the subject of significant, growing trade between Member States in which EDF was actively engaged. These exchanges, reinforced by the adoption of Council Directive 90/547/EEC <sup>(3)</sup>, were taking place on the basis of commercial agreements between the various operators of the high-voltage electricity networks in the Member States. In the European OECD member countries, electricity imports grew at an average annual rate of over 7 % between 1980 and 1990. Between 1981 and 1989, EDF multiplied the surplus on its balance of trade in electricity nine fold, achieving net exports of 42 TWh, representing 10 % of its total production. In 1985, EDF already exported 19 TWh to other Member States.
- (198) Even before Directive 96/92/EC entered into force in February 1999, some Member States acted unilaterally to open up their electricity market. In particular, the United Kingdom opened up its market completely for large industrial customers in 1990. Sweden opened up its market completely in 1996, Finland began the process in 1995 and reached 100 % market opening in 1997, Germany completely opened up its market in 1998 and the Netherlands opened up its market completely for industrial customers in 1998. In those circumstances, even before the deadline set by the Directive for opening up the market to competition, State aid granted to enterprises enjoying a monopoly in a Member State that took an active part in intra-Union trade, as in the case of EDF, was likely to affect trade between Member States within the meaning of Article 107(1) of the Treaty.
- (199) In its annual report for 1997, EDF stated that it ranked 'among the world's leading operators in the electricity industry, with, outside France, more than FRF 13 billion invested, a total installed production capacity equal to nearly 11 % of the figure for France and over 8 million customers'. The report also stressed that in 1997 EDF had 'increased the number and size of its investments in Europe by extending its presence to Austria and Poland' and had 'exported over 70 TWh in Europe'. These exports were delivered in competition with alternative suppliers in the markets concerned.
- (200) The 1997-2000 management contract, signed on 8 April 1997 between the French state and EDF, stipulated that EDF was to allocate some FRF 12-13 billion to its international investments, assigning priority to regions in Europe. Between 2000 and 2002, EDF acquired one third of the capital of the German company EnBW,

<sup>(1)</sup> Judgments in *Gezamenlijke Steenkolenmijnen v High Authority*, 30/59, EU:C:1961:2; judgment in *Banco de Crédito Industrial C-387/92*, EU:C:1994:100; judgment in *SFEI*, C-39/94, EU:C:1996:285; judgment in *France v Commission*, C-241/94, EU:C:1996:353; judgment in *FFSA v Commission*, T-106/95, EU:T:1997:23.

<sup>(2)</sup> See in particular *Ladbroke v Commission*, T-67/94, EU:T:1998:7, paragraph 109.

<sup>(3)</sup> Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids (OJ L 313, 13.11.1990, p. 30).

increased the production and distribution capacities of its United Kingdom subsidiary London Electricity, took direct control of the Italian enterprise Fenice and set up a partnership with Fiat for the purchase of Montedison (now Edison).

- (201) In 1997, SDS, a wholly owned subsidiary of EDF, brought together its activities associated with the provision of services to individual customers, businesses and local authorities. SDS was active in waste treatment, street lighting and other energy-related services and generated turnover equivalent of EUR 685 million in 1998 as against EUR 650 million in 1997. In 2000, EDF established a partnership with Veolia Environnement via the company Dalkia, the European leader in energy services to businesses and local authorities. Dalkia offers energy engineering and maintenance services, manages heating plants and technical services to do with the operation of buildings and operates district heating networks, combined heat and power schemes, and energy production and industrial fluid systems.
- (202) EDF has also developed its activities in the market for renewable energy sources. In 1997, the holding company Chart, a wholly owned EDF subsidiary, brought together its activities in the renewables sector, e.g. geothermal energy and wind power. Its contribution to consolidated turnover that year was EUR 70 million.
- (203) Lastly, as an electricity producer and distributor, EDF was and still is in competition with suppliers of other substitute energy sources such as coal, oil and gas, both in its domestic market and in international markets. In France, for example, EDF has launched a successful campaign to promote the use of electricity for heating. It has thus increased its market share in comparison with its competitors who supply substitute energy sources such as oil or gas. In the steel industry, electric furnaces are in competition with gas and oil-fired furnaces. It follows that a measure such as the one at issue is liable to distort competition with alternative suppliers, such as Gaz de France.
- (204) EDF thus occupied a prominent position in electricity trading between the Member States in 1997, whereas now the French electricity market is fully open and many European suppliers are present. It is therefore clear that, in 1997, EDF was already well established in certain markets in other Member States and that the aid resulting from the non-payment by EDF of corporation tax on some of the accounting provisions created free of tax for the renewal of the RAG inevitably affected competition between Member States.
- (205) The above considerations were detailed in the extension decision. Neither France nor EDF disputed in their comments that the aid was likely to affect trade between Member States.
- (206) Thus, since the four criteria set out in Article 107(1) TFEU are fulfilled, the non-payment by EDF of corporation tax on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network constitutes State aid. The compatibility of the aid with the internal market must now be assessed.

#### 10. ASSESSMENT OF THE COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

- (207) Article 107(1) of the TFEU provides that aid fulfilling the criteria laid down therein is in principle incompatible with the internal market. According to settled case-law, it is for the Member State to cite the reasons and evidence of any kind for which State aid is compatible with the internal market <sup>(1)</sup>. In the present case, the French Republic has cited no reason nor provided any information in this regard.
- (208) The exceptions laid down in Article 107(2) of the TFEU are not applicable in the case in point because of the nature of the aid since it does not pursue the objectives listed in that paragraph.
- (209) Nor does the aid in question fulfil the conditions laid down for exceptions in Article 107(3)(a) and (c) of the TFEU in respect of aid intended to promote the economic development of certain regions, particularly since it corresponds to operating aid. It is not conditional on investments or on job creation as envisaged in the Guidelines on regional State aid <sup>(2)</sup>.

<sup>(1)</sup> C-364/90 — *Italy v Commission*, EU:C:1993:157, paragraph 20.

<sup>(2)</sup> Guidelines on regional State aid (OJ C 209, 23.7.2013, p. 1).

- (210) Article 107(3)(c) of the TFEU also allows an exception to be made for aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The aid measure under examination does not qualify for this exception. The derogation from the applicable tax law, granted for the benefit of a single enterprise, cannot be regarded as being intended to facilitate the development of an activity. Its sole purpose is to assist an enterprise by reducing its operating costs.
- (211) As regards the exceptions allowed by Article 107(3)(b) and (d) of the TFEU, the aid measure under examination is not intended to promote the execution of a project of common interest, remedy a serious disturbance in the French economy or promote culture and heritage conservation.
- (212) The compatibility criteria set out in Article 107(2) and (3) of the TFEU are therefore not met. Furthermore, as regards compensation for public service costs, the French authorities have not cited Article 106(2) of the TFEU in defence of the tax concession, but they have stressed the fact that EDF performs public service tasks. They have not, however, provided any assessment of the cost incurred by EDF in carrying out those tasks. The Commission cannot therefore determine whether or not the tax concession in question compensates for any additional cost linked to the public service tasks entrusted to it. In any event, if the non-payment of the tax must be qualified as compensation for the provision of a service of general economic interest, it has not been established that such compensation was determined in advance in accordance with transparent and objective criteria and calculated by reference to the costs of an efficient undertaking.
- (213) It is consequently not possible in the case in point to examine whether the conditions set out in the judgment in *Altmark* <sup>(1)</sup> for escaping the application of Article 107(1) of the TFEU, and the criteria for qualifying for the exception allowed by Article 106(2) of the TFEU, which, moreover, the French authorities do not cite, are fulfilled.
- (214) In the light of the foregoing considerations, it appears that the aid under examination constitutes operating aid which has had the effect of strengthening EDF's competitive position in relation to its competitors. In those circumstances, it would be incompatible with the internal market.
- (215) The Commission also considers that, contrary to what is claimed by the French authorities, the rule on limitation periods does not apply in the case in point. Admittedly, EDF created the accounting provisions free of tax between 1987 and 1996. However, it should be pointed out, firstly, that corrections to accounting errors, which by their very nature relate to the posting of past transactions, should according to the National Accountancy Council be posted in the accounts for the financial year in which they are discovered and, secondly, that the Act providing that the grantor rights were to be reclassified as capital contributions without being subject to corporation tax dates from 10 November 1997. The tax concession therefore dates from 1997 and any new aid paid on that date is therefore not time-barred because the first Commission instrument concerning this measure dates from 10 July 2001. Furthermore, under Article 15 of Regulation (EC) No 659/1999, legal proceedings suspend the period of limitation.

## 11. CONCLUSIONS

- (216) The Commission finds that France has unlawfully implemented the aid in question in breach of Article 108(3) of the TFEU. The Commission considers that the exemption from corporation tax in the amount of FRF 5 882 849 762 relating to the reclassification as a capital contribution, provided for by Act No 97-1026, of accounting provisions for the renewal of the high-voltage transmission network, already implemented to the tune of FRF 14 119 065 335, constitutes aid that is illegal and incompatible with the internal market.
- (217) Under Article 108(2) of the TFEU, when the Commission has found that aid is incompatible with the internal market, it is competent to oblige the Member State concerned to abolish or alter it. According to Article 14 of Regulation (EC) No 659/1999 '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 (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.

<sup>(1)</sup> C-280/00 — *Altmark Trans and Regierungspräsidium Magdeburg*; EU:C:2003:415.

- (218) The Commission's objective in requiring the Member State concerned to recover the aid incompatible with the internal market is to restore the previously existing situation <sup>(1)</sup>. In this context, the Court of Justice has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage it enjoyed over its competitors. In this way, the situation prior to payment of the aid is restored <sup>(2)</sup>.
- (219) In the present case, it appears that no general principle of EU law would run counter to the recovery of the unlawful aid found to exist. In particular, neither France nor the interested parties presented any arguments to that effect.
- (220) It follows that France must take all necessary measures to recover from EDF the aid unlawfully paid in the form of exemption from corporation tax in the amount of FRF 5 882 849 762 relating to the reclassification of part of the provisions to the tune of FRF 14 119 065 335 as capital.
- (221) For the purposes of recovery, the French authorities must also add to the amount of the aid the recovery interest due from the date on which the incompatible aid was made available to the undertaking, i.e. the date on which the corporation tax in respect of tax year 1997 became payable, until it is actually recovered <sup>(3)</sup>, in accordance with Chapter V of Commission Regulation (EC) No 794/2004 <sup>(4)</sup>.
- (222) In the context of France's obligation of loyal cooperation within the framework of the recovery procedure, this amount will have to be established more precisely during the procedure, on the basis of information to be supplied by the French authorities, and which will take account, inter alia, of the exchange rates between the ECU/EUR and the French franc (FRF) that may apply to the instalments of corporation tax paid by EDF during 1997 and of the reimbursement to EDF of the aid following the annulment of the first negative decision in 2009. In the present case, interest is not due for the period during which the aid was no longer at the disposal of the undertaking, namely the period between the actual recovery of the aid by France and the repayment to EDF. Any interest paid by France to EDF will nevertheless have to be taken into account.
- (223) The French authorities must recover the above amount within four months from the date of notification of this Decision.
- (224) In accordance with settled case-law, in the event that a Member State encounters unforeseen and unforeseeable difficulties or perceives consequences overlooked by the Commission, it may submit those problems for consideration by the Commission, together with proposals for suitable amendments. In such a case, the Commission and the Member State concerned must work together in good faith with a view to overcoming the difficulties while fully observing the provisions <sup>(5)</sup> of the TFEU.
- (225) The Commission therefore requests France to submit to it without delay any problems with which it would be faced in implementing this Decision,

HAS ADOPTED THIS DECISION:

#### Article 1

1. The exemption from corporation tax in favour of Électricité de France for an amount of 5 882 849 762 French francs, relating to the reclassification as capital of the provisions corresponding to the value of the assets in kind allocated under concession to the high-voltage transmission network, constitutes State aid within the meaning of Article 107(1) of the TFEU.

<sup>(1)</sup> Judgment in *Spain v Commission*, C-280/92, EU:C:1994:325, paragraph 75.

<sup>(2)</sup> Judgment in *Belgium v Commission*, C-75/97, EU:C:1999:311, paragraphs 64-65.

<sup>(3)</sup> See Article 14(2) of Regulation (EC) No 659/99 (cited above).

<sup>(4)</sup> 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).

<sup>(5)</sup> Judgment in *Commission v Germany*, C-94/87, EU:C:1989:46, paragraph 9, and judgment in *Commission v Italy*, C-348/93, EU:C:1995:95, paragraph 17.

2. The aid mentioned in paragraph 1, unlawfully granted by the French Republic, is incompatible with the internal market.

#### *Article 2*

1. The French Republic is required to recover from the beneficiary the equivalent in euro of the aid referred to in Article 1.

2. The sums to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiary until that of their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

#### *Article 3*

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. The French Republic shall ensure that this Decision is implemented within four months of the date of its notification.

#### *Article 4*

1. Within two months of notification of this Decision, the French Republic shall provide 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; and
- (c) the documents proving that the beneficiary has been ordered to repay the aid.

2. The French Republic shall keep the Commission informed of the progress of the national measures adopted pursuant to this Decision until the recovery of the aid specified in Article 1 has been concluded. At the Commission's request, it shall immediately submit information on the measures already adopted and planned for the purpose of complying with this Decision. It shall also provide detailed information on the amounts of aid and the interest already recovered from the beneficiary.

#### *Article 5*

This Decision is addressed to the French Republic.

Done at Brussels, 22 July 2015.

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

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