

Commission Decision (EU) 2015/1824 of 23 July 2014 on the measures taken by Germany with regard to Airport Niederrhein (Weeze) und Flughafen Niederrhein GmbH — SA.19880 and SA.32576 (ex NN/2011, ex CP/2011) (notified under document C(2014) 5084) (Only the English text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2015/1824

of 23 July 2014

on the measures taken by Germany with regard to Airport Niederrhein (Weeze) und Flughafen Niederrhein GmbH — SA.19880 and SA.32576 (ex NN/2011, ex CP/2011)

*(notified under document C(2014) 5084)*

(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 provisions cited above<sup>(2)</sup> and having regard to their comments,

Whereas:

1. **PROCEDURE**

- (1) Between 2003 and 2006, the Commission received several complaints alleging that regional authorities had granted illegal State aid to Niederrhein-Weeze airport (hereinafter ‘the airport’).
- (2) By letters dated 13 October 2005, 2 March 2007, 3 August 2007, 19 October 2010 and 1 April 2011 The Commission requested information from Germany in relation to those complaints.
- (3) Germany replied to the Commission's requests for information by letters dated on 21 December 2005, 2 February 2006, 14 June 2007, 18 October 2007, 11 November 2010 and 30 May 2011. However, the reply of Germany of 30 May 2011 was incomplete as it did not address questions referring to issues that related to periods prior to July 2009. Germany indicated that they were refusing to reply to such issues on the ground that those issues had previously been the subject of an investigation which the Commission had allegedly closed July 2009.

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- (4) On 24 August 2011 the Commission issued a reminder to Germany in accordance with to Article 10(3) of Council Regulation (EC) No 659/1999<sup>(3)</sup> (hereinafter: ‘Procedural Regulation’) to Germany giving them the possibility to provide information until 19 September 2011. The Commission added that it would consider issuing an information injunction absent a reply within that deadline.
- (5) By email dated 13 September 2011 Germany requested an extension of the deadline until 19 October 2011. The Commission agreed to the extension requested.
- (6) Germany submitted their reply on 19 October 2011. However, it remained incomplete as Germany maintained their refusal to reply to issues concerning periods prior to July 2009.
- (7) By letter dated 25 January 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’) with respect to the aforementioned illegal aid (‘the opening decision’).
- (8) By email dated 1 February 2012 Germany requested an extension of the deadline within which to submit their comments on the opening decision. This extension was granted by the Commission services by e-mail dated 10 February 2012.
- (9) Germany submitted its observations to the Commission on 13 March 2012 and supplemented them with further documents on 4 March 2013.
- (10) A corrigendum of the opening decision was adopted on 13 July 2012.
- (11) The opening decision was published in the *Official Journal of the European Union* on 14 September 2012<sup>(4)</sup>. The Commission invited interested parties to submit their comments on the measures in question within one month of the date of publication.
- (12) The Commission received comments from Düsseldorf airport, the district of Kleve, FN GmbH, and several other interested parties, notably companies, whose operations depend on the existence of the Niederrhein-Weeze airport. On 18 April 2013, 3 May 2013 and 19 June 2014, the Commission transmitted these comments on to Germany. By letter dated 19 August 2013 and 3 July 2014, Germany sent its observations on the comments of the interested parties.
- (13) By letters dated 18 April 2013, 29 October 2013, 17 March 2014 and 16 May 2014 the Commission requested further information. Germany responded by letters dated 19 August 2013, 17 December 2013, 15 January 2014, 16 April 2014, 8 May 2014 and 25 May 2014.
- (14) By letter of 18 June 2014, Germany has accepted that the present Decision is adopted in English. Therefore, only the English version is authentic.

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## 2. GENERAL CONTEXT

### 2.1. General presentation of the airport

- (15) The airport is located in Germany in the Land Nordrhein-Westfalen in the *Landkreis* (administrative district) Kleve between the municipalities of Weeze and Kevelaer adjacent to the German-Dutch Border. To the south, the next largest city is Duisburg, about 60 km away. To the north, the city of Nijmegen (Netherlands) is some 50 km away.
- (16) The ten closest airports are:
- Düsseldorf (distance of 51 minutes travelling time by road or 76 km),
  - Eindhoven, NL (1 hour 12 minutes or 88 km),
  - Maastricht, NL (1 hour 14 minutes or 98 km),
  - Köln-Bonn (1 hour 23 minutes or 133 km),
  - Dortmund (1 Hour 25 minutes or 120 km),
  - Liege, BE (1 hour 41 minutes or 152 km),
  - Antwerp, BE (1 hour 54 minutes or 153 km),
  - Rotterdam, NL (1 hour 44 minutes or 172 km),
  - Münster-Osnabrück (1 hour 46 minutes or 175 km), and
  - Brussels, BE (2 hour 10 minutes or 200 km).
- (17) Between 1954 and 1999, the airport was used by the United Kingdom's Royal Air Force as military airport. Following its conversion into a civilian airport, passenger flights commenced in 2003.
- (18) The airport has a runway of 2 440 metres. Its terminal has capacity for 3,5 million passengers. The passenger numbers have evolved as follows:

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*Table 1*

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#### Traffic at Niederrhein-Weeze airport between 2003 and 2012

Year	Number of Passengers (Total)	Index of growth
2003	207 992	100
2004	796 745	383
2005	591 744	285
2006	585 403	281
2007	848 852	408
2008	1 524 955	733
2009	2 403 115	1 155

*Source:* Germany's observations to the opening decision for the years 2003-2011, and <http://unternehmen.airport-weeze.com/de/historie.html> for 2012.

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Table 1

**Traffic at Niederrhein-Weeze airport between 2003 and 2012**

2010	2 896 999	1 392
2011	2 421 720	1 164
2012	2 200 000	1 058

Source: Germany's observations to the opening decision for the years 2003-2011, and <http://unternehmen.airport-weeze.com/de/historie.html> for 2012.

(19) The airport is currently served by Ryanair and Transavia<sup>(5)</sup>. The airlines cover over 50 international destinations. All passenger volume at the airport is currently generated by Low Cost Carriers (hereinafter 'LCCs'). Ryanair's passenger share of total passengers at the airport amounts to [80-99]<sup>(6)</sup> %. Ryanair has been present at the airport since its opening and has, in the intervening period, made the airport one of its German base by stationing there nine aircraft permanently (as from Summer 2013).

(20) Until 2010, more than 50 % of the airport's passengers came from the Netherlands, the rest stemming mainly from the surrounding German and partially Belgian regions. According to the latest public information<sup>(7)</sup>, the share of Dutch passengers dropped to around 40 %.

## 2.2. Development of the airport

### 2.2.1. Development of the Ownership of the airport

(21) The airfield was founded 1954 by the Royal Air Force for military purposes. In the early 1990s, the Royal Air Force announced its intention to withdraw from the airfield by 1999. The ownership of the airport was due to be transferred to the German Federal Government. In view of the expected loss of some 400 civilian jobs, the district of Kleve and the municipality of Weeze in 1993 planned to create a civilian airport (*Euroregionales Zentrum für Luftverkehr, Logistik und Gewerbe, 'EuZZLG'*) on the former military airfield. To that end, they established a company, Flughafen Niederrhein GmbH (hereinafter 'FN GmbH'), to manage the conversion of the former military airfield for subsequent civilian use.

(22) FN GmbH was registered in 1993 as a private limited liability company, with an equity capital of DM 50 000 (= 25 564 EUR). The founding shareholders were the district of Kleve (52 %), the municipality of Weeze (48 %).

(23) From the outset, the municipality and the district of Kleve envisaged that the airport would be operated by a private company. In furtherance of that objective, four steps were identified:

(a) Finding the private investor who should be responsible for the preparation and the operation of the airport;

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- (b) Obtaining the necessary permit for the conversion of the military airfield into a civilian airport;
  - (c) Concluding a treaty with the Netherlands concerning the use of its air space;
  - (d) Purchase of the area from the Federal Government.
- (24) The Royal Air Force transferred the ownership of the airport on 30 November 1999 to the German Federal Government.
- (25) On 16 December 1999, the district of Kleve and the municipality of Weeze incorporated a further company, *Entwicklungs- und Erschließungsgesellschaft Laarbruch GmbH* ('EEL GmbH'). 52 % of the shares in EEL GmbH are held by the district of Kleve and 48 % by the municipality of Weeze.
- (26) The then tasks of EEL GmbH were different from the tasks of FN GmbH. While FN GmbH had been created to manage the conversion of the former military airport, EEL GmbH was entrusted in particular with the administration of the facilities between the closure of the military airport in 1999 and its purchase by a private investor.
- (27) In this regard, EEL GmbH had to tear down the infrastructures and facilities of the former military airport estate for a subsequent commercial use.
- (28) Following the authorisation by the Land Nordrhein-Westfalen on 23 August 2000 of the military airfield conversion plan submitted by the district of Kleve and the municipality of Weeze and the granting of a license to operate a civilian airport to FN GmbH by the Bezirksregierung Düsseldorf on 20 June 2001<sup>(8)</sup>, the privatisation of the airport operation and real estate took place in two steps:
- (a) *Step 1:* On 1 July 2001, the district of Kleve and the municipality Weeze withdrew from FN GmbH selling 99,261 % of the shares in the company for EUR [0,5-3] million by the district of Kleve and the municipality Weeze to a private investor, Airport Niederrhein Holding GmbH, ('ANH GmbH'). ANH GmbH is a 100 % subsidiary of the Dutch company Airport Network B.V. Until 31 December 2011, the district of Kleve and the municipality of Weeze held respectively 0,0459 % and 0,0279 % of the shares. At the time of the sale of FN GmbH from the public authorities to ANH GmbH, FN GmbH had practically no physical assets [...].
  - (b) *Step 2:* On 14 March 2002, the German Federal Government sold the real estate on which the airport was built for EUR [5-15] million to FN GmbH. Prior to selling this estate to FN GmbH, the Federal Government had contacted other potential purchasers on an informal basis. Only one other investor had signalled an interest, offering a price of EUR [...] million and an additional EUR [...] million, if certain profit targets would be achieved by 2009.

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- (29) The German Federal Government established the sales price of the real estate on which the airport was built in accordance with Article 63(3) of the *Bundeshaushaltsordnung* and the *Wertermittlungsverordnung*. This provision obliges the federal government to sell property at their current value, i.e. their market price as established by an independent expert following the rules laid down in the *Wertermittlungsverordnung*. In the case at hand, the estate was valued by an independent expert at EUR [11-20] million while the buildings on the estate were valued at EUR [4-10] million based on the proposed development and utilisation concept of the estate. From these values, the expert deducted EUR [4-10] million representing the cost of the demolition of the barracks forming part of the conversion works, and a further EUR [2-5] million representing costs of adopting measures required by applicable environmental and planning legislation. As from 2001, the first construction measures were implemented (demolition of bunkers, infrastructure for clarification plants, etc.) in order to prepare the airport for civil use

#### 2.2.2. *The economic development of EEL GmbH and FN GmbH*

- (30) Immediately after its establishment in 1999, EEL GmbH took over the management of the airport real estate through a leasing contract. The first development measures and the first construction measures were carried out between 2000 and 2001.
- (31) After the Bezirksregierung Düsseldorf granted the FN GmbH the licence to operate a civilian airport under German aviation law and upon completion of the purchase of FN GmbH by the private investor group ANH on 1 July 2001, the ANH group reimbursed EEL GmbH the costs that the latter has incurred to manage the airport infrastructure, including some conversion work.
- (32) In the course of 2002, EEL GmbH handed over the management of the airport infrastructure to FN GmbH. In 2002, FN GmbH made a loss of EUR 0,3 million. As of 2003, EEL GmbH no longer carries out tasks relating to the management of the airport real estate. Nevertheless, the district of Kleve and the municipality of Weeze did not liquidate the EEL GmbH in 2003.
- (33) FN GmbH initially accumulated financial losses before making profits, as illustrated in the following table:

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*Table 2*

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**Annual results and EBITDA 2003-2011**

*(in thousand EUR)*

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<b>Year</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
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*Source:* Germany

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Table 2

**Annual results and EBITDA 2003-2011**

Annual profit	- 6 960	- 8 336	- 7 914	- 4 822	663	707	426	34
EBITDA	- 4 805	- 4 718	- 4 399	- 1 172	4 372	5 508	6 108	6 286

Source: Germany

**3. DESCRIPTION OF THE MEASURES UNDER ASSESSMENT AND THEIR CONTEXT**

**3.1. Measure 1: Loans from EEL GmbH to FN GmbH**

- (34) At the beginning of 2003, FN GmbH encountered financial difficulties which endangered the commencement of commercial flights (expected on 1 May 2003) and thus the entire airport conversion and development project. The public owners of EEL GmbH therefore decided to continue the activities of their company. On 11 April 2003, EEL GmbH granted a first loan ('Loan 1') of EUR [11-20] million, at an interest rate of [1-5] % above the base rate to FN GmbH. According to Germany the base rate of interest applied to this loan was the ordinary rate provided for in Article 247 of the German Civil Code (*Bürgerliches Gesetzbuch* or 'BGB'), which on the relevant date was 1,97 %<sup>(9)</sup>. The maturity of the loan was set until 30 June 2005. As collateral, a charge was placed over the land and the buildings of the airport (*Grundschild*) in favour of EEL GmbH for the amount of the loan, namely EUR [11-20] million. In addition to that figure, [15-23] % interest was to be added annually, should the collateral be used in case of non-payment. Additionally, [...] provided a personal guarantee for the loan (*selbstschuldnerische Bürgschaft*) for a maximum amount of EUR [5-15] million. Germany did not provide details as regards the value of this personal guarantee. This personal guarantee was replaced on 8 June 2003 by a personal guarantee provided by the [...] for the amount of EUR [5-15] million. In addition, FN GmbH's private shareholders pledged both their shares of ANH GmbH's shares in FN GmbH's capital (assessed to EUR [20-30] million) and Airport Network BV's shares in ANH GmbH's capital. Germany did not provide full details as regards the value of the collateral provided.
- (35) According to Germany, with this loan, the public owners of EEL GmbH wanted to provide FN GmbH with bridge financing to cover operational liquidity shortages in order to enable it to complete the acquisition and installation of assets necessary for the timely start of airport operations.
- (36) In 2003, airport operations began and FN GmbH incurred a loss of EUR 7 million. Only one year after the airport started its commercial flight operations, that is in 2004, the most important airline for the airport, Dutch company V-Bird, ceased its operations due to insolvency. In view of the

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resulting on-going financial problems of FN GmbH, EEL GmbH continued to grant loans to FN GmbH in the course of 2004:

- (a) On 17 June 2004, EEL GmbH granted FN GmbH a second loan ('Loan 2') amounting to EUR [2-5] million with the same maturity date as the first loan granted in 2003 (i.e. until 30 June 2005). The interest rate was set at [1-5] % above the applicable base rate. According to Germany, the base rate of interest applied to this loan was the one set out in Article 247 BGB on that date, i.e. 1,14 %. As collateral, a charge was placed on the land and buildings of the airport (*Grundschuld*) in favour of EEL GmbH covering the amount of the loan of EUR [2-5] million. In addition [15-23] % interest was to be added annually, should the collateral be used in the event of non-payment. Additionally a pledge on the shares of Airport Network BV's in ANH GmbH's capital and a pledge on ANH GmbH's shares in FN GmbH's capital was established. Germany did not provide full details as regards the value of the collateral provided.
- (b) One month later, on 28 July 2004, EEL GmbH granted FN GmbH a third loan ('Loan 3') amounting to EUR [2-5] million. The maturity of the third loan was set for 31 December 2007 and an interest rate of [3-8] % above the applicable base rate was established. According to Germany, the base rate of interest applied to this loan was the one set out in Article 247 BGB on that date, i.e. 1,13 %. As collateral, a charge was placed on the land and buildings of the airport (*Grundschuld*) in favour of EEL GmbH covering the amount of the loan of EUR [2-5] million. In addition, [15-23] % interest was to be added annually, should the collateral be used in the event of non-payment<sup>(10)</sup>. Additionally a pledge on the shares of Airport Network BV's in ANH GmbH's capital and ANH GmbH's shares in FN GmbH's capital was established. Furthermore a pledge of the enterprise of FN GmbH was also established. Germany did not provide full details as regards the value of the collateral provided.
- (37) Overall, in 2004 alone FN GmbH received EUR [4-10] million in loan granted by EEL GmbH (in addition to the second series of measures under investigation granted directly by the district of Kleve — see section 3.2). According to Germany, these loans were granted for the purpose of the development and conversion of the former, military used airport, not for operating expenses.
- (38) At the end of 2004, FN GmbH had again incurred losses, this time amounting to EUR 8,3 million. Once again, FN GmbH appeared to be in need of further liquidity. Repayment of Loan 1 and Loan 2 (together amounting to EUR [10-20] million) granted by EEL GmbH would have been due on 30 June 2005. At that time, FN GmbH had reimbursed interests from previous loans partially. According to Germany, the losses incurred by FN GmbH between 2002 and 2006 were however borne by its private owners.



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- (39) In that context, on 1 July 2005, EEL GmbH granted a fourth loan ('Loan 4') to FN GmbH, this time amounting to EUR [4-10] million with a maturity date of 31 December 2010. Paragraph 1, point 2 of the loan agreement stipulated that the loan was earmarked for investments only. In addition, paragraph 2 required FN GmbH (and EEL GmbH if it requested to) to check that invoices were strictly linked to the completion of the airport and that EEL GmbH (and not FN GmbH) paid the invoices from the loan. In addition, Loan 1, Loan 2 and Loan 3 amounting in total to EUR [15-30] million (without interest) were rolled over ('Extension 1'). The maturity of these loans was harmonised and extended to 31 December 2010. A fixed interest rate of [1-5] % was set for all these loans applicable as of 1 July 2005. Thus the interest rate for Loan 1, Loan 2 and Loan 3 was lowered. As collateral, a charge was placed on the land and buildings of the airport (*Grundschuld*) in favour of EEL GmbH for the amount of the fourth loan (EUR [4-10] million) additionally to the extension of the previous pledges for Loan 1, Loan 2 and Loan 3 (on top of which was to be added [15-23] % interest per annum, should the collateral be used in case of non-payment). Additionally, to secure all claims of EEL GmbH from all loans a personal guarantee was provided by [...] on 1 July 2005. (*selbstschuldnerische Bürgschaften*) for a maximum amount of EUR [20-30] million (plus interest and compounded interest). This guarantee extended the previous guarantee provided by [...] on 8 June 2003 in relation to Loan 1. Finally, a pledge on the shares of Airport Network BV's in ANH GmbH's capital and a pledge of ANH GmbH's shares in FN GmbH's capital was established. Germany did not provide full details as regards the value of the collateral provided.
- (40) Moreover, EEL GmbH and FN GmbH agreed that FN GmbH would have to pay interest on the date of the maturity, i.e. 31 December 2010 at the latest and that in case FN GmbH would break even and become profitable before that date, FN GmbH would be obliged to start paying interest as of the date at which it ceased making a loss. As regards the interest rates applicable for the first three loans until their harmonisation with the loan agreement of 1 July 2005, the rollover contract (*Darlehensverlängerungsvertrag*) of 29 November 2010 mentions in § 5 (5.4.) that each of the four loans bears [15-23] % yearly interest in case of non-payment<sup>(11)</sup>.
- (41) Germany stated that EEL GmbH agreed to step down in its creditor's rank (*Rangrücktrittklärung*) as regards the access to the land charges collateral between March 2009 and 31 December 2010 in order to enable FN GmbH to receive a short term loan from [bank] (see Recital 73).
- (42) FN GmbH became profitable in 2007. Nevertheless and contrary to prior contractual agreements, FN GmbH did not commence to reimburse either the loans or the interest. Calculated as of 31 December 2010, the maturity date contractually agreed by the parties, FN GmbH owed EEL GmbH EUR [20-30] million in loans plus EUR [7-10] million in interests, i.e. a total of

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EUR [24-40] million. EEL GmbH agreed for a second time to rollover all four loans and the cumulated interest payments (second extension). On 29 November 2010, FN GmbH and EEL GmbH signed a fifth loan agreement thus prolonging the maturity of all loans until 31 December 2016.

- (43) The interest rate for this second extension of the loans was set at [1-5] % p.a. Germany stated that the interest rate for the loan agreement of 29 November 2010 was established by adding [...] basis points to the reference rate of 1,24 %<sup>(12)</sup>. EEL GmbH and FN GmbH agreed that the interests due until 31 December 2010 were added to the loan principal thus increasing it to EUR [24-40] million. Additionally, FN GmbH was obliged to pay interest on a quarterly basis and that the first interest payment would be due by the end of the first quarter of 2011.
- (44) The following table summarises the main features of the five loan agreements under assessment:

Table 3

**Overview of public support measures from EEL GmbH in favour of FN GmbH**

Volume (in Million EUR)	Date of loan agreement	Interest rate	Maturity/roll over of loan	Collateral	Way of financing (EEL)
[11-20]	11.4.2003	[1-5] % above base rate (1,97 %)	First maturity: 30.6.2005, rolled over for the first time to 31.12.2010, rolled over for the second time to 31.12.2016	—	Charge on granted by land the district and of Kleve: building (EUR (5-15) Million at [1-5] %); of EUR [2-5] [...] Million (selbstschuldnerische Bürgschaft) bank], Pledge of guarantor: ANH municipality GmbH of Weeze). The EUR and [2-5] Million loan is converted shares on 30.6.2005, and [bank] takes over

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Table 3

**Overview of public support measures from EEL GmbH in favour of FN GmbH**

					as new creditor.
[2-5]	17.6.2004	[1-5] % above base rate (1,14 %)	First maturity 30.6.2005, rolled over for the first time to 31.12.2010, rolled over for the second time to 31.12.2016	—	Charge on land and buildings (Kassenkredite') ANHf GmbH shares and FN GmbH shares
[2-5]	28.7.2004	[3-8] % above base rate (1,13 %)	First maturity 31.12.2007, rolled over for the first time to 31.12.2010, rolled over for the second time to 31.12.2016	—	Charge on land and buildings (Kassenkredite'). The district ANHf Kleve and GmbH Weeze inject EUR [0,4-1] million of capital into EEL GmbH. Pledge of the enterprise of FN GmbH
[4-10]	1.7.2005	[1-5] %	First maturity 31.12.2010, rolled over to 31.12.2016	—	Charge on land and buildings (Kassenkredite') The district of Kleve and municipality Weeze inject EUR [0,4-1] million of

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Table 3

**Overview of public support measures from EEL GmbH in favour of FN GmbH**

				—	Personal capital into guarantee of EEL GmbH. [...] ( <i>selbstschuldnerische Bürgschaft</i> ) Pledge on ANH GmbH shares and FN GmbH shares
[24-40] (= [20-30] (sum of all four loans) plus accumulated interest of (= [4-10])	29.11.2010	[1-5] %	31.12.2016	—	Charge prolongation on all land previous and loans to buildings ( <i>Gewerkschulden</i> )
				—	Personal guarantee by district of Kleve [...] (' <i>Kassenkredite</i> ') ( <i>selbstschuldnerische Bürgschaft</i> )
				—	Pledge by [bank] on possibly ANH with a GmbH continued shares public and guarantee FN of the GmbH Municipality shares of Weeze.

- (45) FN GmbH was at the end of the first quarter 2011 again not in a position to pay the first interest payment as agreed in the prolongation of the loan agreements (*Darlehensverlängerungsvertrag*) of 29 November 2010. The district of Kleve accepted the offer of the shareholder of FN GmbH to receive shares of FN GmbH by in March 2011 in a debt-to-equity swap for the continued deferral of the payments of interest and principal<sup>(13)</sup>. However, this debt-to-equity swap

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was legally signed only at the end of 2012. The district of Kleve currently owns 1,88 % of FN GmbH's share capital<sup>(14)</sup>.

### 3.2. **Measure 2: Support from the Land Nordrhein Westfalen**

- (46) On 15 October 2002, FN GmbH was granted public support of EUR 3,525 million by the Land Nordrhein Westfalen for the financing of 50 % of the following costs: handling apron, fueling area, widening of taxiways and rehabilitation of existing apron areas, precision approach lighting system, edge lighting, start and runway lighting.
- (47) The legal basis for this support was the Land Nordrhein-Westfalen's Ministry for Transport, Energy and spatial planning's decree concerning public support for construction and renovation measures (infrastructure investments) for airports in Nordrhein-Westfalen (*Richtlinien über die Gewährung von Zuwendungen für Ausbau- und Erneuerungsmaßnahmen auf Flugplätzen RdErl. — MBl.NRW.1993 S. 617*) ('the 1993 Decree'). These guidelines were subsequently replaced by the Guidelines with reference (*VA 5 — 10 — 60/195- v. 25 November 2002*)<sup>(15)</sup>, which were in force between 1 January 2003 and 1 January 2008.
- (48) According to the 1993 Decree provided for the granting of financial support to cover investment costs for certain types of airport infrastructure such as runways, taxiways, aprons, protection strips, air traffic control infrastructure (tower, radar, optical alert systems), navigation lights, optical landing support devices, high rise buildings (terminals, hangars etc.), parking facilities, fencing, infrastructure for flight safety, supply and disposal, noise protection, fire protection, winter and rescue services as well as investment costs for compensational measures for landscape conservation and environmental protection. By means of the 1993 Decree, the Land Nordrhein-Westfalen provided support up to 40 % of the eligible costs for the above mentioned airport infrastructure types. International airports and regional airports could receive support of up to 65 % of the eligible costs. For parking facilities, fencing and flight safety infrastructure, up to 80 % of the eligible costs could be granted as support upon application from the airport.

### 3.3. **Measure 3: Support granted from the district of Kleve directly to FN GmbH concerning the acquisition of the airport real estate**

- (49) As described in Recital 28, the German Federal Government sold the airport estate on 14 March 2002 for EUR [5-15] million to FN GmbH. On the same day, the district of Kleve entered into an agreement with FN GmbH with regard to the provision of bridge financing of part of the acquisition costs of the airport real estate. The bridge financing was granted by means of an interest free loan, totally collateralised with the airport estate properties (therefore worth EUR [5-15] million on the date of the granting of the loan). It was agreed that an amount of EUR [4-10] million of the EUR [5-15] million would be pre-financed by the district of Kleve. Airport Network B.V., the

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parent company of ANH GmbH, had to reimburse a first tranche amounting to EUR [2-5] million of this interest free loan to the district of Kleve by 30 December 2003 (which it did). The second tranche of EUR [2-5] million was payable five years after the start date of the flight operations at the airport, at the latest on 31 December 2007, unless a job creation clause of the agreement (350 jobs) between the district of Kleve and the FN GmbH was fulfilled.

- (50) On 8 July 2004, the district of Kleve decided that FN GmbH would not have to reimburse the second tranche of EUR [2-5] million since more than 350 jobs had been already created.

#### 3.4. **Measure 4: Public support to EEL GmbH**

- (51) In order to be able to grant loans to FN GmbH, EEL GmbH itself required refinancing. EEL GmbH has refinanced itself through obtaining loans of:

(a) EUR [5-15] million and EUR [2-5] million at an interest rate of [1-5] % per annum set to mature on 30 June 2005. These two loans were granted by the district of Kleve on 11 April 2003 and 16 June 2004 respectively.

(b) EUR [1-5 million] at an interest rate of [2-5] % per annum set to mature on 30 December 2007. This loan were granted by the district of Kleve on 28 July 2004<sup>(16)</sup>.

- (52) In July 2005, EEL GmbH's capital structure was transformed by its shareholders who decided a EUR [5-15] million capital injection and a EUR [1-4] million debt-to-equity swap, which reduced the first loan debt to EUR [3-13] million. EEL GmbH reimbursed the second loan amounting to EUR [2-5] million. Finally, the remaining loan contracts of EUR [3-13] million and EUR [2-5] million were extended until 31 December 2010. The interest rate was then set to [3-8] % on 1 July 2005 and [3-8] % as of 1 November 2005. On 29 November 2010, these two loans were again extended until 31 December 2016, at an interest rate of [3-8] %.

- (53) The district of Kleve further injected capital into EEL GmbH in 2006 (EUR [1-5] million) and in 2007 (EUR: [2-6] million). These amounts have been booked as a capital reserve in the society and are due for repayment together with the loan repayments at the end of 2016. Altogether, the two public shareholders have granted EEL GmbH EUR [24-40] million ([15-25] million in capital injections including the debt-to-equity swap measure and EUR [10-20] million in loans).

- (54) In parallel, EEL GmbH received on 2 May 2003 a loan of EUR [2-5] million from the privately owned [bank]. The loan was set to mature on 30 June 2005 with an interest rate of [1-5] %. The municipality of Weeze provided a 100 % public guarantee for this loan in favour of EEL GmbH and the [bank], respectively. On 30 June 2005, this loan was converted and the publicly owned [bank] (a subsidiary of [bank]) replaced [bank] as creditor. The maturity was extended a first time until 30 December 2010 with the interest rate set to

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[1-5] %, and a second time in 2010 until 31 December 2016 with an interest rate of [1-5] %.

#### 4. **FOUNDATIONS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE**

##### 4.1. **Measure 1: Loans granted by EEL GmbH to FN GmbH**

(55) In the opening decision, the Commission expressed doubts as to whether the loans provided by EEL GmbH to FN GmbH had been granted and rolled over at market terms. The Commission noted first that Germany had not provided a credit history or a rating of the loan recipient. Moreover, the Commission could not exclude that FN GmbH was a company in financial difficulty. The Commission also pointed out that Germany had not provided any explanation regarding the interest rates applied to the individual loans or the collateral received. The Commission also noted the absence of explanations as to why the publicly owned loan grantor had repeatedly agreed to roll over the loans, always extending their maturity and why the reimbursement of the loan principal and the interests due had so far never been enforced.

(56) On the basis of such considerations the Commission took the preliminary view that in granting and rolling over the loans to FN GmbH, EEL GmbH did not act as a market economy investor or a market creditor. Given that FN GmbH appeared to have been a company in difficulty throughout the entire period, which was unable to obtain funding from commercial banks at least until the end of 2010, the Commission took the preliminary view that the entire amount of the loans, plus the outstanding interest, should be qualified as State aid.

(57) Since these measures were put into effect without being notified to the Commission, the Commission provisionally concluded that they constituted illegal State aid.

(58) Finally, the Commission raised doubts as to the compatibility of the agreements at issue with the internal market, should they qualify as State aid, notably in view of the rules laid down in the Rescue and Restructuring Guidelines<sup>(17)</sup>.

##### 4.2. **Measure 2: Support from Land Nordrhein-Westfalen to FN GmbH**

(59) In the opening decision, the Commission noted that the support provided by the Nordrhein-Westfalen Land to FN GmbH was a selective measure since not all airports in the Land were eligible for such support. Given that the support came from public funds and provided an advantage to the airport by granting investment support, it could not be excluded that the support constituted State aid.

(60) Since these measures had been put into effect without being notified to the Commission, the Commission provisionally concluded that they constituted unlawful State aid.

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(61) Finally, the Commission raised doubts as to the compatibility of the measure at issue with the internal market, should it qualify as State aid, notably in view of the rules laid down in the Rescue and Restructuring Guidelines<sup>(18)</sup>.

4.3. **Measure 3: Direct support from the district of Kleve to FN GmbH**

(62) As regards the direct support from the district of Kleve to FN GmbH, the Commission took the preliminary view that no market investor would have provided such a grant without any remuneration. Furthermore, the Commission expressed doubts as to the willingness of a market economy investor to waive part of the repayment of an outstanding grant on the basis of job creation considerations in the region.

(63) Since these measures were put into effect without being notified to the Commission, the Commission provisionally concluded that they constituted illegal State aid.

(64) Finally, the Commission raised doubts as to the compatibility of the measure at issue with the internal market, should it qualify as State aid, notably in view of the rules laid down in the Rescue and Restructuring Guidelines<sup>(18)</sup>.

4.4. **Measure 4: Capital injections and loans to the benefit to EEL GmbH**

(65) In the opening decision, the Commission expressed doubts as to whether the financing provided to EEL GmbH by its public shareholders were granted and rolled over at market terms.

(66) Since these measures were put into effect without being notified to the Commission, the Commission provisionally concluded that they constituted illegal State aid.

(67) Finally, the Commission raised doubts as to the compatibility of the measures at issue with the internal market, should they qualify as State aid.

5. **COMMENTS FROM GERMANY**

5.1. **General comments**

5.1.1. *Project Background*

(68) Germany recalls the background of the project as described in section 2.1 and 2.2 above. The cornerstone of the ‘Euroregionales Zentrum für Luftverkehr, Logistik und Gewerbe’ was the development of a privately-owned and run civilian airport on the former military airfield.

(69) Germany argues that the development of the traffic growth was hampered by external factors. First, the bankruptcy of V-bird in October 2004, which located its main operations base in Niederrhein-Weeze, caused a significant traffic loss, which could not be fully compensated by Ryanair and Hapagfly's additional flights until 2008, when the traffic reached its 2004 level. Second,



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a series of legal actions brought before national Courts repeatedly created legal uncertainty for airlines<sup>(19)</sup> and implied unforeseeable extra-costs for FN GmbH. Before it could get the final operating licence in 2009, FN GmbH could not implement its strategy due to the ongoing litigations, and opted to settlement actions outside court. The successful outcome, however, required FN GmbH to pay compensations to the parties to these proceedings amounting to EUR [5-10] million. Third, airport traffic was penalised in 2010 by air traffic disruption caused by the eruption of Iceland's Eyjafjallajökull volcano. Fourth, Germany notes that in September 2010, it introduced a passenger tax, which undermined the competitiveness of Niederrhein-Weeze vis-à-vis other European airports not subject to that tax. According to Germany, this translated in Ryanair reducing its operations from Niederrhein-Weeze, which witnessed a passenger volume decrease in both 2011 and 2012.

- (70) Germany claims that despite these adverse events beyond the control of FN GmbH, EEL GmbH or their shareholders, the success of the project is demonstrated by the steadily increasing traffic over the period under investigation (see Recital 18), which matched or even exceeded the traffic forecast by the various expert studies (except in 2011). In addition, Germany points out that FN GmbH could also increase non-aviation revenues and improve its profitability over time.

5.1.2. *The logic of private financing of the airport*

- (71) Germany points out that Niederrhein-Weeze is a 'success story' airport, since it is now not only the third largest airport in Nordrhein-Westfalen, but also a unique example of a privatised infrastructure sold at market price. Germany adds that the investments into the airport was always maintained at a very high level. In the period 2002 to 2011, FN GmbH's overall investments amounted to EUR [60-90] million, of which EUR [20-30] million was applied to the development of commercial buildings, EUR [10-20] million in flight and apron facilities and EUR [5-10] million to start-up and expansion projects. Germany claims that since its privatisation FN GmbH could continuously rely on private resources to finance these significant investments, namely: (i) shareholder' loans and capital injections, (ii) commercial banks' loans and (iii) FN GmbH's own operational profits.
- (72) As regards the majority shareholder's support, Germany considers that ANH GmbH and its own shareholders have repeatedly supported their subsidiary FN GmbH to cover its initial operating losses as well as its investments into the airport infrastructure. This support took the form of capital injections and loans, for which the majority shareholder accepted to step down in its creditor's rank (*Rangrücktrittklärung*). By doing so, the majority shareholder turned debt receivables into equity that could no longer be part of the insolvency mass. However, Germany notes that the sole private shareholders could not have sustained the whole financial burden for such a costly investment, and needed additional sources of funding, which only







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Table 5

**FN GmbH adjusted cost structure (cleared from public-remit related costs)**

Adjusted annual profit	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Adjusted EBITDA	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

5.1.3. *Notion of aid — Airport construction seen as a non-economic activity*

- (76) Germany considered that the construction of an airport is not an economic activity that private investors would be ready to undertake on their own and that there is no such an example in Europe (see next section). According to Germany, private investors would be much more interested to operate an airport infrastructure, which already exists, because the risks are reduced and manageable.
- (77) Germany suggested that the construction of airport infrastructure should no longer be part of the scope of State aid control in order to remedy the lack of private investment in that area. Germany argues that the construction of such an infrastructure constitutes a tool, by which the State can steer economic development and structure land planning through transport policy.
- (78) In addition, Germany considers that public support in the case at hand was mostly targeted at public remit activities, which fall out of the scope of Commission State aid control. Out of the [20-30] million [20-30] would have been invested into fire protection and security systems. Germany added that the outstanding EUR [2-5] million had been completely used for the financing of other activities in 2011.

5.1.4. *Notion of aid — Non-existence of a hypothetical reference investor*

- (79) Germany is of the opinion that there is no market for the financing of privately owned regional airport infrastructure in Europe. According to Germany there are only few fully privatised airports in Europe. Glasgow-Prestwick or Luton are examples of such airports. Although no State aid investigation had been opened concerning such fully private airports, Germany doubted the absence of public support to those airports. Germany underlined that even in the example of Lübeck-Blankensee airport, the public municipality of Lübeck regained ownership of the platform in 2009. This scarcity of private ownership would pertain to the high level of fixed costs necessarily incurred for the construction of an airport infrastructure, acknowledged by the Commission in the draft 2014 Aviation guidelines, which were in preparation when the formal investigation procedure<sup>(21)</sup>. In addition, Germany noted that the legal uncertainties created by the mandatory certification process of the airport, the

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concomitant delivery of the *Aéroports de Paris* judgment and the signing of an international treaty between Germany and the Netherlands deterred private investors from entering into this type of project. According to Germany, the Commission's initial assessment in the opening decision wrongly overlooked the fact that commercial banks were unsurprisingly adverse to financing the construction of private airports, and that there was no functioning market in that area.

- (80) Germany takes the view that the Commission's preliminary assessment did not rely on clear criteria to assess the market conformity of the measures under scrutiny. According to Germany, the Commission should on the contrary have relied upon established case law<sup>(22)</sup> in the context of universal postal services, which would confirm that the creation and maintenance of a network are not in line with a purely commercial approach. Germany also suggests relying on existing Commission practise, where the Commission has allegedly approved similar support measures. To support these views, Germany used the example of the financing of Kassel-Calden airport infrastructure.
- (81) Germany concluded that, in light of the successful development of the airport, any private investor would have invested in the Niederrhein-Weeze airport as Germany did.

5.1.5. *FN GmbH does not qualify as a company in difficulty*

- (82) Germany refutes the Commission's preliminary conclusion that FN GmbH may qualify as a company in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the Rescue and Restructuring Guidelines')<sup>(23)</sup>.
- (83) Germany bases that claim on five grounds. First, FN GmbH would have already achieved gains after a very short start-up phase (first positive EBITDA in 2006 — excluding public remit expenses — and first net profit in 2007). Germany notes that in its assessment of financing measures in favour of regional airports, the Commission had never qualified a loss-making beneficiary as a company in difficulty during the start-up phase. According to Germany, should the Commission persist in that line of reasoning, it would not be possible for any airport infrastructure to be financed any longer.
- (84) Second, Germany argues that no 'hard' criteria for a firm in difficulty were fulfilled at any time. Germany disputes the comments made in the opening decision as regards negative equity and adds that the majority shareholder kept the company financially afloat — through a loan, new capital injection and the agreement to step down in its creditor's rank (*Rangrücktrittklärung*). In addition, Germany contests the Commission's interpretation of the General Court's judgments in cases T-102/07 and T-120/07 *Freistaat Sachsen/Commission* insofar it implies automaticity between the existence of negative equity and qualification as a company in difficulty. According to Germany,

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the negative equity criterion is only one of several criteria identified by the General Court to determine whether a firm is in difficulty.

- (85) Third, Germany states that FN GmbH exhibits no symptoms suggesting that the company is in difficulty, since FN GmbH's business development has been positive since its inception. In particular, the fact that FN GmbH's interest charges increase would not reveal financial difficulties such as over-indebtedness, but would rather reflect the main shareholder's repeated investment into FN GmbH.
- (86) Fourth, Germany argues that FN GmbH could solve its financial difficulties thanks to its own operational profits, loans from commercial banks as well as loans and funds received from its majority shareholder.
- (87) Finally Germany claims that FN GmbH cannot be deemed a company in difficulty under the Rescue and Restructuring Guidelines, which exclude companies created less than three years after their creation (like FN GmbH GmbH) from that qualification.

#### 5.1.6. *Distortion of competition*

- (88) Germany argues that in the opening decision, the Commission failed to demonstrate the effects of the support measures on competition on the relevant market, which it failed to define.
- (89) After making these general comments, Germany took position on the various measures under assessment:

### 5.2. **Measure 1: EEL GmbH's support to FN GmbH**

#### 5.2.1. *EEL GmbH control over FN GmbH*

- (90) Germany claimed that all payments funded from the loans granted by EEL GmbH to FN GmbH were strictly controlled by EEL GmbH, which supervised their direct transfer to the creditors on behalf (*treuhänderisch*) of FN GmbH.
- (91) According to Germany, by doing so, EEL GmbH could ensure that its resources would be exclusively allocated to investments, and not to day-to-day operations.
- (92) Germany notes in addition, that as shareholders of EEL GmbH, the district of Kleve and the municipality of Weeze have been granted several exclusive rights in FN GmbH's founding act (*Geschäftsvertrag*) such as the power to appoint FN GmbH's CEO (used in 2004) and several veto rights regarding individual management measures, as well as the modifications or the sale of FN GmbH' capital. These rights will be valid until FN GmbH has repaid all its debts to these two shareholders.

#### 5.2.2. *Ex ante assessment of the market conditions and the investments needed*

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- (93) Germany argued that throughout the period under investigation, all investments decisions had been underpinned by market studies the conclusions of which pointed systematically to the necessity of the investment.
- (94) In that regard, Germany mentions first a 1998 study (carried out by [...]) according to which the Niederrhein-Weeze project appeared to be economically sound and sustainable. Germany mentioned additional studies produced shortly afterwards, which recommended the specialisation of the new airport infrastructure to the LCC segment, which was then identified as the most promising growth source in the late 1990s. The construction of an infrastructure explicitly designed for LCC traffic, the geographical situation of the airport (catching around 35 million inhabitants), the saturation of the nearby Amsterdam and Dusseldorf airports were then depicted as competitive advantages.
- (95) Germany further refers to further business plans which relied upon the expected growth of LCC traffic, the saturation of the neighbouring airport platforms, the signing of agreements with Ryanair, to predict the financial success of the airport. Given the need to enforce environmental protection rules, FN GmbH simultaneously commissioned an air traffic forecast from [...] ('the [...] study'), which anticipated for 2010 a traffic of 2,88 million passengers, and for 2020 a traffic ranging between 3,1 and 4,85 million passengers. Germany observes that the traffic records show that the business plan was perfectly respected until 2010, despite the adverse events described above.
- (96) Germany further explains that in 2009, in view of the enlarged scope of Ryanair activities at the airport, FN GmbH commissioned another business plan covering the year 2009-2020 ('the 2009 business plan'). This business plan was transmitted to [bank], which could take this expert's study into consideration when making the decision to grant a commercial loan to FN GmbH.
- (97) In light of those elements, Germany contested the Commission's preliminary views that FN GmbH's business model was unsustainable and that the privatisation process was conducted on political considerations and not on pure commercial terms.

#### 5.2.3. *Market-conformity of EEL GmbH's loans to FN GmbH*

- (98) Germany stated that the opening decision uses an incorrect legal basis to assess the market conformity of the interest rates of the loans granted by EEL GmbH. According to Germany, the Commission used the 2008 Communication from the Commission on the revision of the method for setting the reference and discount rates ('the 2008 Reference Rate communication')<sup>(24)</sup> in its assessment. Germany argues that since most



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measures under scrutiny were granted between 2003 and 2005, the Commission should have applied its 1997 notice on the method for setting the reference and discount rates ('the 1997 Reference Rate communication')<sup>(25)</sup>.

- (99) Moreover, irrespective of which of the two communications would be applicable *ratione temporis*, Germany questioned the applicability of any Commission reference rate to this case on the grounds that there is allegedly no functioning financial market for the construction of airport infrastructure.
- (100) Germany added that the loans granted by the public authorities were totally market compliant on the following grounds:
- (a) all loans agreements provided for the repayment of the principal accrued with market conform and/or legally applicable interests;
  - (b) all loans granted to FN GmbH were completely and constantly secured by (i) charges on land of prime rank (*Grundschild auf sämtliche Grundstücke*), (ii) Airport Network BV's shares in ANH GmbH's capital and (iii) ANH GmbH's shares in FN's capital;
  - (c) the interest rates of the loans granted to FN GmbH, ranging from [1-8] %, were at all times market-compliant taking into account the significant initial contribution of private capital injections (around [20-50] %) in the overall project financing and the high level of collateralisation;
  - (d) these interest rates are equivalent to the interests granted for 10-year maturity loans that are 80 % collateralised with estate properties.
- (101) As regards the private investor test, Germany referred to the case-law in the *Italian Republic v Commission* case<sup>(26)</sup> where the Court stated that 'In order to determine whether such measures are in the nature of State aid, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount'. Germany argued that a private investor in lieu of EEL would have taken into account the obligation of legal compliance and accepted that the profitability of the investment could be delayed given the compliance costs, as already recognised by the Commission in the previous individual aid case *Einzelbeihilfe für Wasserwerke*<sup>(27)</sup>. Germany also added that a private investor may also take into account the strategic nature/objective of the business model to adapt its profitability projections. According to point 3.2 (v) of the Commission Communication on Public authorities' holdings in company capital of 14 September 1984<sup>(28)</sup>, 'the strategic nature of the investment in terms of markets or supplies is such that acquisition of a shareholding could be regarded as the normal behaviour of a provider of capital, although profitability is delayed'. Germany concluded that this provision rules out the presence of an economic advantage involving State aid.

### 5.3. **Measure 2: Land NordRhein Westfalen's support measure to FN GmbH**

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- (102) According to Germany, the support measure granted by a decision of Land Nordrhein Westfalen to FN GmbH on 15 October 2002 for an amount of EUR 3,525 million actually constitutes no aid or at least existing aid within the meaning of the Procedural Regulation. Germany argued that that the measure has been adopted on the basis of the 1993 Decree. According to Germany, the decree had been adopted before the Commission notice on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA agreement to State aids in the aviation sector ('the 1994 Aviation Guidelines')<sup>(29)</sup>.
- (103) Germany added that the financing of airport infrastructures only constituted State aid and became subject to the Commission's scrutiny at a later stage, following: (a) the Commission's adoption of its Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ('the 2005 Aviation Guidelines') in 2005 and (b) the adoption of landmark judgments in that sector by the General Court and the Court of Justice of the European Union<sup>(30)</sup>.
- (104) Germany also argued in this respect that the Commission used an incorrect legal basis in the opening decision to preliminary assess Measure 2. Indeed, the opening decision<sup>(31)</sup> was based on the new version of the 1993 Decree, which entered into force on 1 January 2003, after the granting of the measure.
- (105) Finally, Germany considers that, since the 1993 Decree, on the basis of which the aid measure under scrutiny has been adopted, has been repealed, there is no need for the Commission to make use of the provisions of the Procedural Regulation related to existing aid.

#### 5.4. **Measure 3: Direct support from the district of Kleve to FN GmbH**

- (106) Germany considers that the granting of the bridge financing was necessary to accompany the private investment into the airport at the startup phase. As regards the waiving of FN GmbH's obligation to repay the second loan tranche, Germany holds that the district of Kleve deliberately took that decision since FN GmbH had fulfilled its legal obligation to create at least 350 jobs.

#### 5.5. **Measure 4: public refinancing of EEL GmbH**

- (107) Germany contests that the refinancing of EEL GmbH constitutes an operation involving the State, since it is merely a capital injection undertaken by EEL GmbH's shareholders. Germany points out that the refinancing of the EEL GmbH was carried out by the public owners and private banks.
- (108) Germany claims that the opening decision counts the alleged State aid twice (FN GmbH's refinancing by EEL GmbH, and EEL GmbH's refinancing by its public shareholders) although they form only one single measure. Germany recalls that the Commission had renounced to proceed to a double assessment in the similar *Leipzig/Halle* case<sup>(32)</sup>.

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- (109) Germany denies that EEL GmbH was involved in any economic activity and argues that EEL GmbH should be instead considered as a temporary Special Purpose Vehicle ('SPV') set up to manage and develop the airport infrastructure. Germany takes the view that EEL GmbH was set up to be more efficient in the project management than its two separate shareholders (the district of Kleve and the municipality of Weeze) and to channel start-up support provided by the latter in a more transparent way. According to Germany, no private investor would have carried out the same activities as those of EEL GmbH.
- (110) Finally, Germany added that EEL GmbH was making a profit margin thanks to the difference between the interest rates of the loans received from its shareholders and those granted to FN GmbH.

#### 5.6. **Compatibility assessment**

- (111) Germany doubts that the Commission thoroughly assessed the compatibility of the support measures in the opening decision. It adds that, in view of the issue relating to legitimate expectations explained below, the Commission should neither proceed further with the investigation nor consider any recovery of the support measure. Finally, Germany notes that the Commission had already cleared the support measures granted to the Kassel-Calden airport, which are similar to those granted to Niederrhein-Weeze airport. Germany infers from this that the Commission should declare the latter compatible with the internal market.

#### 5.7. **Legitimate expectations**

- (112) In its comments on the opening decision, Germany reiterated previous arguments as regards legitimate expectations. According to Germany, the Commission would have informed it in July 2009<sup>(33)</sup> that it had no intention to investigate the case further, and, by doing so, would have created legitimate expectations. Germany concluded that the Commission was then bound by the principle of good administration and should have closed the preliminary investigation. To support its views, Germany claimed that the Court of Justice of the European Union had established in the *Salzgitter case*<sup>(34)</sup> that a delay by the Commission in exercising its supervisory powers and ordering recovery of State aid did not render a recovery decision unlawful, except in exceptional cases (like this one) where the Commission would have manifestly failed to act and would have clearly breached its duty of diligence.
- (113) Germany argued that the Commission's formal investigation overlooked other Commission acts such as the 2005 Konver II Decision (granting 14,9 million ECU for the conversion of former military airports in Nordrhein Westfalen) and the action plan for airport capacity, efficiency and safety in Europe<sup>(35)</sup>, which would explicitly call for the creation of new airport infrastructure.

## 6. **COMMENTS FROM INTERESTED PARTIES**

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6.1. **Flughafen Düsseldorf GmbH**

(114) Flughafen Düsseldorf GmbH ('Flughafen Düsseldorf'), the operator of Düsseldorf airport, took the view that the four measures under scrutiny have affected competition in the Single market and should be declared incompatible. According to Flughafen Düsseldorf, the traffic at Niederrhein-Weeze was multiplied by ten in less than 10 years only because the airport's cost structure had been artificially lowered by public support. Because of the start of flight operations at Niederrhein-Weeze, Ryanair has abusively used the brand 'Düsseldorf' in its marketing campaigns, which have misled and diverted potential customers to Niederrhein-Weeze at the expense of Flughafen Düsseldorf.

6.2. **Niederrheinische Industrie — und Handelskammer Duisburg Wesel Kleve zu Duisburg**

(115) The Niederrheinische Industrie—und Handelskammer Duisburg Wesel Kleve zu Duisburg ('the Niederrheinische IHK'), the local chamber of commerce and industry, points that the closure of the military airport led to a loss of 400 jobs and around EUR 100 million of revenues per year for the district whereas conversely, the business development of Niederrhein-Weeze airport has been extremely positive and created over 1 200 jobs in the region. The Niederrheinische IHK further notes that the airport has grown according to the 2003 business plan and has turned into the third largest regional airport in the Land. The recent decrease in passengers traffic would be largely imputable to the introduction of the air passenger tax in Germany.

6.3. **Erlebe-Fernreisen and Atlasreisen**

(116) Erlebe-Fernreisen GmbH ('Erlebe-Fernreisen') and Atlasreisen Partnerunternehmen ('Atlasreisen'), two local travel agencies, expresses support to Niederrhein-Weeze airport's position in the procedure. Erlebe-Fernreisen takes the view that the renovation of the military airport and the cooperation with the management of Niederrhein-Weeze airport boosted the company's growth. Atlasreisen recalls the airport's ability to go through the difficult certification process and the introduction of the air passenger tax in Germany.

6.4. **Agello**

(117) Agello Service GmbH ('Agello'), an airport services provider, considers that the positive business development of Niederrhein-Weeze airport has turned it into the third largest regional airport in the Land and considers it to be a successful European project. In its view, the recent decrease in passengers traffic is largely imputable to the introduction of the air passenger tax in Germany.

6.5. **Pro:niederrhein**

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- (118) Pro:niederrhein, a group of local citizens supporting the Niederrhein-Weeze airport considers that the measures under assessment are not illegal and that the airport is important for the region, as highlighted by a petition signed by over 20 000 persons in 2006.

**6.6. Tower Company and STI**

- (119) The Tower Company GmbH ('Tower Company'), the airport service provider in charge of flight security, and STI Security Training International GmbH ('STI'), the passenger control service provider, considers that the public remit activities it carries out could not be relocated in case of closure of the airport. It invites the Commission to take employment into consideration in its assessment.

**6.7. Serve2fly and I-Punkt**

- (120) Serve2fly Heico Losch Airport Service GmbH ('Serve2fly'), the airport ground handling provider, and I-Punkt GmbH ('I-Punkt'), a local construction company, consider that the business development of Niederrhein-Weeze airport has been extremely positive and created over 1 000 jobs in this less developed part of the Nordrhein Westfalen region. Serve2fly argues that the views put across in the opening decision go against the Commission's own guidelines by preventing local airports from competing on the market. Serve2fly recalls the external adverse events that the airport had to cope with and invite the Commission to take them into account.

**6.8. Gaetan Data**

- (121) Gaetan Data GmbH ('Gaetan Data'), a local training company argues that the airport constitutes a unique resource in terms of airport training, and considers that the Commission should clear the case rapidly.

**6.9. Van Boekel, RAS and SOV**

- (122) Van Boekel GmbH ('Van Boekel'), a local company active, inter alia, in road construction works and landscape design, Rheinland Air Service Werft & Handel GmbH ('RAS'), the aircraft refuelling service provider, and Schilling Omnibusverkehr GmbH ('SOV'), the bus transport company serving Niederrhein-Weeze from Cologne and Düsseldorf, argue that the airport is now a profitable private airport with a truly European dimension.

**6.10. NRN Energie**

- (123) NRN Energie GmbH ('NRN Energie') states that the airport was financed by a private investor, contrary to Eindhoven airport, which could rely on the additional financing of military operations by the Netherlands. As regards public involvement, NRN Energie considers that the public loans have been granted on market terms. NRN Energie shared Germany's concerns on the breach of legitimate expectations.

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6.11. **KPP**

- (124) KPP Steuerberatungsgesellschaft mbH ('KPP'), a tax advisory services firm, refers to FN GmbH's significant return on capital ([10-20] %) in 2010. KPP argues that the loans received by FN GmbH should be considered as quasi equity for a significant part, and in any case, have been completely collateralised.

6.12. **The district of Kleve**

- (125) The district of Kleve supports all the comments made by Germany, in particular those related to the breach of legitimate expectations. It also emphasises the growing demand for regional airports in Nordrhein Westfalen, one of the most densely populated areas in Europe, which cannot be fully met by the nearby and nearly saturated Düsseldorf airport. The district of Kleve adds that the financing of Niederrhein-Weeze airport strictly adhered to the 2005 Aviation Guidelines, as the latter qualified as a category D airport (until 2007 included).

6.13. **FN GmbH**

- (126) FN GmbH supports all the comments made by Germany on the opening decision, to which it contributed. FN GmbH stresses that the measures under scrutiny do not constitute State aid, notably the loans granted by EEL GmbH, which were granted on market terms. According to FN GmbH, despite a very significant level of investment into the airport infrastructure (EUR [50-100] million), FN GmbH has been able to maintain a high equity ratio (above [20-50] %) and to limit the share of the financing measures under scrutiny to less than [20-50] % in the overall financing. FN GmbH adds that both traffic records and operational profits have been on the rise since the start of operations in 2003 so that FN GmbH make yearly profits since 2007. FN GmbH further notes that the operational revenues keep increasing and largely exceed the operational costs, which remain stable. According to FN GmbH, this solid operational performance would be even better, if all costs related to public remit expenses were deducted from the profit and loss accounts.
- (127) FN GmbH stresses that it is not a company in difficulty and that all loans have been granted on market terms. FN GmbH claims that, for this class of credit, the interests rates set out in the loans granted by EEL GmbH are higher than the Bundesbank' rates for new collateralised credits or the Pfandbriefindex<sup>(36)</sup> rates (plus a usual margin of 80 to 120 basis points).

6.14. **Other third parties**

- (128) Five individuals, doubt that:
- (a) the information provided by Germany reflected the real amounts granted to EEL GmbH and FN GmbH;

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- (b) the airport was able to survive without public loans;
- (c) there was no functioning financial market that could finance projects such as the Niederrhein-Weeze airport project;
- (d) FN GmbH would be in a position to repay all loans and interests on the repayment dates in 2016; the third parties concerned argue in that regard that Germany would have been forced to accept the debt-to-equity swap contemplated in 2011, which would constitute illegal aid as well as an operation that no private investor would have undertaken;
- (e) the interest charged by Germany to FN GmbH corresponds to market realities;
- (f) FN GmbH has created 350 jobs (which was a pre-condition imposed by Germany on FN GmbH to waive the repayment of the second tranche of EUR [2-5] million in 2004);
- (g) the real value of the collaterals provided by Airport Network B.V for the loans granted to FN GmbH is high<sup>(37)</sup>;
- (h) an investor would have taken the risk to grant loans to an airport that had not obtained its operating licence from the onset.

#### 7. COMMENTS FROM GERMANY ON THIRD PARTY COMMENTS

- (129) Germany did not consider that the elements provided by Mr Kleinschnittger may be validly used in the procedure since it discloses confidential information from the deliberations of the district of Kleve assembly, which has been illegally collected and transmitted to the Commission.
- (130) As regards the comments made by some individuals, Germany referred to its submissions of 18 March 2013 and 19 August 2013 summarised in Section 5.

#### 8. ASSESSMENT OF THE MEASURES

- (131) In accordance with Article 107(1) of the TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the internal market.
- (132) The criteria laid down in Article 107(1) of the TFEU are cumulative. Therefore, for a measure to constitute State aid within the meaning of Article 107(1) of the TFEU, each of the four following conditions need to be fulfilled. The financial support must:
  - be granted by the State or through state resources;
  - favour certain undertakings or the production of certain goods;
  - distort or threaten to distort competition; and
  - affect trade between Member States.

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- (133) In the present case, Germany has argued that EEL GmbH and its shareholders consistently acted as prudent market economy operators guided by profitability goals, and that the measures under assessment did not confer any economic advantage that the company would not have obtained under normal market conditions. If this is indeed the case, the measures implemented by Germany would not constitute State aid.

8.1. **Legitimate expectations**

- (134) Contrary to what Germany argues, the Commission has not created any legitimate expectations as regards the closure of the preliminary investigation. First, the argument that the Commission would have stayed inactive is irrelevant. In Joined Cases *Demesa and Territorio Histórico de Álava v Commission*<sup>(38)</sup>, the Court confirmed that that any apparent failure to act is irrelevant when an aid measure has not been notified to it. Since Germany failed to notify the aid (see Recital 247), Germany cannot invoke legitimate expectation. The Commission notes that the reference to the *Salzgitter* case law is irrelevant since this judgment concerns only the recovery period in case of an aid declared incompatible by a Commission decision and not the preliminary investigation period covered by Germany's comments. Finally, the Commission notes that, since it has never informed Germany of the closure of the case at hand, it is entitled to proceed to its formal investigation.

8.2. **Company in difficulty**

- (135) In the opening decision, the Commission found that it could not be excluded that FN GmbH was a company in financial difficulty. However, in view of the information provided by Germany, the Commission is of the opinion that the FN GmbH's financial situation has improved overtime:
- (a) the company was able to generate positive cash-flows less than 5 years after the start of operations (see table 5) and made a profit until the end of 2010, year of the last measure under scrutiny,
  - (b) the company always benefited from its private shareholders' support (see Recital 72) and could eventually access commercial bank credit (see Recital 73),
  - (c) FN GmbH's management never envisaged to file for bankruptcy during that period.
- (136) Therefore the Commission takes the view that the company was never in the situation described in paragraph 9 of the Rescue and Restructuring Guidelines where the company would have been 'unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the



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short or medium term'. The Commission concludes that FN GmbH should not qualify as a company in difficulty.

8.3. **Existence of Aid Concerning the Loans Granted to FN GmbH (Measure 1)**

8.3.1. *Notion of Undertaking and Economic Activity*

(137) Until recently, the development of airports was often determined by purely territorial considerations or, in some cases, military requirements. The operation of airports was organised as part of the administration rather than like a commercial undertaking. Competition between airports and airport operators was also limited and developed gradually.

(138) That situation has however changed in recent years. Although those land-use planning considerations and administrative structures may still persist in some cases, the majority of airports have been incorporated under commercial law in order to allow their operation on market terms in an increasingly competitive environment. The process of transfer to the private sector has normally taken the form of privatisation or a progressive opening-up of capital. In recent years, private-equity firms and investment and pension funds have shown a great interest in acquiring airports, as illustrated in the case at hand.

(139) As noted in paragraph 44 of the Commission Guidelines on State aid to airports and airlines ('the 2014 Aviation Guidelines')<sup>(39)</sup>, the gradual development of market forces in the airport sector does not allow for a precise date to be determined, from which the operation of an airport should without doubt be considered as an economic activity. However, the Union Courts have recognised the evolution in the nature of airport activities. In '*Leipzig/Halle airport*'<sup>(40)</sup>, the General Court held that, from the date on which the judgment in '*Aéroports de Paris*' was rendered, the application of State aid rules to the financing of airport infrastructure could no longer be excluded. Consequently, from the date of the judgment in '*Aéroports de Paris*' (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control.

(140) With regard to the present case, the various loans granted to FN GmbH by EEL GmbH, subject to the formal investigation procedure, to finance the construction of Niederrhein-Weeze airport, were granted as of 2003, that is after the '*Aéroports de Paris*' judgment. As a result, the Commission concludes that it is entitled to examine all loans granted to FN GmbH by EEL GmbH.

8.3.2. *State resources and imputability to the State*

(141) The concept of State aid applies to any advantage, granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.

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- (142) In the present case, the grantor of the aid EEL GmbH is entirely owned by public bodies, i.e. by the district of Kleve on one part and by the municipality of Weeze on the other part. For this reason, it is a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC<sup>(41)</sup> on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings.
- (143) The predominant influence of the district of Kleve and the municipality of Weeze at this time is clearly apparent in the shareholding structure since the district of Kleve (52 %) and the municipality of Weeze (48 %) are the sole shareholders of EEL GmbH. Moreover, the management board of EEL GmbH consists of two representatives of public bodies, namely the mayor of the municipality of Weeze and the Landrat of the district of Kleve.
- (144) The decisive influence of the public authorities on EEL GmbH is also financial because of the above mentioned fact that during the years 2004-2005, EEL GmbH has received from its shareholders various subsidies ('liquidity benefits' and capital injections). Thus, there has been a direct financial support to EEL GmbH granted by the public administration.
- (145) Therefore, the Commission considers that EEL GmbH is a public undertaking and that its resources must be regarded as State resources.
- (146) However, the Court has also ruled that, even if the State is 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 cannot automatically be presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the loans in question, to be imputable to the State. The Court indicated that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators.
- (147) Such indicators may include the integration of the undertaking into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or 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 scope of the measure, its content or the conditions which it contains.
- (148) It must first be noted that significant investment projects affecting an airport are of interest to local authorities, which are often involved to some degree

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in such projects. This is because an airport can play a fundamental role in several policies: transport policy, regional or national economic development policy or town and country planning policy. In the case at issue, the airport is actually operated by a private company. Nevertheless, the decision to convert the former military airport into a civil airport and to sell it to a private investor was a political decision. Moreover, the district of Kleve and the municipality of Weeze played a fundamental role in this conversion.

- (149) The Commission notes that EEL GmbH was founded by the two regional public bodies in order to prepare the airport real estate for further commercial use as civilian airport and to manage the real estate until the takeover by a private investor, as laid down in Article 2 of its founding act (*Gesellschaftsvertrag*)<sup>(42)</sup> of 16 December 1999. As explained in Recital 32, this activity ceased until the company's activity was revived in April 2003. Ever since, the nature of EEL GmbH's activities is limited to channelling new investments into the Niederrhein-Weeze airport, which is still consistent with its original mission.
- (150) Moreover, between 1999 and 2001, the airport was operated by the district of Kleve and the municipality of Weeze (through the then publicly owned FN GmbH) and EEL GmbH was especially created in order to assure the future functioning of the civilian airport.
- (151) It follows from the above that EEL GmbH ought to be regarded as a vehicle set up already defined at Recital 109 by the district of Kleve and the municipality of Weeze to achieve their public policy objectives vis-à-vis the Niederrhein-Weeze airport and in particular, its conversion from a military into a civil use, which the measures at issue were intended to finance and accompany. Those are strong indication that the measures at issue are imputable to the district of Kleve and the municipality of Weeze.
- (152) Moreover, the decision to grant loans and extensions of these loans to FN GmbH via EEL GmbH was taken by the shareholders of EEL GmbH, which represent the public authorities. The Commission also notes that the two public shareholders have determined the scope, the content and the conditions for each of loans granted by EEL GmbH in favour of FN GmbH, as highlighted in the minutes of EEL GmbH's general assembly.
- (153) Besides, all the loans granted from EEL GmbH to the airport operating company FN GmbH were refinanced by the district of Kleve<sup>(43)</sup>. This is a further indication that the decisions to grant loans and rollovers to FN GmbH originated in fact from the public authorities.
- (154) Furthermore, EEL GmbH has no board of directors. Both managing directors are representatives of the public shareholders. One managing director of the company is the Landrat, that is the head of the district of Kleve and the other managing director is the mayor of the municipality of Weeze. Moreover, EEL GmbH has no permanent staff and is managed by a single public official from

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the district of Kleve. It is apparent from these elements that any decision taken by EEL GmbH is in fact adopted by representatives from the public shareholders, who run it on a day-to-day basis in addition to sitting in its governing bodies. This confirms that the measures at issue are imputable to the public shareholders.

- (155) In addition, despite having the legal form of a private company, EEL GmbH is subject to public accounting rules<sup>(44)</sup>.
- (156) Finally, it is planned to dissolve EEL GmbH once FN GmbH has repaid all loans and interests due to it. Therefore, as argued by Germany, EEL GmbH should be seen as a vehicle created by its two public shareholders, the sole function of which is to pool resources to be channelled out to FN GmbH for investments purposes. This also confirms that the measures can be imputed to these public shareholders.
- (157) Therefore, the Commission takes the view that the decisions by EEL GmbH to grant the loans and repayment deadline extensions that form Measure 1 to FN GmbH constitute a transfer of State resources and are imputable to the State.

#### 8.3.3. *Selective economic advantage — Market economy investor/creditor principle*

- (158) In order to verify whether an undertaking has benefited from an economic advantage induced by granting of a loan at privileged terms, the Commission applies the criterion of the ‘market economy operator principle’. According to this principle, capital put at the disposal of a company by the State, directly or indirectly, in circumstances, which correspond to the normal conditions of the market, should not be qualified as State aid<sup>(45)</sup>.
- (159) Therefore, the Commission has to assess first whether the conditions of the four loans and the two loan extensions provided by EEL GmbH to FN GmbH confer an economic advantage to the latter, which would not have obtained under normal market conditions. In the present case, Germany explained, concerning the four loans that loan commitments in favour of FN GmbH from commercial banks were very unlikely at that time (2003-2005), as explained above.
- (160) The determination of the aid element of the measures refers to the concept of State aid and, as the Court of Justice has consistently held, ‘the concept of State aid must be applied to an objective situation, which falls to be appraised on the date on which the Commission takes its decision’. In order to assess whether loans from public sources have been granted on market terms or whether they entail an advantage for the lender, the Commission can, in the absence of a comparable market rate, base itself on the reference rate proxies. Consequently, the Commission considers that the appropriate method for determining the aid element is the method stated in the Communication from the Commission on the revision of the method for setting the reference and discount rates (‘the 2008 Reference Rate Communication’)<sup>(46)</sup>, which entered

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into force on 1 July 2008. The Commission proposes to examine the measures at issue in the light of that communication<sup>(47)</sup>.

- (161) According to the 2008 Reference Rate communication, the interest rate margin of a loan is dependent on the level of collateralisation and the credit rating of the borrower. Consequently, in order to determine the appropriate market conform interest rate, the Commission needs to take into account the credit rating of FN GmbH and the value of the collateral with which the loan was secured.

The credit rating of FN GmbH

- (162) During the period when the first four loans were granted FN GmbH has not been rated by a credit rating agency and a bank internal rating was also not available. For that reason Germany have commissioned the consultant company [...] ('the Consultant') to estimate a rating of FN GmbH for each of the years in which loans 1 to 4 were granted. The Consultant provided an estimation of the one-year probability of default (PD) and the rating. These estimations were then verified and confirmed by the audit company [...].
- (163) The estimations of the Consultant are made on the basis of the Solvability Regulation of 2006<sup>(48)</sup> which implements the rules of Basel II in Germany. According to the Solvability Regulation the banks are supposed to calculate the one-year probability of default in the frame of the so called Internal Ratings Based Approach (IRBA). However, some types of financing, called *Spezialfinanzierungen*, are excluded from the obligation to calculate a PD. For such types of financing the Solvability Regulation foresees a simple risk weighing instead. The Consultant based its estimation of the PD and the rating on this simplified method of assessment. According to that method, the following five factors are assessed: financial strength of the Borrower; political and legal environment; characteristics of the business; strength of the owner; collateralisation.
- (164) The PD for each of the loans is assessed to be between [0,5-3] % and [1-5] %. According to the Consultant this PD corresponds to a rating of [...]. It has to be noted that this rating evaluation includes an estimation of the level of collateral and hence the loss given default (LGD) associated with each of the loans. This means that the rating provided by the Consultant already includes a potential notch up for the provision of collateral and represents the issue rating (as opposed to an issuer rating). However the report of the Consultant does not include information about the value of the provided collateral for the loans in question and does not provide information about the actual level of LGD associated with each loan.
- (165) If only the first four factors, which the Consultant assessed, are taken into consideration (and the last one 'Collateralisation' is excluded) then the estimations of the Consultant should provide a rating close to the issuer rating. For example the average of the scores of the first four factors is [1-5] which

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could be interpreted as close to a rating of [...]. This issuer rating applies to loans 1, 2 and 3. For Loan 4 the issuer rating estimated according to this approach is [...].

- (166) The Commission notes that the report made by the Consultant leaves some doubts as regards the quality of the rating assessment. Furthermore, this rating estimation has to be taken with some caution given the fact that the Consultant has no credit relation with the Borrower. However, the rating estimation is fairly low on the rating scale used by credit rating agencies and does not appear inconsistent with the credit rating estimation made by [bank] for a later period.
- (167) In addition, Germany provided the estimation of the one-year probability of default (PD) of FN GmbH used by [bank] for 2009 and 2010. [bank] has provided a two-year loan of EUR [4-10] million to FN GmbH in 2009. [bank] estimated the one-year PD to be [1-5] % in 2009 as well as in 2010. According to estimations of the average probabilities of default published by rating agencies<sup>(49)</sup>, a one-year PD of [1-5] % corresponds to a rating between [...] and [...].

Collateral and Loss Given Default (LGD)<sup>(50)</sup>

- (168) The first loan is secured by the following collateral at the time when the loan was granted (11 April 2003):
- (a) Charge on the land and the buildings of the airport (about 6,2 million sq.m.). FN GmbH bought the land from the German state in 2002 for the price of EUR [5-20] M. A report of an independent evaluator made in September 2002 indicates that the market value of the land is about EUR [5-20] M. The book value of the long-term assets of the Airport at the end of 2002 (including the investments in the land and the buildings) was about EUR [5-20] M. At the time Loan 1 was granted a priority mortgage in favour of [...] for the amount of EUR [1-6] M existed on the land.
  - (b) Personal guarantee of Mr [...]; Germany did not provide information about the value of the personal property of the guarantor.
  - (c) Pledge of the shares of Airport Network (AV) B.V. in Airport Niederrhein Holding (ANH) GmbH; Germany did not provide information on the value of these shares.
  - (d) Pledge of the shares of ANH GmbH in FN GmbH; Germany did not provide information on the value of these shares.
- (169) If the book value of the long-term assets of the Airport is taken into account (EUR [5-20] M) and the priority claim of [...] is subtracted (EUR [1-6] M) about EUR [5-15] M are left to cover the claims of the Lender (EUR [5-15] M). The LGD is thus estimated to be about [...] %<sup>(51)</sup>. This is most probably a conservative estimation of the LGD as some additional value could be also attributed to the personal guarantee and the pledge of shares for which the information is missing.

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- (170) The second loan is secured by the following collateral at the time when the loan was granted (17 June 2004).
- (a) Pledge on the land and the buildings of the airport. The book value of the long-term assets of the Airport at the end of 2003 (including the investments in the land and the buildings) was about EUR [20-40] million. At the time Loan 2 was granted a priority mortgage in favour of [...] for the amount of EUR [1-6] million and a priority mortgage in favour of EEL GmbH for the first loan of EUR [11-20] M (see Loan 1 above) existed.
  - (b) Pledge of the shares of Airport Network (AV) B.V. in Airport Niederrhein Holding (ANH) GmbH. Germany did not provide information on the value of these shares.
  - (c) Pledge of the shares of ANH GmbH in FN GmbH. Germany did not provide information on the value of these shares.
- (171) If the book value of the long-term assets of the airport is taken into account (EUR [20-40] million) and the two priority claims of [...] and EEL GmbH are subtracted (EUR [1-6] M and EUR [11-20] M) about EUR [10-25] M are left to cover the claims of EEL GmbH from Loan 2 (EUR [1-5] million). The estimated recovery rate in this case is close to [...] %. The LGD is thus estimated to be [...].
- (172) The third loan is secured by the following collateral at the time when the loan was granted (28 July 2004).
- (a) Pledge on the land and the buildings of the airport. The book value of the long-term assets of the Airport at the end of 2003 (including the investments in the land and the buildings) was about EUR [20-40] M. At the time Loan 3 was granted a priority mortgage in favour of [...] for the amount of EUR [1-6] M and a priority mortgage in favour of the Lender for the first and the second loans of the total amount of EUR [10-20] M existed on the land.
  - (b) Pledge of the shares of Airport Network (AV) B.V. in Airport Niederrhein Holding (ANH) GmbH. Germany did not provide information on the value of these shares.
  - (c) Pledge of the shares of ANH GmbH in FN GmbH. Germany did not provide information on the value of these shares.
  - (d) Pledge of the enterprise of FN GmbH. There is no information about the value of this collateral.
- (173) If the book value of the long-term assets of the Airport is taken into account (EUR [20-40] M) and the two priority claims of [...] and EEL GmbH are subtracted (EUR [1-6] M and EUR [10-20] M) about EUR [10-20] M are left to cover the claims of the Lender from Loan 3 (EUR [2-5] M). The recovery rate in this case is about [...] %. The LGD is thus estimated to be [...].

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- (174) At the time when Loan 4 was granted (1 July 2005) all previous loans together with the unpaid and still due interest of about EUR [0,5-3] M were extended with the same maturity (31 December 2010). The total loan amount summed up to EUR [20-30] M plus EUR [0,5-3] M for unpaid interest. The collateral agreed to secure these claims of EEL GmbH was the following:
- (a) Pledge on the land and buildings of the airport. The book value of the long-term assets of the Airport at the end of 2004 (including the investments in the land and the buildings) was about EUR [20-40] M. At the time Loan 4 was granted a priority claim in favour of the Lender for the first, second and third loans existed for the total amount of EUR [10-25] M. No priority claim existed anymore on the loan granted by [...] <sup>(52)</sup>.
  - (b) Pledge of the shares of Airport Network (AV) B.V. in Airport Niederrhein Holding (ANH) GmbH; Germany did not provide information on the value of these shares.
  - (c) Pledge of the shares of ANH GmbH in FN GmbH; Germany did not provide information on the value of these shares.
  - (d) Additionally to secure all claims of EEL GmbH from all loans [...] provided a personal guarantee on 1 July 2005. This guarantee extended a previous guarantee provided by [...] in relation to the first loan on 8 June 2003. Germany provided an estimation of the value of the personal wealth of [...] excluding the value of his shares in Airport Niederrhein Holding GmbH and FN GmbH in order to avoid a double counting of collateral. At the end of 2004 the value of the personal wealth of the guarantor was estimated to be around EUR [20-40] million <sup>(53)</sup>.
- (175) The book value of the long-term assets of the airport (EUR [20-40] million) and the personal guarantee of [...] (EUR [20-40] million) cover more than 100 % of the total loan amount and due interest (EUR [20-30] million plus EUR [0,5-3] million). The recovery rate is hence [...] % and the LGD is [...].
- (176) On 29 November 2010 all granted loans at the total amount of EUR [20-30] million plus accumulated and due interest of EUR [5-10] million were extended for additional 6 years until 31 December 2016. The amount due was secured by the following collateral:
- (a) Pledge on the land and buildings of the airport. The book value of the long-term assets of the airport at the end of 2009 (including the investments in the land and the buildings) is unknown to the Commission. The latest known book value of the long-term assets is EUR [20-40] million the end of 2005. Germany reported the book value of the land and buildings at the end of 2010 to be EUR [30-70] million <sup>(54)</sup>. As this value was reported in the books shortly after the second loan extension, it may be accepted as the value of available collateral. A first rang mortgage on the land and buildings existed at that time to secure the claims of [bank] for EUR [0,5-3] million;



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- (b) Pledge of the shares of Airport Network B.V. in Airport Niederrhein Holding (ANH) GmbH; Germany did not provide information about the value of these shares at the time of the second extension;
  - (c) Pledge of the shares of ANH GmbH in FN GmbH; Germany did not provide information about the value of these shares at the time of the second extension;
  - (d) Pledge of shares of FN GmbH in FN Gewerbe GmbH and FN Grundbesitzgesellschaft; Germany did not provide information about the value of these shares at the time of the second extension;
  - (e) Personal guarantee provided by [...] with an estimated value of about EUR [30-70] million<sup>(55)</sup>.
- (177) The book value of the long-term assets of the airport (EUR [30-70] million) and the personal guarantee with an estimated value of about EUR [30-70] million minus the first rang pledge to [bank] (EUR [0,5-3]) cover about [...] % of the total loan amount and due interest (EUR [20-30] million plus EUR [5-10] million) which means an LGD of [...].
- (178) The table below summarises the information on rating and collateral for each of the loans:

Table 6

**Rating and collateral for each of the loans**

Loan	Date	Amount in million EUR (Loan + due interest)	Issuer Rating	Collateral value (land and buildings and personal guarantee)	Priority claim [...]	Priority claim [bank]	Recovery rate	LGD
<b>Loan 1</b>	11.4.2003	[11-20]	[...]	[5-20]	[1-6]	[...]	[...]	[...]
<b>Loan 2</b>	17.6.2004	[2-5]	[...]	[20-40]	[1-6]	[...]	[...]	[...]
<b>Loan 3</b>	28.7.2004	[2-5]	[...]	[20-40]	[1-6]	[...]	[...]	[...]
<b>Loan 4 and extension 1</b>	1.7.2005	[20-33]	[...]	[40-100]	[...]	[...]	[...]	[...]
<b>Extension 2</b>	29.11.2011	[24-40]	[...]	[70-120]	[...]	[1-3]	[...]	[...]

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- (179) According to the 2008 RRC the benchmark interest rates are determined by adding an appropriate risk premium to the 1-year base rate. The appropriate risk premiums are set out in the grid in the 2008 RRC and take into account the rating of the borrower and the level of collateralisation of the loan. For example the second loan extension was granted with high collateralisation and the rating of FN GmbH is between [...] and [...]. In order to be conservative the Commission considers a rating of [...]. Consequently, FN GmbH is in the rating group of ‘[...]’<sup>(56)</sup> in the grid determined in the 2008 Reference Rate Communication. The risk margin, which corresponds to this rating group and to high collateralisation, is [...] bps. The applicable base rate at the time when the loan extension was granted (on 29 November 2010) is 1,24 %<sup>(57)</sup>.
- (180) The following table summarises the information about the actual loan rates and the benchmark reference rates applicable at the moment of granting the loans according to the 2008 Reference Rate Communication:

Table 7

**Benchmark interest rates vs interests rate charged**

<b>Loan</b>	<b>Date</b>	<b>Duration</b>	<b>Issuer Rating</b>	<b>LGD</b>	<b>Base rate 1-year EURIBOR (3 month averages) (%)</b>	<b>risk margin RRC</b>	<b>Total benchmark interest rate</b>	<b>Interest rate charged</b>
<b>Loan 1</b>	11.4.2003	[...]	[...]	[...]	2,50	[...]	[1-6]	[3-7]
<b>Loan 2</b>	17.6.2004	[...]	[...]	[...]	2,30	[...]	[1-6]	[3-7]
<b>Loan 3</b>	28.7.2004	[...]	[...]	[...]	2,35	[...]	[1-6]	[6-9]
<b>Loan 4 and extension 1</b>	1.7.2005	[...]	[...]	[...]	2,20	[...]	[1-6]	[1-5]
<b>Extension 2</b>	29.11.2010	[...]	[...]	[...]	2,20	[...]	[1-6]	[1-5]

- (181) According to the above estimations, loans 1, 2 and 3 are granted at rates well above the applicable benchmark rates. Therefore, the Commission considers that FN GmbH has not received any economic advantage through those measures.

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- (182) As regards Extension 2, the above data also suggest that it was granted on market terms, since the interest rate of this extension is higher than the estimated benchmark interest rate. However, various elements cast doubts on the absence of State aid in Extension 2, such as the fact that the beneficiary had not yet repaid previous loans, the existence of aid in Loan 4 and Extension 1 and the short duration of the period between the granting of Extension 2 and the preliminary agreement concluded by public authorities and FN GmbH on the debt-to-equity swap referred to in Recital 45. In any event, the Commission considers that, for the very same reasons set out in Section 9.4 concerning the compatibility of the aid involved in Extension 1 with the internal market, if Extension 2 qualifies as State aid, such aid can be considered as compatible with the internal market.
- (183) Loan 4 and Extension 1 are granted at a rate below the benchmark rate with a difference of [...] bps. Therefore, the Commission takes the view that as regards Loan 4 and extension 1, FN GmbH has received an economic advantage that it would have not received under normal market conditions<sup>(58)</sup>.

#### 8.3.4. *Selectivity*

- (184) For the case at hand, the Commission notes that Measure 1 (Loan 4, Extension 1 and possibly Extension 2) is an individual aid measure, which was only granted to FN GmbH, and is not a general measure.
- (185) Therefore, the advantage conferred on FN GmbH by Measure 1 (Loan 4, Extension 1 and possibly Extension 2) is selective.

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

- (186) According to the case law of the Court of Justice of the European Union, financial support distorts competition in so far as it strengthens the position of an undertaking compared with other undertakings<sup>(59)</sup>. In general, when an advantage granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in a given Union market, trade between Member States must be regarded as being affected by that advantage<sup>(60)</sup>.
- (187) Airport managers compete at European level to attract airlines so that they open new routes from their airports, or add new frequencies on such routes. When choosing the airports from which they open routes, or where they add new frequencies on existing routes, airlines compare airports, on the basis of factors such as the type of airport services provided and the clients concerned, the population or economic activity, congestion, whether there is access by land, and the level of charges and overall commercial conditions for use of airport infrastructure and services<sup>(61)</sup>. By providing FN GmbH with financing under more favourable terms than normal market conditions, Germany has thus allowed it to compete more aggressively against other airport managers

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to attract airlines than it could have done should it have paid a cost of capital in line with normal market conditions.

- (188) Therefore, Measure 1 (Loan 4 and Extension 1 and possibly 2) had the potential to distort competition and affect intra-EU trade.

#### 8.3.6. *Conclusion*

- (189) The comparison of the actual loan rates with the benchmark rates derived from the 2008 Reference Rate communication shows that all loans and loan extensions apart from Loan 4 and Extension 1 are granted at rates above the benchmark rates.

- (190) The Commission can therefore conclude that loans 1, 2, 3 were granted in line with market conditions, while Loan 4 and Extension 1 were not. The Commission leaves open whether Extension 2 has been granted in line with market conditions.

- (191) As the cumulative criteria pursuant to Article 107(1) of the TFEU are fulfilled, the Commission considers that Loan 4, Extension 1, and possibly Extension 2 in Measure 1 involve State aid within the meaning of Article 107(1) of the TFEU.

### 8.4. **Existence of aid concerning the support received by the Land Nordrhein-Westfalen (Measure 2)**

#### 8.4.1. *Notion of Undertaking and Economic Activity*

- (192) The same reasoning as for the aid nature of Measure 1 applies (see section 8.3.1 further above), although Germany argued that it constitutes existing aid (see Recital 102). In the *Leipzig Halle* judgment, the Court of Justice confirmed that the construction of the airport infrastructure should also fall under State aid rules as of 2000, that is before the date of granting of measure 2 on 15 October 2002. The Commission takes the view that the measure therefore constituted aid at the time it was put into effect. Contrary to what Germany has claimed, the fact that the measure was adopted under the 1993 Decree does not affect that assessment. The 1993 Decree only provided a legal basis to allow possible support measures to regional airports that the Land Nordrhein Westfalen may contemplate as from 1993. But it did not provide for an irrevocable commitment vis-à-vis FN GmbH to grant Measure 2 or create any legal entitlement by itself for the beneficiary (as explicitly stipulated in Article 1 of the 1993 Decree). Measure 2 constitutes in fact an individual application of the scheme established by the 1993 Decree.

- (193) As a result, the Commission concludes that it is entitled to examine Measure 2 put into question under State aid rules since at the time when it was granted, it was clear that FN GmbH was engaged in an economic activity.

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

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(194) As mentioned at paragraph 111 of the opening decision, public support was paid directly from the budget of the Nordrhein-Westfalen Land as a direct grant in favour of FN GmbH. Thus, the funding provided by the Land Nordrhein-Westfalen was financed through State resources and is imputable to the State.

#### 8.4.3. *Economic Advantage*

(195) In order to evaluate whether a State measure constitutes aid, it has to be determined whether the beneficiary undertaking receives an economic advantage that it would not have received under normal market conditions.

(196) In the case under investigation, the Land of Nordrhein-Westfalen has granted public funds in form of a direct grant to support infrastructure investments at the airport. These funds were received by FN GmbH as airport manager to finance investments at the airport. The Commission notes that no market investor would provide such a grant without any remuneration and without any possibility of a return.

(197) Therefore, the investment grant reduces the investment costs that the airport operator would normally have to bear, without any remuneration, and therefore confer an economic advantage on FN GmbH.

#### 8.4.4. *Selectivity*

(198) For the case at hand, the Commission notes that Measure 2 is an individual application of a scheme on the basis of which advantages were not only granted to the Niederrhein-Weeze Airport, but also to several other airports located in the Land Nordrhein-Westfalen. However, the scheme in question is not a general measure for all airports in Nordrhein-Westfalen, as the larger airports Düsseldorf and Köln/Bonn are not eligible for this support measure from the Land. In any event, had all airports in Nordrhein-Westfalen would been eligible, such a sectorial measure would have to have been regarded as selective, as it only benefitted a certain sector in a certain region.

(199) Therefore, the advantage conferred on FN GmbH by Measure 2 is selective.

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

(200) According to the case law of the Court of Justice of the European Union, financial support distorts competition in so far as it strengthens the position of an undertaking compared with other undertakings<sup>(62)</sup>. In general, when an advantage granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in a given Union market, trade between Member States must be regarded as being affected by that advantage<sup>(63)</sup>.

(201) Airport managers compete at European level to attract airlines so that they open new routes from their airports, or add new frequencies on such routes.

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When choosing the airports from which they open routes, or where they add new frequencies on existing routes, airlines compare airports, on the basis of factors such as the type of airport services provided and the clients concerned, the population or economic activity, congestion, whether there is access by land, and the level of charges and overall commercial conditions for use of airport infrastructure and services<sup>(64)</sup>. By providing FN GmbH with financing under more favourable terms than normal market conditions, Germany has thus allowed it to compete more aggressively against other airport managers to attract airlines than it could have done should it have paid a cost of capital in line with normal market conditions.

(202) Therefore, Measure 2 had the potential to distort competition and affect intra-EU trade.

#### 8.4.6. *Conclusion*

(203) Measure 2 constitutes State aid to FN GmbH within the meaning of Article 107(1) TFEU.

### 8.5. **Existence of aid concerning the support received from the district of Kleve (Measure 3)**

#### 8.5.1. *Notion of Undertaking and Economic Activity*

(204) The same reasoning as for the aid nature of the loans provided by the publicly owned EEL GmbH applies (see section 8.3.1 further above) applies. Indeed, the various measures constituting Measure 3 were granted on 14 March 2002, that is, after the judgment in *Aéroports de Paris* was delivered. According to paragraph 1, point 4 of the loan agreement, the date of granting of the measure is the date, when the beneficiary concluded the purchase of the airport infrastructure with the German federal government, that is 14 March 2002.

(205) As a result, the Commission concludes that it is entitled to examine Measure 3 and to assess its compatibility with State aid rules since at the time when it was granted, it was clear that FN GmbH was engaged in an economic activity.

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

(206) The support was granted directly from the budget of the district of Kleve to FN GmbH. Thus, Measure 3 was financed through State resources and is imputable to the State.

#### 8.5.3. *Economic Advantage*

(207) In order to evaluate whether a State measure constitutes aid, it has to be determined whether the beneficiary undertaking receives an economic advantage that it would have not received under normal market conditions. In this respect, the Commission must analyse whether the district of Kleve has acted as a market economy investor in waiving one tranche of the bridge financing previously granted to FN GmbH.

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- (208) The conduct of an investor in a market economy is guided by prospects of profitability<sup>(65)</sup>. The market investor test will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private undertaking, can be expected within a reasonable period.
- (209) In the case at issue, the district of Kleve has granted a zero-interest loan granted to FN GmbH of EUR [4-10] million and waived the obligation of FN GmbH to repay a tranche, amounting to EUR [2-5] million, without receiving any further remuneration. This last decision was in fact the implementation of the clause laid down in paragraph 4, point 1 of the loan agreement itself, whereby the tranche in question would not be repaid if the objective of creation of 350 jobs would be reached. Thus, the Commission notes that no market investor would have granted a zero-interest loan and waived the repayment of a significant part thereof without any remuneration.
- (210) Furthermore, the assessment of the market economy investor should leave aside any positive repercussions on the economy of the region in which the airport is located, including in terms of job creation, since the Commission assesses whether the given measure constitutes aid by considering 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>(66)</sup>. In the case at issue, the only counterpart to the waiver of the repayment obligation was a certain level of job creation. However, job creation should be disregarded in the context of the market economy operator principle. In other words, no market economy investor would have agreed to waive the repayment of EUR [2-5] million on the basis of job creation considerations in the region.
- (211) Therefore, the interest-free nature of the loan and the waiver granted by the district of Kleve reduce the costs that the airport operator would normally have to bear and therefore confers an advantage to FN GmbH that it would not obtain under normal market conditions.

#### 8.5.4. *Selectivity*

- (212) The advantage in question was granted only to FN GmbH. As the public funding was directed at a single undertaking, it is selective within the meaning of Article 107(1) TFEU.

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

- (213) The same reasoning as for the distortion of competition and effect on trade as elaborated above (see section 8.4.5) applies.

#### 8.5.6. *Conclusion*

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- (214) For the reasons set out above the Commission takes the view that the public funds provided by the district of Kleve and granted to FN GmbH with regard to the agreement concerning the bridge financing of part of the acquisition costs for the airport real estate involve State aid within the meaning of Article 107(1) TFEU.
- 8.6. **Existence of aid concerning the support received by EEL GmbH from the district of Kleve and the municipality of Weeze (Measure 4)**
- 8.6.1. *Notion of Undertaking and Economic Activity*
- (215) Germany argues that EEL GmbH is a vehicle, whose object is to facilitate the channelling of funds to FN GmbH in an efficient and economic manner.
- (216) As has been laid out in Recital 25, EEL GmbH was founded by the district of Kleve and the municipality of Weeze to manage the airport real estate prior to its privatisation. Thereafter, EEL GmbH engaged in granting loans to FN GmbH. The granting of loans to third parties is by itself an economic activity. Therefore, when the various measures forming Measure 4 were granted to EEL GmbH, the latter was engaged in an economic activity.
- (217) With reference to Article 101 TFEU, 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. EEL GmbH is only acting as a vehicle of public authorities, and does not, as such, carry economic activities: its only purpose is to pool the resources of two public authorities in view to financing the development of the airports.
- (218) As the cumulative criteria pursuant to Article 107(1) of the TFEU are not fulfilled, the Commission considers that Measure 4 does not contain any State aid within the meaning of Article 107(1) of the TFEU.
- (219) Even if EEL GmbH had to be regarded as an undertaking subject to the EU competition law throughout the period during which the measures forming Measure 4 were granted (which is not), the Commission assessment would lead to the same conclusion that Measure 4 does not constitute State aid as demonstrated in the sections below.
- 8.6.2. *State resources and imputability to the State*
- (220) EEL GmbH has received all the capital, liquidity benefits and capital injections included in the scope of Measure 4 from its shareholders, which financed these measures through their respective budgets. Measure 4 also includes a 100 % guarantee granted by the municipality of Weeze, which exposed the budget of the municipality. Therefore, the all the measures constituting Measure 4 were financed through budget resources of two local authorities, which in addition, decided to grant these various measures.



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(221) Therefore, Measure 4 is financed through State resources and is imputable to the State.

#### 8.6.3. *Economic Advantage*

(222) In order to evaluate whether a State measure constitutes aid, it has to be determined whether the beneficiary undertaking receives an economic advantage that it would not have received under normal market conditions.

(223) In this respect, the Commission must analyse whether the district of Kleve and the municipality of Weeze acted as prudent market economy operators guided by profitability prospects<sup>(67)</sup> would have done in the same circumstances in providing EEL GmbH with the capital measures, guarantees, loans and loan repayment deadline extensions that constitute Measure 4.

(224) It is first important to recall, as concluded in section 8.3.2, that EEL GmbH constitutes an SPV created by its two public shareholders with a view to managing the real estate of the Niederrhein-Weeze airport, and used exclusively as of 2003 to provide financing to the same airport. This is confirmed by the fact that in their (written) General Meeting of 10 and 11 April 2003 these two public shareholders have strictly circumscribed EEL GmbH's new financing activity to investments into Niederrhein-Weeze airport. This objective is in line with the purpose of EEL GmbH laid down in Article 2 of its Founding Act (*Gesellschaftsvertrag*) of 16 December 1999<sup>(68)</sup>. Moreover, as already explained in Recital 153, EEL GmbH has no board of directors. Both managing directors are representatives of the public bodies. One managing director of the company is the Landrat, that is the head of the district of Kleve and the other managing director is the mayor of the municipality of Weeze. Moreover, EEL GmbH has no permanent staff and is managed by a single public official from the district of Kleve. It results from these elements that any decision taken by EEL GmbH is in fact taken by representatives from the public shareholders, who run it on a day-to-day basis in addition to sitting in its governing bodies. This confirms that the measures at issue are imputable to the public shareholders.

(225) In applying the market economy operator principle to Measure 4, it is necessary to give due consideration to the fact that the beneficiary of these financing measures is an SPV created and owned by the entities from which Measure 4 originates, and exclusively used for a well-defined objective pursued by these same entities. Moreover, in this context, it is necessary to give due consideration to the very objective in view of which the Special Purpose Objective is used and maintained in operation.

(226) SPVs are commonly created and used by private undertakings in a variety of circumstances. A possible situation where SPVs are used is cases where two independent undertakings set up a joint venture in order to develop a specific project or perform a specific activity or function (for instance research and

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development, production, distribution)<sup>(69)</sup> to the benefit of each undertaking. The SPV is therefore a legal structure to which both undertakings allocate the resources (funding, staff, assets ...) that are necessary for the implementation of their joint project, function or activity and through which they implement this joint project or perform this joint function or activity. In certain situations, for instance when the SPV only has a production or research and development function, it receives funding on the part of its parent companies without by itself generating profit which can be redistributed to shareholders, for example in the form of dividends. Instead of generating such profit, it contributes to the performance of operations that its parent companies consider necessary in view of their objectives.

- (227) Therefore, it is clear that when two independent private undertakings create and use a SPV in view of a well-defined objective, and provide it with funding, they do not necessarily provide this funding with a view to obtaining a financial return in the form of dividends or payment of interests, as an investor or a bank would do. Instead, they provide this funding with a view to achieve the objective for which the SPV is used.
- (228) In view of these considerations, the behaviour of the district of Kleve and the municipality of Weeze towards EEL GmbH ought to be analysed taking account of the fact that these two public authorities are the sole shareholders of EEL GmbH and taking account of the exclusive objective assigned to EEL GmbH as of 2003, namely, the granting to FN GmbH of the various loans and repayment deadline extensions constituting Measure 1. It should be recalled in this respect that the various measures forming Measure 1 are, as indicated in section 8.3.2, clearly imputable to the district of Kleve and the municipality of Weeze. In other words, the two public authorities designed and decided to implement Measure 1 and decided to use EEL GmbH for that purpose.
- (229) Therefore, when applying of the Market Economy Operator Principle to Measure 4, the fact that the district of Kleve and the municipality of Weeze decided to implement Measure 1 and to use EEL GmbH for that purpose ought to be taken as a starting point. The relevant question that the Commission must address is the following: if two hypothetical market economy operators had decided to implement measures such as those forming part of Measure 1, would they have used an SPV such as EEL GmbH and provide it with similar funding as that stemming from Measure 4 in order to achieve this objective?
- (230) Against this backdrop, the fact that certain loans may have been provided to EEL GmbH by its shareholders at rates lower than normal market rates, that a guarantee was provided free of charge, or that capital was injected with no clear prospects of financial return would not necessarily lead to the conclusion that the district of Kleve and the municipality of Weeze did not act vis-à-vis EEL GmbH as market economy operators would have done. The relevant question is rather whether the financing provided to EEL GmbH under Measure 4 is reasonable, from a market economy operator perspective,

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in light of the objective pursued by EEL GmbH's shareholders, namely, the implementation of Measure 1.

- (231) Two prudent market economy operators pursuing the same objective as EEL GmbH's public shareholders would have had essentially two options: create a Special Purpose Vehicle similar to EEL GmbH (option 1) or grant loans directly to FN GmbH without a dedicated body (option 2). A rational market economy operator would not have considered any other option, like the use of private financial intermediaries, which would have charged a fee for the provision of such a service. This option would have increased the cost of channelling funds to FN GmbH due to these fees.
- (232) The Commission notes that, when making the Decision to finance EEL GmbH themselves instead of using financial intermediaries, the public shareholders limited their financial exposure to what was strictly necessary to fund FN GmbH under Measure 1:
- (a) the level of funding directly provided by public shareholders to EEL GmbH until 2010 (EUR [20-40] million<sup>(70)</sup>) was proportionate to the amounts borrowed by FN GmbH from EEL GmbH (EUR [20-40] million<sup>(71)</sup>);
- (b) the conditions of the funding of EEL GmbH (date, amount and maturity) have been aligned to the funding of FN GmbH by EEL GmbH:

<b>Volume (in Million EUR)</b>	<b>Date of loan agreement granted by EEL GmbH to FN GmbH</b>	<b>Date of public measures granted by Germany to EEL GmbH</b>	<b>Volume (in Million EUR)</b>
[11-20]	11.4.2003	11.4.2003	[5-15] (+ [2-5] received from a bank loan on 2 May 2003)
[2-5]	17.6.2004	16.6.2004	[2-5]
[2-5]	28.7.2004	28.7.2004	[2-5]
Loan roll over to 31.12.2010 (+ 6,5)	1.7.2005	1.7.2005	Loan roll over to 31.12.2010 and debt restructuring
Loan roll over to 31.12.2016	29.11.2010	29.11.2010	Loan roll over to 31.12.2016

- (c) EEL GmbH does not have any material assets in its balance sheet other than its claims vis-à-vis FN GmbH. The (small) profits derived from the financing activities to FN GmbH only appear in EEL GmbH's accounts, but they do not

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correspond to any cash or liquidity since FN GmbH has not repaid its debt to EEL GmbH.

- (d) Indeed, given EEL GmbH's strategy to fund FN GmbH, these interests are only intended to allow EEL GmbH to break even and to pay the interests of the rolled over loans granted by the public shareholders and [bank], as evidenced by the minutes of EEL GmbH's general assemblies.
- (e) EEL GmbH's is therefore unable to reimburse its two shareholders and the [bank], as long as FN GmbH has not repaid the loans and interests due to EEL GmbH. This means that EEL GmbH cannot engage into any other economic activities as claimed by Germany.
- (233) The Commission takes the view that the choice of option 1 made by the two shareholders was therefore consistent with the latter's stated objective to dedicate EEL GmbH' resources to the sole financing of FN GmbH.
- (234) In addition, the Commission considers that under option 1 the administration and management costs of a SPV like EEL GmbH is reduced to the strict minimum (no immobilisation of assets other than the claims vis-à-vis FN GmbH, no permanent staff and management, almost no operating costs, no financial costs other than the reimbursement of the loan granted by the [bank]). This is all the more so since when the two public shareholders decided to implement Measure 1, EEL GmbH was already existing, as a dormant structure, and did not have to be created *ex nihilo*. The choice of an SPV also facilitates the management of the financial transactions with third parties (like FN GmbH or a private bank) while minimising the transaction costs between the two shareholders. On the contrary, the choice of option 2 would induce the duplication of the mechanisms put in place to support FN GmbH, which would increase the administration and legal costs of channelling funds to FN GmbH (e.g. duplication of legal contracts) and possibly affect the quality of the supervision and coordination of the project.
- (235) Therefore, it would have been rational for two prudent market economy operators guided by medium to long-term profitability prospects and acting in lieu of EEL GmbH's public shareholders, to choose option 1 rather than option 2. The Commission takes the view that the market investor test is satisfied and that there is no economic advantage conferred to EEL GmbH.

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

- (236) As of 2003, the activity of EEL GmbH was strictly limited to the provision of funding to FN GmbH. EEL GmbH could not engage in any other activity. For instance, it could not grant loans to any other entity.
- (237) Therefore, the only activity for which Measure 4 might have affected the competitive dynamics would be the provision of funding to FN GmbH. Such competitive effect would have existed if, absent Measure 4, providers of funding other than EEL GmbH, such as banks or other investors, would have

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had a greater opportunity to provide funding to FN GmbH with a view to making a profit.

- (238) However, as indicated in section 8.5.3, the clear intention of the district of Kleve and the municipality of Weeze was to implement Measure 1 themselves in order to provide FN GmbH with funding. Indeed, the only rationale for Measure 4 is the implementation of Measure 1.
- (239) Absent Measure 4, EEL GmbH would have been unable to implement Measure 1 itself. However, the absence of Measure 4 would simply mean that the district of Kleve and the municipality of Weeze would have decided to implement Measure 1 without using EEL GmbH, for instance, through a direct legal relationship between themselves and FN GmbH. Therefore, absent Measure 4, banks or other investors would not have enjoyed a greater opportunity to provide funding to FN GmbH with a view to making a profit because the necessary funding would have been provided by the district of Kleve and the municipality of Weeze in any event.
- (240) Therefore, assuming that Measure 4 would involve an economic advantage in favour of EEL GmbH (*quod non*), this advantage would have no effect on competition and trade, and would therefore not constitute State aid within the meaning of Article 107(1) TFEU.

#### 8.6.5. *Conclusion*

- (241) For the reasons set out above, Measure 4 does not involve State aid to EEL GmbH within the meaning of Article 107(1) TFEU.

#### 8.7. **New aid v. existing aid**

- (242) The situations in which a measure constitutes existing aid are exhaustively enumerated in Article 1 of Regulation (EC) No 659/1999<sup>(72)</sup>.
- (243) It is undisputed that the challenged measures were not put into effect before Germany's accession to the EU (paragraph (b)(i) of said Article), are not deemed to have been authorised due to the Commission's failure to take a decision within the prescribed procedural deadlines (paragraph (b)(iii)) and cannot be considered existing aid because of the expiry of the limitation period (paragraph (b)(iv)). They did not become aid due to the evolution of the common market and without having been altered by the Member State (paragraph (b)(v), first sentence)<sup>(73)</sup>.
- (244) This assessment is notably valid for measure 2, although Germany argued that it constitutes existing aid (see Recital 102). In the *Leipzig Halle* judgment, the Court of Justice of the European Union confirmed that the construction of the airport infrastructure should also fall under State aid rules as of 2000<sup>(74)</sup>, that is before the date of granting of measure 2 on 15 October 2002 (see Recital 46). The Commission takes the view that the measure therefore constituted aid at the time it was put into effect. Contrary to what Germany has claimed,

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the fact that the measure was adopted under the 1993 decree does not affect that assessment. The 1993 decree only provided a legal basis to allow possible support measures to regional airports that the Land Nordrhein Westfalen may contemplate as from 1993, but it does not create by itself any legal entitlement for those airports, as explicitly stipulated in Article 1 of the 1993 Decree.

- (245) The granting date of Measure 2 is therefore 15 October 2002, that is, after the *Aéroports de Paris* judgment. Therefore, Measure 2 already constituted State aid when it was granted, as shown in section 8.4.6 and did not become State aid subsequently because of the evolution of the common market. Moreover, Measure 2 was granted less than 10 years before the Commission opened the formal investigation procedure on it and thus did not become existing aid following the expiry of the limitation period. Consequently, Measure 2 does not qualify as existing aid.

#### 8.8. Lawfulness of the aid

- (246) Pursuant to Article 108(3) TFEU, Member States must notify any plans to grant or alter aid, and may not put the proposed measures into effect until the notification procedure has resulted in a final decision.
- (247) Since Germany failed to notify all public measures under scrutiny, Measure 1, 2 and 3 constitute unlawful aid.

### 9. COMPATIBILITY

#### 9.1. Applicability of the 2014 and 2005 Aviation Guidelines

- (248) The measures in question should be assessed upon the basis of Article 107(3) (c) TFEU, 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.
- (249) 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) TFEU.
- (250) According to the 2014 Aviation guidelines, the Commission considers that the provisions of its 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 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>(75)</sup>.
- (251) As regards investment aid to airports, the Commission, in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, apply to unlawful investment aid to airports

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the rules in force at the time when the aid was granted. Accordingly, it 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>(76)</sup>.

(252) The Commission has already concluded that Measure 2 and 3 constituted unlawful State aid granted before 4 April 2014, whereas Measure 1 and 4 did not qualify as State aid.

(253) In view of the provisions of the 2014 Guidelines referred to in Recital 250 and 251, the Commission is then under the obligation to determine whether the measures in question constitute illegal operating aid or investment aid.

## 9.2. **Investment aid vs Operating aid**

### 9.2.1. *Measure 1*

(254) As concluded in section 8.3.6, FN GmbH has benefited from State aid contained in Loan 4 and Extension 1 and possibly Extension 2 that form part of Measure 1. The Commission will assess the nature of each submeasure separately.

(255) The Commission notes that Loan 4 has been granted in view to financing investments made by FN GmbH: as mentioned in Recital 39, paragraph 1 point 2 of the loan agreement signed on 1 July 2005 specified that the loan is earmarked for investments only. The Commission observes that EEL GmbH has put in place control mechanisms laid down in paragraph 2 of the loan agreement, which required that FN GmbH (and EEL GmbH on its own request) checked that invoices were strictly linked to the completion of the airport and that EEL GmbH (and not FN GmbH) paid the invoices from the loan. These control mechanisms have proven effective since Germany could demonstrate that the installments disbursed from that loan helped exclusively cover investments costs. Therefore the Commission takes the view that Loan 4 constitutes unlawful investment aid granted before 4 April 2014 and its compatibility has to be assessed under the 2005 Aviation Guidelines.

(256) As regards Extension 1, the Commission notes that it constitutes a roll over of loans 1, 2 and 3. As such, this extension is not targeted to the financing of new investments, which Germany failed to demonstrate. The Commission rather considers that this extension was only granted to relieve FN GmbH from its short-term obligation to reimburse all accumulated loans and interests. By doing so, EEL GmbH and its public shareholders wanted to ensure that FN GmbH would not run short of liquidities, which could have caused the aid beneficiary to cut its investments or turn into a company in difficulty. For these reasons, the Commission takes the view that Extension 1 constitutes unlawful operating aid granted before 4 April 2014 and its compatibility has to be assessed under the 2014 Aviation Guidelines.

(257) Similar considerations apply to Extension 2, if it would have to be considered as State aid.

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#### 9.2.2. *Measure 2*

(258) FN GmbH has benefited from Measure 2 to compensate the costs of acquisition and installation of fixed capital assets described in Recital 46. According to point 25 of the 2014 Aviation Guidelines, ‘investment aid’ means aid to finance fixed capital assets, specifically, to cover the capital costs funding gap’. Therefore, all costs supported under Measure 2 constitute investment costs. Measure 2 thus constitutes unlawful investment aid granted before 4 April 2014 and its compatibility has to be assessed under the 2005 Aviation Guidelines.

#### 9.2.3. *Measure 3*

(259) As described in Section 3.3, Measure 3 under scrutiny has been granted to provide FN GmbH with a bridge financing of part of the acquisition costs of the airport real estate (615 ha and about 650 buildings of various types to reconfigure into a civil airport). As stipulated in point 3 of the preamble and in paragraph 1 of the loan agreement of 14 March 2002, the bridge financing was granted by means of an interest free loan explicitly earmarked to the financing of investment expenditures necessary to the completion of the EuZZLG (see Recital 21).

(260) Therefore, this bridge financing constitutes unlawful investment State aid granted before 4 April 2014 and its compatibility has to be assessed under the 2005 Aviation Guidelines.

#### 9.2.4. *Conclusion*

(261) As explained above, the Commission considers that Loan 4 of Measure 1, Measure 2 and Measure 3 constitute investment State aid, while Extension 1 and possibly 2 of Measure 1 have to be regarded as operating aid.

### 9.3. **Compatibility of investment aid measures**

(262) According to paragraph 61 of the 2005 Guidelines, the Commission must examine whether

- (a) the construction and operation of the infrastructure meets a clearly defined objective of general 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,



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- (e) the development of trade is not affected to an extent contrary to the Community interest.
- (263) In addition to the requirement to satisfy specific compatibility criteria specified in the 2005 Aviation Guidelines, State aid to airports, as any other State aid measure, should be necessary and proportional in relation to the aimed legitimate objective in order to be cleared as compatible aid<sup>(77)</sup>.
- 9.3.1. *Construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.)*
- (264) The investment aid measures under assessment aimed at financing the conversion of the former British military base of Weeze into a civilian airport, and to substantially develop the airport. These measures provided a significant contribution to the regional development and the creation of new jobs in an area economically hit by the closure of the British military base. As pointed out by Germany, the closure of the British military had led to around 6 300 people leaving the area, triggering the loss of 400 civilian jobs directly linked to the operation of the military base, and the loss of around EUR 102 million in revenues for about 80 companies. In addition, the departure of British troops left 1 600 residential units empty, that is more than 30 % of the total housing stock for the community Weeze alone.
- (265) The Commission notes that according to Germany the creation and the development of the civil airport have led to the creation of more than 1 200 jobs in the district of Kleeve area and to the clustering of service companies on the premises of the airport business park.
- (266) As pointed out by Germany, the contribution of this project to regional economic development — and thus to economic cohesion, an important objective of the Union — has to some extent already been acknowledged by the Commission. The Commission has indeed granted structural funds to Nordrhein-Westfalen under the Konver II — program, which explicitly provided for the financing of the reconversion of former military facilities in Kleve.
- (267) The investment aid measures at issue also contributed to the improvement of the accessibility of the area. Indeed, the closest airports to Niederrhein-Weeze airport are Düsseldorf (located 76 km from the airport, 51 minutes travelling time by car) and Eindhoven, NL (88 km, 1 hour 12 minutes traveling time by car)<sup>(78)</sup>.
- (268) Traffic at Düsseldorf and Eindhoven airports has continuously increased since 2003: the traffic at Düsseldorf grew from 14,3 million passengers in 2003 to approximately 21 million in 2013, while the traffic at Eindhoven airport grew from 0,4 million in 2003 to 3,4 million in 2013. Their constant growth has only been affected during that period by own congestion problems and capacity constraints (in particular the insufficient number of available slots

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in Düsseldorf). The capacity of Düsseldorf airport reached its 22 million passengers capacity limit in 2013, while Eindhoven airport could only serve 2,5 million passengers in 2012. Despite the traffic growth at Niederrhein-Weeze airport, the Commission observes that extension work have been completed or started since 2012 in view to expanding the capacity of the two airports<sup>(79)</sup>.

- (269) Therefore, the Commission concludes that the investment in Niederrhein-Weeze does not constitute a duplication of existing non-profitable infrastructure. On the contrary, Niederrhein-Weeze airport has played an important role in decongesting Düsseldorf without limiting the plans to expand Düsseldorf and Eindhoven's airports. Without the project at issue there was a risk that the region would be underserved.
- (270) The Commission can therefore conclude that the construction and operation of the infrastructure meets a clearly defined objective of common interest, namely regional economic development and improvement of the accessibility of the region.

9.3.2. *The infrastructure is necessary and proportional to the objective which has been set*

- (271) According to Germany the planned modernisation of Niederrhein-Weeze airport was necessary to complete the conversion of a former military airbase into a civil aviation airport. The construction and modernisation of taxiways and aprons needed to be carried out to start civil flights operations.
- (272) As argued by Germany, the infrastructure project has been undertaken only to the extent it was necessary to attain the goals set: while the infrastructure was built for a maximum passenger traffic of 3,5 million passenger, traffic statistics displayed in Table 1 show that the traffic steadily increased until 2010 to reach a record 2,9 million passengers, before going down to 2,2 million in 2012. This means that the expected traffic demand largely met the actual demand and that the project is not disproportionately large or elaborate.
- (273) The Commission can therefore conclude that the infrastructure in question is necessary and proportional to the objectives, which have been set.

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

- (274) As previously explained, Niederrhein-Weeze airport has reached in 2010 a number of passengers (2,9 million passengers) close to its capacity limit (3,5 million passengers). This traffic has been reached within 6 years of operations only, which is much faster than other German airports devoted to the same LCC strategy (like Cassel or Hahn) The significant growth of Niederrhein-Weeze airport results from the important role of the airport in decongesting Düsseldorf and Eindhoven airports and the density of the population in the catchment area (more than 35 million inhabitants).

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- (275) On the basis of the above mentioned figures for passenger numbers, in the medium- term, the development project for Niederrhein-Weeze airport offered good perspectives for use, especially in relation to initial military infrastructure at the airport, which the initial investment works has helped convert into a civil platform.
- 9.3.4. *All potential users of the infrastructure have access to it in an equal and non-discriminatory manner*
- (276) The Commission observes that the civil infrastructures in place has always been open to all potential users in a non-discriminatory manner.
- 9.3.5. *The development of trade is not affected to an extent contrary to the interest of the EU*
- (277) At the time of the granting of the aid on 15 October 2002, Niederrhein-Weeze airport served less than 1 million passengers per annum, which qualified it according to the 2005 Aviation Guidelines as a small regional airport (category D)<sup>(80)</sup>.
- (278) Niederrhein-Weeze airport's catchment area is the Western regions of Germany and the Eastern regions of the Netherlands. As previously explained, Niederrhein-Weeze airport has not significantly harmed competition in this catchment area, that is Düsseldorf and Eindhoven airports, which were hit by severe congestion problems and slot shortages (see Recital 268).
- (279) In addition, Niederrhein-Weeze airport is neither served by a train connection nor by a connection to the motorway system, contrary to its two competitors.
- (280) Furthermore, the Commission notes that the business travel segment occupies a significant 40 % market share at Düsseldorf airport, while it only represents only 7 % at Niederrhein-Weeze.
- (281) As regards Eindhoven airport, the Commission observes that this facility serves both civil and military flight operations and that the financing of the infrastructure costs is accordingly shared between the civil airport managers and the Dutch military. In 2010 and 2011, Eindhoven airport paid around EUR 1 million annually to compensate the Dutch military mostly for the cost of the infrastructure maintenance, security, air control, but it did not incur the initial investment costs that Niederrhein-Weeze had to (partially) bear.
- (282) In addition, the aid intensity of the overall project (see section on the necessity and proportionality of the aid further below) is limited to its funding gap. The shareholders of the airport operator will finance more than 50 % of the investment costs.
- (283) On the basis of the above, the Commission can therefore conclude, that the development of trade is not affected to an extent contrary to the common interest.

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9.3.6. *Necessity and proportionality of the aid*

- (284) The Commission must establish, whether the State aid granted to FN GmbH has changed the behaviour of the beneficiary undertaking in such a way that it engages in activity that contributes to the achievement of a public-interest objective that (i) it would not carry out without the aid, or (ii) it would carry out in a restricted or different manner. In addition, the aid is considered to be proportionate, only if the same result could not be reached with less aid and less distortion. This means that the amount and intensity of the aid must be limited to the minimum needed for the aided activity to take place.
- (285) According to Germany, the aid was necessary because the development of the airport would have been jeopardised given the tight financial situation of FN GmbH at the time of the granting of the aid. Germany also adds that, if the project had been undertaken directly by public authorities, these authorities would have had to cover the construction costs as well as the initial operating losses. The Commission shares this view and notes that the public support was granted in a period when FN GmbH' private shareholders realised very significant investments into the infrastructure in the start-up phase of the project (EUR [20-60] million in 2002-2003), while bearing the initial operational losses of the airport. It is doubtful that local authorities with limited financial resources like the district of Kleve and the commune of Weeze could have borne the financial burden of such a large scale project on their own, while they could reach the same result with a limited involvement by backing up a private initiative. In view of the risky nature of the project, which constitutes one of the very few cases of private airports in Europe, a limited public support seems therefore well justified at its start-up phase.
- (286) According to Germany, without the aid, the investment could not have been carried out to the same extent absent measure 1, 2 and 3. As rightly argued by Germany, only a limited number of investments could have been carried out, such as the widening of the runway. It would have been necessary to delay certain investments substantially, thereby causing the airport to face serious operational difficulties or preventing them from meeting the expected demand of airlines and passengers in the catchment area. Therefore, it may be concluded that aid measures 1, 2 and 3 have an incentive effect, as they enabled the beneficiary to carry out the investment.
- (287) With regard to the assessment of the proportionality of Measure 2, the level of public funding actually granted to the airport amounted to EUR [2-5] million. As explained in Recital 46, this support measure corresponds to the financing of 50 % of the eligible costs under the 1993 Decree. The remaining amount (EUR [2-5] million) has been financed by FN GmbH. Consequently, the aid intensity amounts to 50 %.
- (288) As the 2005 Aviation Guidelines leave open the issue of aid intensities, the maximum permissible aid amount has to be limited to what is

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strictly necessary. The Commission notes that the investments supported by Measure 2 were funded under *pari passu* terms. Therefore, the aid intensity of 50 % seems justified in the case at issue.

- (289) As regards the proportionality of Loan 4 of Measure 1 and measure 3, the Commission notes that the granting of a low or free interest loan constitutes a less distortive measure than a direct grant. In addition, since the public authorities have completely collateralised the loans, their financial involvement was very limited. As regards the proportionality of waiving the reimbursement obligation of half of the bridge financing, the Commission concurs with Germany that the condition of creation of 350 jobs constitutes an incentive for the private owners of the airport to complete the construction and development of the airport infrastructure. The Commission notes that this incentive was effective since 445 jobs were created at the time of the waiver (in 2004), well before the contractual deadline expired (at the end of 2007).

#### 9.3.7. *Conclusion on Measure 1 (Loan 4), 2 and 3*

- (290) In view of the above assessment the Commission concludes that Measure 1 (Loan 4), 2 and 3 are compatible with the internal market on the basis of Article 107(3)(c) of the Treaty.

#### 9.4. **Compatibility of the operating aid measure**

- (291) Section 5.1.2 of the 2014 Aviation Guidelines set 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) TFEU. Notably, pursuant to paragraph 172 of the 2014 Aviation Guidelines, the Commission will apply these criteria to all cases concerning operating aid to the airport, including pending notifications and unlawful non-notified aid cases, even if the aid was granted before 4 April 2014, i.e. before of the entry into force of the 2014 Aviation Guidelines. The compatibility criteria for operating aid, which may be granted for a transitional period of 10 years starting from the date of the publication of the 2014 Aviation Guidelines, are:

- (a) Contribution to a well-defined objective of common interest: this condition is fulfilled, *inter alia*, if the aid increases the mobility of EU citizens and connectivity of the regions or facilitates regional development<sup>(81)</sup>;
- (b) Need for State intervention: the aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver<sup>(82)</sup>;
- (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>(83)</sup>;

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- (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>(84)</sup>;
  - (e) Avoidance of undue negative effects on competition and trade<sup>(85)</sup>.
- (292) Considering that the operating aid constituted by Extension 1 and possibly Extension 2 of Measure 1 was granted, in its entirety, before the entry into force of the 2014 Aviation Guidelines, these compatibility criteria are applied in light of the considerations set out in paragraph 137 of the 2014 Aviation Guidelines (i.e. some conditions do not apply).
- 9.4.1. *The operating aid contributes to a clearly defined objective of common interest*
- (293) The operating aid under assessment had the objective of maintaining the appropriate level of operation of Niederrhein-Weeze airport.
  - (294) According to point 113 of the 2014 Aviation Guidelines operating aid to airports will be considered to contribute to the achievement of an objective of common interest if it increases the mobility of Union citizens and the connectivity of the regions, combats air traffic congestion at major Union hub airports or facilitates regional development.
  - (295) As concluded in Recital 270, the construction and operation of the Niederrhein-Weeze meets a clearly defined objectives of common interest, namely regional economic development and improvement of the accessibility of the region.
- 9.4.2. *Need for State intervention*
- (296) According to point 116 et seq. of the 2014 Aviation Guidelines operating aid to airports will be considered necessary if it brings about a material improvement that the market itself cannot deliver. The guidelines further recognise that the need for public funding to finance operating costs will normally be proportionately greater for smaller airports due to high fixed costs and that airports with annual passenger traffic between 200 000 and 700 000 passengers may not be able to cover their operating costs to a substantial extent;
  - (297) Since the start of operations of the new terminal in 2003 the annual passenger number of Niederrhein-Weeze airport has reached 207 992 in 2003, 796 745 in 2004 and 591 744 in 2005 (See Table 1). The Commission observes that the passenger traffic has displayed huge variations in this start-up phase, notably a significant decrease of 34 % from 2004 to 2005. The Commission therefore considers that over these 3 years, the passengers traffic has on average remained between 200 000 and 700 000. At the same time, the Commission also notes that FN GmbH was always loss-making (See Table

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5), and could not even cover its operational costs (the adjusted EBITDA is negative in 2004 and 2005), which the 2014 Aviation Guidelines identify as typical for airports of this size.

(298) Therefore the Commission considers that the operating aid to the Niederrhein-Weeze Airport is necessary.

9.4.3. *Appropriateness of State aid as a policy instrument*

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

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

(300) According to point 124 of the 2014 Aviation Guidelines the operating aid has an incentive effect if it is likely that in the absence of the operating aid and taking into account the possible presence of the investment aid and the level of traffic, the level of the economic activity of the airport would be significantly reduced.

(301) The Niederrhein-Weeze Airport received investment aid to construct a new terminal and to implement new safety and security requirements. This enabled the airport to satisfy the connectivity and transport needs of the Niederrhein region, which expressed in passenger numbers increased over the last years. Despite rather increasing passenger numbers the airport is not able to cover their operating costs. Without the operating State aid the airport could not maintain the current level of traffic and investment and its economic activity would have to be reduced. At the same time the aid did not exceed the amount required to cover operating losses, hence the aid amount is limited to the minimum necessary.

(302) Therefore the Commission considers that the operating aid to the Niederrhein-Weeze Airport has an incentive effect and is proportionate.

9.4.5. *Avoidance of undue negative effects on competition and trade*

(303) According to point 131 of the 2014 Aviation Guidelines when assessing the compatibility of operating aid to the airport, the Commission will take into account the distortions of competition and the effects on trade. An indication of potential competition distortions or effect on trade may be the fact that the

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airport is located in the same catchment area as another airport with spare capacity.

- (304) As demonstrated in Recital 276 et seq. above, the Commission already concluded that the development of trade is not affected to an extent contrary to the common interest.

9.5. **Conclusion on the compatibility of the aid measures**

- (305) All the measures that are subject to this investigation and qualify as State aid are compatible with the internal market pursuant to Article 107(3)(c) of the Treaty. This conclusion is entirely without prejudice to the assessment of any other State aid measures that the public authorities may have granted to FN GmbH, that the Commission might conduct in the future.

10. **LANGUAGE**

- (306) By letter of 18 June 2014, Germany has accepted that the present Decision is adopted in English. Therefore, only the English version is authentic,

HAS ADOPTED THIS DECISION:

*Article 1*

The loans granted by EEL GmbH to FN GmbH on 11 April 2004, 17 June 2004 and 28 July 2004, and the support measures granted by the District of Kleve and the Commune of Weeze to EEL GmbH do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

*Article 2*

1 The loan granted by EEL GmbH to FN GmbH on 1 July 2005 as well as the roll-over on 1 July 2005 of all existing loans granted by EEL GmbH to FN GmbH, the support measure granted by the Land Nordrhein-Westfalen to FN GmbH and the support measure granted from the district of Kleve directly to FN GmbH concerning the acquisition of the real estate of the Niederrhein-Weeze airport constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union compatible with the internal market under Article 107(3)(c) of the Treaty on the Functioning of the European Union.

2 The roll-over of all existing loans granted by EEL GmbH to FN GmbH on 29 November 2010, if it constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, is compatible with the internal market compatible with the internal market under Article 107(3)(c) of the Treaty on the Functioning of the European Union.

*Article 3*

This Decision is addressed to the Federal Republic of Germany.



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Done at Brussels, 23 July 2014.

*For the Commission*

Joaquín ALMUNIA

*Vice-President*

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- (1) With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('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' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.
- (2) [OJ C 279, 14.9.2012, p. 1.](#)
- (3) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([OJ L 83, 27.3.1999, p. 1](#)), as amended by Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([OJ L 204, 31.7.2013, p. 15](#)).
- (4) [OJ C 279, 14.9.2012, p. 1.](#)
- (5) In addition to Ryanair and Transavia, the airport was previously served by Air Berlin, Wizz Air, XL Airways, Sky Airlines, Corendon Airlines and Bulgaria Air as well as the charter companies Tailwind and Solid Executive (see Recital 11 of the opening decision).
- (6) Business secret.
- (7) *Source:* <http://unternehmen.airport-weeze.com/de/kurzportrait.html>
- (8) Stakeholders introduced more than 1 000 complaints against the granting of the operating license to FN GmbH before the start of operations, which could accordingly only start on 1 May 2003. In 2006, the operating license was again legally challenged creating legal uncertainty for the airport operations. It took until the 1 February 2007 to settle the issue, when the Bundesverwaltungsgericht allowed flight operations at the airport. Full legal compliance was achieved with an amendment to the operating licence issued by the regional authorities on 1 May 2009.
- (9) The basic rate of interest changes on 1 January and 1 July each year by the percentage points by which the reference rate has risen or fallen since the last change in the basic rate of interest. The reference rate is the rate of interest for the most recent main refinancing operation of the European Central Bank before the first calendar day of the relevant six-month period. The Deutsche Bundesbank announces the effective basic rate of interest in the Federal Gazette without undue delay after 1 January and 1 July.
- (10) The [1-3] -million EURO difference between the loan amount and the land charge stems from the fact that FN GmbH and EEL GmbH concluded on 14 July 2004 a bridging credit agreement that was accompanied by a EUR [1-3] million EURO worth land charge. This bridging contract was eventually replaced by the 3<sup>rd</sup> loan agreement of 27 July 2004, but the land charge was not annulled and remain valid, so that the 3<sup>rd</sup> loan agreement only required a collateral of EUR [1-5] million.
- (11) None of the contracts include a specific provision related to late interests since the latter are legally provided for in article 288 BGB and therefore applicable to all loan agreements.
- (12) [http://ec.europa.eu/competition/state\\_aid/legislation/reference\\_rates.html](http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html)
- (13) Following the agreement of 31 March 2011, the shares were passed on to EEL GmbH on 31 December 2011. They were eventually handed over to the district of Kleve.
- (14) The present decision does not cover this debt-to-equity swap or any other measure that may have been granted by Germany in favour of FN GmbH as of 2011.
- (15) [https://recht.nrw.de/lmi/owa/br\\_bes\\_text?anw\\_nr=1&gld\\_nr=9&ugl\\_nr=96&bes\\_id=1284&val=1284&ver=7&sg=&aufgehoben=N&menu=1](https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=1&gld_nr=9&ugl_nr=96&bes_id=1284&val=1284&ver=7&sg=&aufgehoben=N&menu=1)
- (16) This implies that, when EEL GmbH rolled over the loans granted to FN GmbH, its own loans granted by the district of Kleve and the loan granted by the [bank] to EEL GmbH in the amount of EUR [1-5] million were rolled over accordingly.
- (17) Community guidelines on State aid for rescuing and restructuring firms in difficulty ([OJ C 244, 1.10.2004, p. 2](#)).
- (18) See footnote 16.
- (19) See footnote 7.

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- (20) However, this offer has never materialised.
- (21) See Recital 38 for more developments on the final 2014 Aviation guidelines.
- (22) See joint cases *Chronopost v Ufex and Others*, C-83/01 P, C-93/01 P and C-94/01, EU:C:2003:388, paragraph 37.
- (23) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).
- (24) 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).
- (25) Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).
- (26) *Italian Republic/Commission of the European Communities*. C-305/89 EU:C:1991:142, paragraph 19
- (27) Commission Decision of 15.6.2011, N 322/10–, paragraph 49. [http://ec.europa.eu/competition/state\\_aid/cases/237041/237041\\_1243261\\_83\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/237041/237041_1243261_83_3.pdf)
- (28) [http://ec.europa.eu/competition/state\\_aid/legislation/transparency\\_extract\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/transparency_extract_en.pdf)
- (29) Application of Articles 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).
- (30) In particular, 12 December 2000, *Aéroports de Paris v Commission* T-128/98, ECR II-3929 EU:T:2000:290, 17 December 2008, *Ryanair/Commission*, T-196/04, EU:T:2008:585, as well as 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt/Commission a.o.*, T-443/08, EU:T:2011:117.
- (31) Recital 42.
- (32) SA.30743 — *Finanzierung von Infrastrukturprojekten am Flughafen Leipzig/Halle* (OJ C 284, 28.9.2011, p. 6).
- (33) See Recital 54 of the opening decision.
- (34) *Salzgitter/Commission*, C-408/04, EU:C:2008:236, paragraph 106.
- (35) COM(2006) 819.
- (36) The index provides the interest rates of mostly triple-A rated German bank debenture.
- (37) The third parties concerned justified their doubts on this point by claiming that Airport Network B.V was continuously loss-making.
- (38) *Demesa and Territorio Histórico de Álava v Commission*, joined Cases C-183/02 P and C-187/02 P, ECR, EU:C:2004:701, paragraph 52.
- (39) Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
- (40) 24 March 2011, *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission*, Joined Cases T-443/08 and T-455/08, ECR., EU:T:2011:117, in particular paragraphs 93 and 94; confirmed by *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, Case C-288/11 P, EU:C:2012:821.
- (41) Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).
- (42) The purpose of the company is the development and opening up of the former NATO airfield Weeze-Laarbruch in regard to the necessary technical and infrastructural facilities and the maintenance and refurbishment of the site in preparation for a subsequent commercial use.
- (43) The Municipality of Weeze's sole financial support consisted in the initial capital injection at the creation of EEL GmbH, but it backed up all decisions taken by EEL GmbH and the district of Kleve.
- (44) By virtue of paragraph 53 of the Haushaltsgrundsatzgesetz (HGrG), which sets out the budgetary and accounting principles of public entities in Germany.

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- (45) Communication of the Commission to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/CEE to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3, paragraph 11). This communication deals with the manufacturing sector, but is applicable to the other economic sectors. Cf. also Case T-16/96 *Cityflyer*, [1998] ECR II-757, paragraph 51.
- (46) 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).
- (47) The 2008 Reference Rate Communication establishes a method for setting reference and discount rates that are applied as a proxy for the market rate. Despite the fact that the Commission reference rate is only a proxy, the Commission is not in the possession of other conclusive data to determine the interest rate that the borrower could obtain on the market.
- (48) Solvabilitätsverordnung — SolvV of 14 December 2006, published on 20 December 2006 in the German Bundesgesetzblatt (Part I Nr. 61, p. 2926).
- (49) See Standard and Poor's '2012 Annual Global Corporate Default Study and Rating Transitions', 18 March 2013, p. 29, and Moody's 'Corporate Default and Recovery Rates 1920-2010', 28 February 2011, p. 31.
- (50) The level of collaterals can be measured as the Loss Given Default (LGD), which is the expected loss in percentage of the debtor's exposure taking into account recoverable amounts from collateral and the bankruptcy assets; as a consequence the LGD is inversely proportional to the validity of collaterals.
- (51)  $LGD = 1 - \text{recovery rate} = 1 - \text{EUR} [\dots] M / \text{EUR} [\dots] M = [\dots] \%$
- (52) See p. 22 and 23 of Loan Agreement from 1 July 2005.
- (53) See p. 2 of Annex 2 to Germany's letter of 23 May 2014.
- (54) The increase in the value from 2005 to 2010 is due mainly to [...].
- (55) See p. 2 of Annex 2 to Mitteilung vom 23.5.2014.
- (56) This group comprises of the ratings of [...].
- (57) A list of the applicable base rates is published by the Commission on the following website: [http://ec.europa.eu/competition/state\\_aid/legislation/base\\_rates\\_eu27\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/base_rates_eu27_en.pdf)
- (58) The difference of [...] bps in the interest rates represents roughly an advantage of about EUR [...] for the duration of Loan 4 and Extension 1.
- (59) *Italy v Commission*, C-99/02, ECR, EU:C:2004:207, paragraph 65.
- (60) *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ('Altmark' judgment), EU:C:2003:415, ECR
- (61) 2014 Aviation Guidelines, paragraph 43.
- (62) *Italy v Commission*, EU:C:2004:207, paragraph 65.
- (63) 'Altmark' judgment, EU:C:2003:415
- (64) 2014 Aviation Guidelines, paragraph 43.
- (65) 12 December 2000, *Alitalia v Commission*, T-296/97, ECR, EU:T:2000:289, paragraph 84; *Italy v Commission*, C-305/89, ECR, EU:C:1991:142, paragraph 20.
- (66) See 2005 Aviation Guidelines, number 46.
- (67) See footnote 65.
- (68) See footnote 49.
- (69) See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1, paragraph 95).
- (70) See Recital 53.
- (71) See Table 3.

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- (72) Article 1(b)(v), second sentence, of Regulation (EC) No 659/1999 reads: ‘Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation’.
- (73) The aid is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation.
- (74) Recitals 38 and 39.
- (75) Recital 172 of the 2014 Aviation Guidelines.
- (76) Recital 173 of the 2014 Aviation Guidelines.
- (77) See for instance Case SA.34586 (12/N) — *Greece — Chania Airport Modernisation*, paragraph 49.
- (78) While formally distant from Niederrhein-Weeze by less than 100 km (98km), the Maastricht airport can only be reached by a 1 hour 14 min journey by car. The Commission is of the opinion that this airport should not be considered included in the catchment area of Niederrhein-Weeze Airport.
- (79) After the 2012-2013 extension, Eindhoven airport's capacity has been increased to 5 million passengers; extension work in Düsseldorf airport is expected to commence in Summer 2014.
- (80) See paragraph 15 thereof.
- (81) Paragraphs 137 and 113 of the 2014 Aviation Guidelines.
- (82) Paragraphs 137 and 116 of the 2014 Aviation Guidelines.
- (83) Paragraphs 137 and 124 of the 2014 Aviation Guidelines.
- (84) Paragraphs 137 and 125 of the 2014 Aviation Guidelines.
- (85) Paragraphs 137 and 131 of the 2014 Aviation Guidelines.

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