

## COMMISSION DECISION

of 3 October 2012

on the measure SA.23600 — C 38/08 (ex NN 53/07) — Germany

## Financing arrangements for Munich Airport Terminal 2

(notified under document C(2012) 5047)

(Only the German text is authentic)

(Text with EEA relevance)

(2013/693/EU)

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) <sup>(1)</sup> thereof,

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

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

Whereas:

## 1. PROCEDURE

(1) By letter dated 3 November 2005, Ryanair Ltd. (hereinafter: 'the complainant' or 'Ryanair') submitted a complaint concerning the financing of the construction of Terminal 2 at Munich Airport and the exclusive-use contracts in relation to that terminal between Deutsche Lufthansa AG (hereinafter: 'LH') and Flughafen München GmbH (hereinafter: 'FMG'). The complainant alleged, among other things, that the financing provided by the

shareholders in FMG (public authorities) for the construction of Terminal 2 was not in line with the market-economy investor principle and that the exclusive rights for LH and its Star Alliance partners to use Terminal 2 had led to financial losses of over EUR 100 million for FMG in the previous two years. On that basis, Ryanair claimed that the measures in question, by conferring economic advantages on LH, were illegal and incompatible state aid.

(2) The Commission asked Germany to provide further information in relation to the complaint by letters dated 18 November 2005, 31 July 2006, 6 June 2007 and 3 October 2007. Germany replied by letters dated 18 January 2006, 8 August 2006, 28 August 2007, 17 September 2007, 21 September 2007, 29 November 2007 and 13 February 2008. A meeting between the Commission and Germany took place on 10 October 2007.

(3) By letter dated 31 July 2007 the complainant submitted a letter of formal notice under Article 265(2) TFEU, alleging that the Commission had failed to act on its complaint. On 15 November 2007 the complainant lodged an action for failure to act before the General Court <sup>(3)</sup>.

(4) By letter dated 23 July 2008 the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) TFEU in respect of loans 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 granted by KfW Bankengruppe, Bayerische Landesbank and LfA to FM Terminal 2 Immobilien-Verwaltungsgesellschaft mbH and Terminal 2 Betriebsgesellschaft mbH, and the rent paid by FM Terminal 2 Immobilien-Verwaltungsgesellschaft mbH to FMG for the use of the land parcel at Munich Airport (hereinafter: 'opening decision').

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

<sup>(2)</sup> OJ C 5, 10.1.2009, p. 4.

<sup>(3)</sup> The action was registered as Case T-423/07 *Ryanair v Commission*, OJ C 8, 12.1.2008, p. 28.

(5) By letter dated 31 July 2008 Germany requested an extension of the deadline for its reply, which was accepted by the Commission. At the request of Germany, a meeting took place on 12 September 2008. Germany transmitted its comments on 6 November 2008.

(6) A corrigendum to the opening decision to initiate the procedure provided for in Article 108(2) TFEU was adopted on 12 November 2008.

(7) The opening decision was published in the *Official Journal of the European Union* <sup>(4)</sup> on 10 January 2009. The Commission invited interested parties to submit their comments on the measures in question within one month of the date of publication.

(8) The Commission received comments from Ryanair. It forwarded the comments to Germany by letter dated 17 February 2009. Germany was given the opportunity to respond to them within one month. On 1 April 2009 Germany requested an extension of the deadline for its reply, which was accepted by the Commission. Germany transmitted its comments on 30 April 2009.

(9) On 19 May 2011 the General Court issued a judgment on Ryanair's action for failure to act <sup>(5)</sup>.

(10) By letter dated 30 April 2012 the Commission requested further information on loans 17 and 20. Germany responded by letter dated 30 May 2012.

(11) By letter dated 23 July 2012 the Commission requested further information. Germany responded by letter dated 16 August 2012.

## 2. DESCRIPTION OF THE FACTS AND GROUNDS FOR INITIATING THE PROCEDURE

### 2.1. BACKGROUND TO THE INVESTIGATION

(12) It was decided to build a second terminal at Munich Airport because it became apparent only a few years

after operations commenced in 1992 that, due to growth in passenger traffic, capacity at the airport would reach its limits sooner than expected. On 15 July 1998, FMG <sup>(6)</sup> and LH <sup>(7)</sup> signed a Memorandum of Understanding on the construction and operation of Terminal 2 (the new terminal at Munich Airport).

(13) As provided for in the Memorandum of Understanding, FMG and LH created jointly owned undertakings responsible for the construction and operation of the terminal (hereinafter: 'T2 Companies'):

(a) FM Terminal 2 Immobilien-Verwaltungsgesellschaft mbH (hereinafter: 'Immo T2') is a property holding company. The shares are owned by FMG and LH in the proportion 60:40. Immo T2 was responsible for the construction of Terminal 2 and rents the Terminal 2 building under a long-term leasing contract to Terminal 2 Betriebsgesellschaft mbH.

(b) Terminal 2 Betriebsgesellschaft mbH (hereinafter: 'T2 Operating Company') is responsible for the operation and management of Terminal 2. The shares in T2 Operating Company are also owned by FMG and LH in the proportion 60:40.

(14) Pursuant to the Memorandum of Understanding, the risks incurred by the T2 Companies are borne in accordance with the allocation of the shares between FMG and LH. FMG and LH have concluded profit-and-loss transfer agreements with the T2 Companies. They cover the losses in proportion to their shareholding (60:40). Under German law, FMG and LH are therefore liable for all debts contracted by the T2 Companies during the period of validity of the profit-and-loss transfer agreement; that liability also extends beyond the date on which the profit-and-loss transfer agreement ends, if the debt was contracted before that date.

<sup>(4)</sup> See footnote 2.

<sup>(5)</sup> Case T-423/07 *Ryanair v Commission*, not yet published in the European Court Reports.

<sup>(6)</sup> FMG is the state-owned limited liability company that operates Munich Airport. The shareholders in FMG are the Free State of Bavaria (51 % of the shares), the Federal Republic of Germany (26 % of the shares) and the City of Munich (23 % of the shares).

<sup>(7)</sup> LH is a global air carrier that has been listed on the German Stock Exchange since 1966 and was fully privatised in 1997.

(15) The total investment cost for the construction of Terminal 2 at Munich Airport was approximately EUR [...] (\*). The T2 Companies financed the project partly from own capital (capital injections from FMG and LH) and partly from loans. Three German public banks (KfW Bankengruppe<sup>(8)</sup>, Bayerische Landesbank<sup>(9)</sup> and LfA Förderbank Bayern<sup>(10)</sup>) have provided long-term loans to the T2 Companies amounting to EUR [...] million in total in order to finance the Terminal 2 project. Both T2 Companies are parties to all loan agreements.

## 2.2. SCOPE OF THE FORMAL INVESTIGATION PROCEDURE AND THE MEASURES UNDER INVESTIGATION

(16) In its opening decision the Commission concluded that the capital investments by FMG and LH and the exclusive use of Terminal 2 by LH did not amount to state aid.

(17) With regard to the loans provided by KfW, BayernLB and LfA to the T2 Companies for the construction of Terminal 2, the Commission considered that loans 2, 3, 4, 11, 12, 13, 14, 15, 18, 19 and 22 do not constitute state aid within the meaning of Article 107(1) TFEU.

(18) However, the opening decision raised the following questions:

(1) Are loans 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 to the T2 Companies and the land use agreement for land parcels 4935/3 and 4881 imputable to the State?

(2) Were loans 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 to the T2 Companies granted on market conditions? This would mean that they did not involve state aid. If not, can such state aid be considered compatible with the internal market?

(\* Confidential information.

<sup>(8)</sup> KfW Bankengruppe (hereinafter: 'KfW') is an institution established under public law (*Anstalt des öffentlichen Rechts*) to support development in different areas, for example promotion of small and medium-sized enterprises, environmental protection measures, and infrastructure. It is owned by the Federal State of Germany (80 %) and the *Länder* (20 %). KfW refinances its lending business on the international capital markets.

<sup>(9)</sup> Bayerische Landesbank (hereinafter: 'BayernLB') is an institution established under public law. At the time the individual loan agreements were concluded, it was jointly owned indirectly through BayernLB Holding AG by the Free State of Bavaria and the Association of Bavarian Savings Banks (*Sparkassenverband Bayern*), each with a 50 % stake. Currently, the Free State of Bavaria holds a 94 % stake in BayernLB Holding, and the remaining 6 % stake is owned by the Association of Bavarian Savings Banks.

<sup>(10)</sup> LfA Förderbank Bayern (hereinafter: 'LfA') is an institution established under public law specialised in facilitating general business development in Bavaria (including development of the local infrastructure). It is wholly owned by the Free State of Bavaria.

(3) Is the rent paid by ImmoT2 to FMG for the right to use land parcels 4935/3 and 4881 covering an area of approximately 170 000 m<sup>2</sup> and to construct Terminal 2 there a market rent?

### 2.2.1. Loans granted to the T2 Companies

(19) Only loans 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 granted by KfW and Bayern LB, as referred to in the opening decision, are relevant for the purposes of this Decision.

(20) The interest rates for all the loans referred to in recital 19 were established in the relevant loan agreements. The base rate was determined using a maturity-dependent interbank rate published in Reuters information system on page DGZF at 11:00 am (Munich/Frankfurt local time) on the day the interest rate was set (long-term public bonds yield of Deka Bank). The risk margins were agreed in the respective loan agreements.

(21) Loans 5, 6 and 7 were granted under the KfW infrastructure programme in accordance with the loan agreement of [...] to support the provision of infrastructure from a regional and economic development perspective. The interest rates for loans 5, 6, and 7 were fixed for ten years. After the expiry of the fixed-rate period for these loans in 2009–2011, the interest rates will be adjusted to the published Commission reference rate. The risk margin agreed in the loan agreement remains unchanged.

(22) Under the loan agreement of 13 September 2000, loans 1, 9, 10, 16, 21 and 23 are subject to the following risk margins in basis points (hereinafter: 'bps') fixed for the entire duration of the loan agreement:

(a) BayernLB: [...]

(b) KfW: [...]

(23) In July 2003 BayernLB and KfW concluded a loan agreement supplementary to the loan agreement of 13 September 2000 to cover the additional financing needs of Terminal 2 due to the increase in construction costs. The base rate was determined using a maturity-dependent interbank rate published in Reuters information system on page DGZF at 11:00 am (Munich/Frankfurt local time) on the day the interest rate was set (long-term public bonds yields of Deka Bank). On the basis of this amendment, the interest margins for loans 17 and 20 were established at [...] bps<sup>(11)</sup>.

<sup>(11)</sup> Letter dated 17 March 2005.

- (24) The T2 Companies provided the following collateral for the loans and credit facilities:
- (a) [...];
  - (b) [...];
  - (c) [...];
  - (d) [...].
- (25) In addition, the banks reserved the right to cancel the loan agreements if:
- (a) the profit-and-loss transfer agreements between the T2 Companies and their shareholders (FMG and LH) are abandoned or amended with a negative impact on the banks;
  - (b) the Free State of Bavaria, Germany and the City of Munich (individually or together) lose the absolute majority in the capital and/or voting rights in FMG; or
  - (c) the stake and/or voting rights of the Free State of Bavaria in FMG fall to 25 % or less.
- (26) In view of the facts referred to in recitals 20 to 25, the Commission had doubts whether loans 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 granted to the T2 Companies by the public development banks KfW and LfA and the publicly owned bank BayernLB were granted on terms which could have been obtained under normal market conditions. This assessment was primarily based on the fact that the interest rates charged on those loans seemed to be below the reference rates established under application of the Commission Notice on current state aid recovery interest rates and reference/discount rates for 15 Member States applicable as from 1 January 2005 and historic recovery interest rates and reference/discount rates applicable from 1 August 1997<sup>(12)</sup> (hereinafter: '2005 Commission Notice').
- (27) The 2005 Commission Notice was subsequently replaced by the Communication from the Commission on the revision of the method setting the reference and discount rates of 12 December 2007<sup>(13)</sup> (hereinafter: '2008 Reference Rate Communication'). Under the 2008 Reference Rate Communication the rating (creditworthiness) of the undertakings concerned and the available collateral must be taken into account for setting the risk margins. The Commission considered
- that the ratings of the parent companies FMG and LH were relevant for the case at issue. In its preliminary assessment the Commission explained that, in the light of the ratings for the two undertakings, the interest rates for the loans appeared to be below the rates resulting from the application of the 2008 Reference Rate Communication.
- (28) The terms on which loans 1, 5, 6, 7, 9, 10, 16, 17, 20, 21 and 23 were granted therefore seemed to be more favourable than the proxy established by the Commission for the market rate in application of the 2008 Reference Rate Communication.
- (29) The Commission also expressed its doubts on the question of the imputability of the measures to the State. It seemed that the approval of the supervisory board was not required for the loans granted by BayernLB and LfA.
- 2.2.2. The land-use agreement between FMG and Immo T2**
- (30) On 30 March 2000 FMG and Immo T2 concluded a contract under which FMG granted Immo T2 the right to use land parcels 4935/3 and 4881 covering an area of approximately 170 000 m<sup>2</sup> and to construct Terminal 2 there.
- (31) In return, Immo T2 pays an annual rent of [...] plus VAT (approximately EUR [...]) for the exclusive-use rights. This rent is paid quarterly in arrears from the beginning of the operation of Terminal 2. In order to take into account changes in property prices and interest rates, the amount of the annual rent will be reviewed after [...] years and adjusted if necessary.
- (32) The duration of the contract is [...] years. [...]
- (33) With regard to the land-use contract, the Commission could not rule out the possibility that the rent paid by Immo T2 to FMG for the land on which Terminal 2 was constructed is a market price.
- (34) The Commission also expressed doubts about the imputability of the measures to the State. The Commission had no information as to whether the public shareholders in FMG were involved in the conclusion of the land-use agreement.

<sup>(12)</sup> OJ C 88, 12.4.2005, p. 5.

<sup>(13)</sup> OJ C 14, 19.1.2008, p. 6.

### 2.2.3. Compatibility of possible state aid to the T2 companies

- (35) The Commission examined whether the rent referred to in recital 31 and the loans referred to in recital 19 would be compatible with the internal market if they constituted state aid. Loans 16, 17, 20, 21 and 23 in particular seemed to contain operating aid that is unlikely to meet the requirements of Article 107(2) and (3) TFEU to be considered exceptions to the general prohibition on state aid.

## 3. COMMENTS BY GERMANY

### 3.1. SCOPE OF THE INVESTIGATION PROCEDURE AND THE NOTION OF ECONOMIC ACTIVITY OF THE T2 COMPANIES

- (36) Germany first submits observations on the notion of the economic activity of the T2 Companies and on the applicability of Article 107(1) TFEU to them, as interpreted before the judgment of the General Court in *Aéroports de Paris* <sup>(14)</sup>.
- (37) Germany points out that BayernLB, which subsequently took on the role of lead bank for the loans in question, had already issued a binding loan commitment for the financing of the T2 Companies on 2 December 1998. Germany further explains that the terms of all the loans granted by KfW, LfA and BayernLB were based on that commitment, which therefore definitively established the terms of the loan agreements. The terms of loans 5, 6 and 7 were irrevocably established in the loan agreement dated 31 August 1999 and the terms of loans 1, 9, 10, 16, 21 and 23 in the loan agreement dated 13 September 2000 respectively. Both loan agreements were irrevocably concluded prior to the *Aéroports de Paris* judgment. Furthermore, the land-use agreement was signed on 30 March 2000, i.e. prior to the judgment of the General Court in *Aéroports de Paris*.
- (38) Consequently, the conformity of the risk margins can be assessed only on the basis of the situation at that time. Furthermore, at that time the operation and construction

of the airport were not considered to be an economic activity because airports did not fall within the scope of Article 107(1) TFEU.

### 3.2. AID ELEMENT IN THE LOANS GRANTED TO THE T2 COMPANIES

#### 3.2.1. Market conformity of bank loans

- (39) With regard to the loans granted to the T2 Companies, Germany first comments on the suitable framework for the assessment of whether the loans were in line with market conditions. It rejects an assessment of the loans in question on the basis of the 2005 Commission Notice. It is not appropriate to compare the overall interest rates for the individual loans granted to the T2 Companies with the Commission's reference rate. Rather, one should analyse the respective risk margins and compare them with a relevant market benchmark. The base rate fluctuates from day to day and neither party is able to exert any influence over it. Therefore, the Commission should instead use market comparators as a benchmark for the risk margins because the risk margin referred to in the 2005 Commission Notice is generally not taken into consideration by private creditors when entering into loan agreements. Moreover, Germany argues that the inadequacy of the 2005 Commission Notice was also recognised by the 2008 Reference Rate Communication, which also takes into account the rating of the borrower and the collateral provided.
- (40) Nor is it necessary, in Germany's view, for the Commission to apply the 2008 Reference Rate Communication, since the Commission should instead base its assessment on market benchmarks where market comparators exist. Otherwise, the competitiveness of public credit institutions would be seriously jeopardised, since the specific terms could ultimately be determined only by the Commission's reference rate and no longer on the basis of actual market conditions.
- (41) Germany further argues that the terms of the loans in question are explained by the very good rating and very high creditworthiness of FMG and LH. In this context, the assessment of the creditworthiness must be carried out at the level of FMG and LH, because, where a profit-and-loss transfer agreement exists between subsidiaries and their parent companies, it is absolutely standard practice for banks to take into account only the creditworthiness of the parent companies.

<sup>(14)</sup> Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929 (hereinafter: *Aéroports de Paris* judgment), upheld on appeal in Case C-82/01P *Aéroports de Paris v Commission* [2002] ECR I-9297 (hereinafter: *Aéroports de Paris* judgment on appeal).



(42) Germany points out that LH was given a BBB+ <sup>(15)</sup> rating from 2001 to 2003 by the rating agency Standard & Poor's. FMG does not have an external corporate credit rating, as it is a wholly publicly owned company. Germany compares the financial situation of FMG with that of Schiphol Airport, which is also wholly publicly owned and was rated between A <sup>(16)</sup> and AA <sup>(17)</sup> by the rating agency Standard & Poor's. Moreover, in 2006 FMG obtained a syndicated, uncollateralised loan of EUR [...] from an international consortium made up of a total of 21 public and private banks. In the memorandum for this loan FMG received a credit rating of [...] <sup>(18)</sup>.

(43) Germany observes that, in contrast to the syndicated loan granted to FMG, substantial collateral was provided for the loans at stake. In addition to the collateral referred to in the opening decision, it is important to note that [...] in order to collateralise the loans. This demonstrates that an even lower risk margin would be appropriate for the loans at stake than the one used for the syndicated loan, which was between [...] and [...] bps.

(44) Germany further explains that there was no additional collateral other than that referred to in recitals 40 and 45 of the opening decision. According to Germany, on 31 December 2002 the value [...] amounted to EUR [...] and the value of the corresponding debts amounted to EUR [...]. Germany adds that the value of [...] increased to EUR [...] on 31 December 2003 and the value of the corresponding debts amounted to EUR [...]. Neither FMG, LH or the shareholders in FMG provided any additional guarantees.

(45) With regard to the comparability of the terms of the loans in question with the bond issues of Deutsche Telekom AG, Bayer AG, Volkswagen AG and Deutsche Börse AG, the credit ratings of these companies show that their economic situation is entirely comparable to

that of FMG and LH. The credit ratings for these companies provided by Germany are summarised in Table 1:

Table 1

**The credit ratings of comparators provided by Germany**

Company	Credit rating (long-term) Standard & Poor's	Credit rating (long-term) Moody's
Deutsche Telekom AG	BBB+	Baa1
Bayer AG	A-	A3
Volkswagen AG	A-	A3
Deutsche Börse AG	AA	n.a.

(46) Germany further draws attention to the average risk margins (in bps) for euro-zone corporate bonds with a credit rating (according to the Standard & Poor's rating methodology) between AA and BBB, as summarised in Table 2:

Table 2

**Average risk margins in (bps) for euro-zone corporate bonds**

Time period	AA	A	BBB
1997 – 2007	15,6	38,6	83,3
1997 – 3/2005	17,4	40,8	89,4
1997 – 2000	5,0	19,5	47,4

(47) Germany argues that Table 2 shows that the risk margins are very volatile over time and that it is accordingly not acceptable to use the risk margins that were applicable only in a particular month in order to draw conclusion about whether the risk margins for the loans in question were set under normal market conditions.

<sup>(15)</sup> This rating category means that the borrower has an adequate capacity to meet its financial commitments. However, adverse economic conditions or changing circumstances are likely to lead to a weakened capacity of the borrower to meet its financial commitments.

<sup>(16)</sup> This rating category means that the borrower has a strong capacity to meet its financial commitments, but is somewhat more susceptible to the adverse effects of changes in circumstances and economic conditions than borrowers in higher-rated categories.

<sup>(17)</sup> This rating category means that the borrower has a very strong capacity to meet its financial commitments.

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

**3.3. THE TERMS OF THE LAND USE AGREEMENT SIGNED ON 30 MARCH 2000**

(48) As regards the terms of the land use agreement signed on 30 March 2000, Germany argues that a comparison with the land purchase price usually charged in the area around Munich Airport shows that the rent paid by Immo T2 is higher than the comparable market value.

- (49) Germany explains that the annual rent of DEM [...] (approximately EUR [...] million) was set on the basis of the following parameters:
- (a) size of the land parcel of 170 000 m<sup>2</sup>;
  - (b) an initial price per m<sup>2</sup> of DEM [...] (approximately EUR [...]); and
  - (c) an annual rate of return of [...] on the price per m<sup>2</sup>.
- (50) Germany is of the opinion that the price of DEM [...] (approximately EUR [...]) per m<sup>2</sup> is a market price for the following reasons.
- (51) First, in order to determine the market price of a land parcel, it is necessary to compare the prices of similar plots of land, in particular as regards the possibility of building development, their location and the extent of development. In 2000, when the land-use agreement was signed, the plots in question were suitable for development, but there was no infrastructure in place. Consequently, in order to determine the market price for use of the land parcels in question, the infrastructure costs set out in Table 3 must be factored in. Those costs were financed by Immo T2 itself, but would otherwise have had to be borne by the landowner.
- Table 3
- Overview of infrastructure investment costs financed by Immo T2**
- | Measures/investments financed by Immo T2  | EUR million |
|---|-------------|
| Roads and bridges   | [...]       |
| Local public transport infrastructure access  | [...]       |
| Supply duct for utilities and ICT (electricity, water and waste-water disposal, telecommunications, etc.) | [...]       |
| Energy supply   | [...]       |
| Water and waste-water connections   | [...]       |
| Telecommunications  | [...]       |
| <b>Total</b>  | [...]       |
- (52) On the basis of the actual investment costs incurred and financed by Immo T2, the value of the land parcels increases by approximately EUR [...] per m<sup>2</sup> to a total of approximately EUR [...] per m<sup>2</sup>. If the roads and bridges financed by Immo T2 were excluded, the value of the land parcels would still increase to approximately EUR [...] per m<sup>2</sup>.
- (53) Germany further explains that the purpose of this calculation is only the benchmarking of the value of the land parcels in questions with other plots of land. When calculating the rent, the value of the land remained at EUR [...] per m<sup>2</sup>, since all of the infrastructure costs had been borne by Immo T2 rather than the landowner. Otherwise Immo T2 would have to bear those costs twice.
- (54) In addition, Germany points out that the plots of land are located in the municipality of Oberding, which is in the rural district of Erding. The value of plots of land with infrastructure in place located in the industrial area in the immediate vicinity of the airport in the Schwaig area of the municipality of Oberding has remained unchanged in recent years at approximately EUR [...] per m<sup>2</sup>. That assertion was confirmed by the independent Expert Group on Land Valuations (*Unabhängige Gutachterausschuss für Grundstückswerte*) at the Erding Rural District Authority (*Landratsamt*).
- (55) Germany is of the opinion, however, that the price of EUR [...] per m<sup>2</sup> must be further adjusted. First, the price of the comparison plot should therefore be increased by approximately [...] % or EUR [...] per m<sup>2</sup>. On that basis the benchmark price increases to EUR [...] per m<sup>2</sup>.
- (56) Second, the location of a plot of land has a decisive influence on its value. Unlike the comparison plots of land in Schwaig, the Terminal 2 plots have direct access to the airport, the motorway, the suburban railway (*S-Bahn*) and other local public transport infrastructure. In order to reflect those commercial advantages, the price should be further increased by approximately [...] % or EUR [...] per m<sup>2</sup>, according to estimates by experts. This increases the benchmark price from EUR [...] per m<sup>2</sup> to EUR [...] per m<sup>2</sup>.
- (57) In view of the above considerations, the value of the plots of land in question, including the infrastructure costs borne by Immo T2, amounts to at least EUR [...] per m<sup>2</sup> (excluding the cost of bridges and roads). Germany is therefore of the opinion that the value of the plots of land in question is at least [...] % higher than the benchmark price. Consequently, the land use agreement in question was concluded under normal market conditions and therefore does not contain any aid element.
- (58) Germany goes on to point out that all of these benchmark values relate to the sale of land, i.e. they are prices at which a transfer of ownership takes place. However, the agreement in question merely concerns permission to use the land in exchange for a rent for a limited period of time ([...] years) with no transfer of

ownership. During the negotiations, LH sought to use that factor as justification for paying a lower rent. However, under the 'double reversion clause' (*doppelte Heimfallregelung*) included in the land-use agreement, Immo T2 will not be able to acquire ownership of the terminal building or the plot of land on which it has been built.

- (59) That is why Germany takes the view that the rent paid for the use of the two plots of land is actually higher than the normal market price for their purchase and therefore does not contain any elements of state aid within the meaning of Article 107(1) TFEU.

#### 4. COMMENTS BY THIRD PARTIES: RYANAIR

- (60) The Commission received comments on the opening decision from Ryanair only. According to Ryanair, Germany's argument that the arrangements regarding Terminal 2 had allowed the use of the airport to be optimised is unsubstantiated. Ryanair further claims that the Commission should have also investigated the split in the ownership structure between Immo T2 and T2 Operating Company.

- (61) With respect to the bank loans, Ryanair disputes that a risk premium of 75 basis points is adequate. Ryanair also argues that the Commission itself acknowledged that the T2 Companies are newly established special-purpose companies without a credit-rating history, that FMG is highly dependent on the business strategy of LH, that LH, with a relatively high cost base and weak operating margin, operates in the cyclical, capital-intensive and price-competitive airline industry, and that the security normally required by banks is apparently not provided. As a result of these factors, a higher risk premium should apply.

- (62) Ryanair suspects that Germany may have withheld information regarding guarantees offered by the State to the banks. Ryanair observes that the fact that the lending banks have reserved the right to terminate their loan agreements with the T2 Companies if certain public bodies lose control of FMG suggests that those loans were granted because of an implicit or explicit guarantee offered by the public owners of the T2 Companies. Against this background, Ryanair is of the opinion that the interest rates required by the banks are lower than they would have been under normal market conditions and that an investigation should examine whether the T2 Companies have paid adequate remuneration for the guarantee.

- (63) With regard to the rent for the land on which Terminal 2 was constructed, Ryanair submits that, although the

terminal did not start operating until June 2003, Immo T2 has been using the land since March 2000. Ryanair therefore is of the opinion that Immo T2 was able to use the land free of charge for three years and three months. Ryanair further argues that a period of [...] between two rent reviews is unusually long and favourable for the tenant.

- (64) Concerning equal access to the infrastructure, Ryanair contends that the Star Alliance partners of LH also benefited from the aid. Ryanair's view is that the preferential access for Star Alliance members is a special advantage granted by FMG without it receiving any special advantage in return. Ryanair disputes that there is no qualitative difference between Terminals 1 and 2, because, for instance, the capacity, parking positions, floor area and terminal positions are larger in Terminal 2 than in Terminal 1. It is foreseeable that Terminal 1 will become congested more quickly than Terminal 2 in the future. In the view of Ryanair, LH does not appear to pay any extra charge in exchange for this preferential treatment by FMG. Finally, Ryanair stresses the aid's detrimental effect on competition in southern Germany.

#### 5. GERMANY'S REPLY TO THE COMMENTS BY RYANAIR

- (65). In its reply to the comments by Ryanair on the opening decision, Germany first addresses the effect of possible aid in this case on Ryanair's competitive situation. Even on the assumption that state aid has been granted in this case, it would not substantially affect Ryanair's competitive position in the market. Immo T2 is merely a property holding company renting the land parcels on which Terminal 2 is constructed and renting out Terminal 2 to T2 Operating Company. T2 Operating Company is an undertaking that rents, operates and sublets Terminal 2 to individual tenants. Thus, both potential aid beneficiaries are active on entirely different markets than Ryanair. The mere fact that LH holds shares in the T2 Companies does not create a competitive relationship between LH and Ryanair.

- (66) Germany further argues that the arrangements for Terminal 2 did allow the use of the airport to be optimised. Germany also rejects any criticism with regard to the apportionment of ownership in the T2 Companies. The apportionment reflects the capital invested by FMG and Lufthansa, respectively, and the allocation of risks. This practice is accepted by the Commission and confirms that the arrangement is in line with market conditions. In addition, Germany explains that sanctions were not necessary in order to ensure that LH honoured its commitments concerning the establishment of a hub at the airport, since LH has to share the business risks associated with the operation of Terminal 2.



- (67) With regard to Ryanair's observations on the assessment of the loan financing, Germany would point out that the 75 bps risk premium that the Commission used as the basis for its opening decision, in accordance with the 2005 Commission Notice, is adequate only if the undertaking is in difficulties or is unable to provide sufficient collateral. Neither of the situations is present in this case as there is no extraordinary credit risk involved.
- (68) With regard to Ryanair's observations on the terms of the land-use agreement, Germany explains first why Immo T2 did not pay any rent during the construction period for Terminal 2, which lasted three years and three months. Germany confirms that during the construction period no rent was paid by Immo T2 for the use of the land. However, the arrangements in question must be assessed in their entirety, i.e. taking into account the rent payments made after the construction of Terminal 2, which offset the non-payment of rent during the first three years and three months. Account should also be taken of the fact that the T2 Companies were not given the possibility of acquiring the land. As to Ryanair's doubts about the appropriateness of the ten-year adjustment period, Germany has already proved that the rent is well above the market value, which is the decisive issue.
- (69) Furthermore, Germany emphasises again the qualitative equivalence of the two terminals. The quantitative arguments put forward by Ryanair are beside the point. Differences exist because Terminal 1 is designed for point-to-point traffic, whereas Terminal 2 is constructed as a hub and is bigger. In terms of quality, however, Terminal 1 is not inferior. Ryanair's allegation that Terminal 1 will become congested more quickly is not correct: only 66 % of Terminal 1's capacity is currently used, while Terminal 2 operates at nearly full capacity (90 %).
- (70) Germany claims that state-aid control is not applicable to this case. The Commission itself acknowledged that the operation of an international airport has been considered to be an economic activity only since the General Court's judgment in *Aéroports de Paris*. Consequently, measures introduced before this date constitute existing aid within the meaning of Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(19)</sup>. Germany also argues that the measures constitute individual aid within the meaning of Article 1(e) of Regulation (EC) No 659/1999, so the Commission has no right of scrutiny over those measures.
- (71) Finally, Germany points out that what is relevant to this case is not the judgment of the General Court in 2000 but the final judgment of the Court of Justice of

24 October 2002. Only the latter judgment settled the matter definitively and provided legal certainty.

## 6. ASSESSMENT: EXISTENCE OF AID TO THE T2 COMPANIES

- (72) Under Article 107(1) TFEU 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'
- (73) The criteria laid down in Article 107(1) TFEU are cumulative. The measures in question will constitute state aid within the meaning of Article 107(1) TFEU if all of the criteria in (a)-(d) are met. The financial aid must:
- (a) be granted by the State or through state resources;
  - (b) favour certain undertakings or the production of certain goods;
  - (c) distort or threaten to distort competition; and
  - (d) affect trade between Member States.

### 6.1. LOANS GRANTED TO THE T2 COMPANIES

#### 6.1.1. Applicability of the state aid rules to the financing of airport infrastructure

- (74) Until recently, the development of airports was often determined by purely territorial planning considerations or, in some cases, military requirements. The operation of airports was organised as part of the public administration rather than as a commercial undertaking. Competition between airports and airport operators was also limited and developed gradually. Against this background, the financing of airports and airport infrastructure by the State had previously been considered by the Commission itself to be a general measure of economic policy which could not be controlled under the state aid rules in the Treaty<sup>(20)</sup>.

<sup>(19)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(20)</sup> Communication 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, OJ C 350, 10.12.1994, p. 5.

- (75) However, the situation has changed in recent years. Although those territorial planning considerations and administrative structures may still play a role in some cases, the majority of airports have been incorporated under commercial law in order to allow them to operate under market conditions in an increasingly competitive environment. The process of transfer to the private sector has normally taken the form of privatisation or increasing opening-up of capital. In recent years, private equity firms and investment and pension funds have shown a great interest in acquiring airports.
- (76) In recent years the Union's airport industry has undergone fundamental organisational changes that reflect not only the active interest of private investors in the airport sector, but also a change of attitude on the part of the public authorities to private-sector involvement in airport development. This has led to greater diversity and complexity of the functions undertaken by airports.
- (77) These recent changes have led in turn to a change in the commercial relationships between airports. Whereas in the past airports were mostly managed as infrastructures with a view to ensuring accessibility and territorial development, for several years more and more airports have also been pursuing commercial objectives and are competing with each other in order to attract air traffic.
- (78) Given the gradual development of market forces in this sector, it is not easy to determine a date from which the operation of airport facilities must be undoubtedly considered an economic activity. However, the case law of the General Court reflects the changing nature of airport operation. In the *Aéroports de Paris* judgment, the General Court held that the operation of an airport, including the provision of airport services to airlines and service providers at airports, is an economic activity because it consists in the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by the manager, and when the latter is a public authority, the activity does not fall within the exercise of its official powers and is separable from its activities in the exercise of such powers<sup>(21)</sup>. Since the *Aéroports de Paris* judgment (December 2000), therefore, it has no longer been possible to consider the construction and operation of airports as a task carried out within a public policy remit by an administration, which is outside the ambit of state aid control.
- (79) In its *Leipzig/Halle Airport* judgment the General Court confirmed that it is not possible *a priori* to exclude the application of the state aid rules to airports since the operation of an airport is an economic activity, of which the construction of airport infrastructure is an integral part<sup>(22)</sup>. Once an airport operator, regardless of its legal status or the way in which it is financed, engages in an economic activity, it constitutes an undertaking within the meaning of Article 107(1) TFEU, and rules on state aid in the Treaty therefore apply<sup>(23)</sup>.
- (80) In the *Leipzig/Halle Airport* judgment, the General Court also held that since 2000 it has no longer been possible to exclude the application of the state aid rules to the financing of airport infrastructure<sup>(24)</sup>.
- (81) In the light of recitals 74 to 80, the Commission takes the view that, before the General Court's judgment in *Aéroports de Paris*, the Member States could assume that financing measures definitively adopted before the *Aéroports de Paris* judgment did not constitute state aid and accordingly did not need to be notified to the Commission. It follows that the Commission cannot call into question, on the basis of the state aid rules, financing measures definitively adopted before the judgment in *Aéroports de Paris*.
- (82) Although financing measures that were definitively adopted before any competition developed in the air transport sector did not constitute state aid when adopted, they should now be considered existing aid pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999.
- (83) With regard to the present case and the loans granted to the T2 Companies to finance the construction of Terminal 2, in the opening decision the Commission considered that the interest rates were set at the time the loans were drawn, i.e. the date on which the money was disbursed to the T2 Companies.

<sup>(21)</sup> *Aéroports de Paris* judgment on appeal, paragraph 75 with further references.

<sup>(22)</sup> Judgment of 24 March 2011 in Case T-455/08 *Flughafen Leipzig-Halle GmbH und Mitteldeutsche Flughafen AG v Commission*, in particular paragraphs 105 and 106, not yet published in the European Court Reports.

<sup>(23)</sup> See in particular Commission Decision of 17 June 2008 in Case C 29/08 *Frankfurt-Hahn airport - Possible state aid to the airport and the agreement with Ryanair*, OJ C 12, 17.1.2009, p. 6, paragraphs 204–208; Commission Decision of 21 March 2012 in Case C 76/2002 *Charleroi airport - Possible state aid to the airport and Ryanair*, OJ C 248, 17.8.2012, p. 1.

<sup>(24)</sup> *Leipzig/Halle Airport* judgment, in particular paragraph 106.

- (84) However, Germany has explained during the formal investigation procedure that the terms for loans 5, 6 and 7 were irrevocably established in the loan agreement dated 31 August 1999 and for loans 1, 9, 10, 16, 21 and 23 in the loan agreement dated 13 September 2000 respectively. In addition, Germany provided further evidence that the terms of the loan agreements dated 31 August 1999 and 13 September 2000 were established on the basis of a binding loan commitment dated 2 December 1998. The terms of these loans have not been amended since.
- (85) The Commission observes that the terms for loans 1, 5, 6, 7, 9, 10, 16, 21 and 23 were irrevocably established prior to the *Aéroports de Paris* judgment (i.e. before 12 December 2000). As a result, the Commission concludes that it is not entitled to examine and call into question, under the state aid rules, loans 1, 5, 6, 7, 9, 10, 16, 21 and 23.
- (86) In the light of the legal situation referred to in recitals 74 to 82, the Commission will limit its assessment to the loans 17 and 20 granted to T2 Operating Company under the supplementary loan agreement concluded in 2003.
- (87) In this regard the Commission notes that T2 Operating Company operates Terminal 2 on a commercial basis, renting it to airlines, restaurants and business owners against payment of fees. For the purpose of assessing loans 17 and 20 under the state aid rules, T2 Operating Company should therefore be considered an undertaking engaged in an economic activity within the meaning of Article 107(1) TFEU.

#### 6.1.2. Selective economic advantage

- (88) In order to verify whether an undertaking has benefited from an economic advantage arising from a loan granted on preferential terms, the Commission applies the 'market-economy lender principle'. According to this principle, debt capital put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to normal market conditions, should not be qualified as state aid <sup>(25)</sup>.
- (89) In the present case, the Commission must assess whether the terms of loans 17 and 20 provided to T2 Operating

Company confer an economic advantage on it that the recipient undertaking would not have obtained under normal market conditions.

- (90) Germany is of the opinion that the 'market-economy lender principle' was fully complied with as loans 17 and 20 were provided on market conditions. In order to justify the terms of the loans in question, Germany compares the financing of T2 Operating Company with the financing conditions available to Deutsche Telekom AG, Bayer AG, Volkswagen AG and Deutsche Börse AG as well with a syndicated loan granted to FMG in 2006.
- (91) According to its decision-making practice, in order to determine whether the financing under assessment was granted on preferential terms, the Commission may, in the absence of other proxies, compare the interest rate on the loan in question with the Commission's reference rate. The Commission's reference rate is established pursuant to the methodology laid down in the 2008 Reference Rate Communication.
- (92) The 2008 Reference Rate Communication establishes a method for setting reference and discount rates that are applied as a proxy for market rates. However, because the Commission reference rate is merely a proxy, where the Commission is in possession in a specific case of other indicators of the interest rate that the borrower could have obtained on the market, it may base its credit-rating assessment on those indicators.

#### *Credit rating of T2 Operating Company*

- (93) In order to be able to compare the terms of the loans at issue with the comparators provided by Germany, the Commission must first assess the creditworthiness of T2 Operating Company.
- (94) T2 Operating Company has not been rated by a credit rating agency. However, Germany argues that, due to the profit-and-loss transfer agreements concluded between T2 Operating Company and LH and FMG in proportion to their shares, the rating of the parent companies should be taken into account.
- (95) The Commission observes that, under German law, LH and FMG remain liable for any loan contracted by the T2 Companies during the time the profit-and-loss transfer agreement existed, even if the agreement is subsequently revoked.

<sup>(25)</sup> Commission Communication to the Member States: Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC 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 also applicable to other economic sectors. See judgment in Case T-16/96 *Cityflyer* [1998] ECR II-757, paragraph 51.

(96) On this basis, the Commission takes the view that the rating of T2 Operating Company should be considered to be at least the lower of the ratings of the parent companies, LH or FMG respectively.

(97) LH has been rated by Standard & Poor's and by Moody's. At the time when loans 17 and 20 were granted (March 2005), the long-term credit rating assigned to LH by Standard & Poor's was BBB and the rating assigned by Moody's was Baa2, showing that both rating agencies put the company in the same credit-rating category.

(98) FMG has not been rated by a rating agency. The Commission notes that the 2008 Reference Rate Communication does not require that the ratings are obtained from a rating agency; rating systems used by banks to reflect default rates are equally acceptable. The syndicated loan agreement between FMG and 21 public and private banks signed in September 2006, i.e. shortly after loans 17 and 20 were granted, indicates that the banks assumed a rating of at least [...] for FMG.

(99) In view of recitals 94 to 98 above the Commission considers that T2 Operating Company has at least the rating of LH, i.e. at least rating [...].

*Benchmarking of the terms of loans 17 and 20 with comparators provided by Germany*

(100) The Commission notes that the syndicated loan agreement of FMG concluded in 2006 cannot be used as comparator for the loans at issue, as the rating of T2 Operating Company may be lower than the rating of FMG. In addition, the terms of loans 17 and 20 were agreed in 2003, whereas the syndicated loan agreement was concluded in a different year.

(101) With regard to the other comparators provided by Germany, namely Deutsche Telekom AG, Bayer AG, Volkswagen AG and Deutsche Börse AG, the Commission observes that this constitutes only a narrow sample. Moreover, only Deutsche Telekom AG has a rating similar to that of T2 Operating Company, namely a long-term Standard & Poor's BBB+ rating and a long-term Moody's Baa1 rating. It should further be

noted that the financing conditions of Deutsche Telekom AG were established at a very different time to the loans at issue.

(102) In view of recitals 100 to 101 above, the Commission takes the view that Germany has not performed an adequate market benchmarking to justify the terms of loans 17 and 20.

*Benchmarking of the terms of loans 17 and 20 with market proxies based on credit default swap (CDS) spreads*

(103) In order to assess whether loans 17 and 20 were in line with market conditions, the Commission has also performed a benchmarking with market proxies based on credit default swap (CDS) spreads.

(104) Consistent with the methodology underlying the 2008 Reference Rate Communication, the Commission is of the opinion that loan interest rates can be deemed to be in line with market conditions if the loans are priced at a rate equal to or higher than a benchmark rate defined by the following formula:

$$\text{Benchmark rate} = \text{base rate} + \text{risk margin} + \text{fee}$$

(105) The base rate represents the cost for banks of providing liquidity (funding cost). In the case of fixed-rate funding (i.e. the interest rate is fixed for the duration of the loan), it is appropriate to determine the base rate on the basis of swap rates<sup>(26)</sup> with a maturity and currency corresponding to the maturity and the currency of the debt. The risk margin compensates the lender for the risks associated with the specific debt financing, in particular the credit risk. The risk margin can be derived from an appropriate sample of CDS spreads<sup>(27)</sup> relating to reference entities (e.g. company bonds) with a

<sup>(26)</sup> The swap rate is the longer maturity equivalent to the Inter-Bank Offered Rate (IBOR rate). It is used in the financial markets as a benchmark rate for establishing the funding rate.

<sup>(27)</sup> A credit default swap (CDS) is a (tradable) credit derivative contract between two counterparties, the protection buyer and the protection seller, transferring the credit risk on an underlying reference entity from the protection buyer to the protection seller. The protection buyer pays a premium to the protection seller every period until maturity of the CDS contract or until a pre-defined credit event occurs on the underlying reference entity (whichever occurs first). The periodic premium paid by the protection buyer (expressed as a percentage or in terms of basis points of the protected amount, the 'notional') is called the CDS spread. CDS spreads can be used as a close proxy for the price of credit risk.



similar rating to the loans for T2 Operating Company. Finally, it appears appropriate to add 10-20 basis points as an approximation for the bank fees companies usually have to pay <sup>(28)</sup>.

(106) In order to establish the relevant maturity of the loans in question, the amortisation of the loans has to be taken into account. The Commission has calculated for this purpose the weighted average life (WAL) of the loans, which indicates the average number of years that each euro remains outstanding. The WAL of loan 17 has been calculated at [...] years and the WAL of loan 20 at [...] years.

(107) To determine the base rate of loan 17, as its WAL amounts to [...] years (for which swap rates are not available), the Commission has used the two-year EUR swap rate <sup>(29)</sup> as a proxy. For loan 17, the five-year EUR swap rate <sup>(30)</sup> is used as the closest approximation to its WAL of [...] years. Both swap rates have been obtained from Bloomberg, for the day the loans were drawn (i.e. 23 March 2005). The values of the corresponding swap rates are as follows: 2,73 % for loan 17 and 3,28 % for loan 20 <sup>(31)</sup>.

(108) As regards the margin, the Commission notes that both loans in question are highly collateralised <sup>(32)</sup>. The level of collateralisation of the loans on 31 December 2003 amounted to [...] % (i.e. the value of the assets amounted to EUR [...] million on 31 December 2003 and the value of the corresponding debts amounted to EUR [...] million). Market practice in such cases is to increase the rating of the debt instrument (the 'issue rating') in question by one notch compared with the issuer rating <sup>(33)</sup>. Accordingly, the rating of T2 Operating Company for the loans in question should be increased by one notch to a rating of (at least) [...].

(109) Based on Bloomberg data, the Commission has established samples of reference entities with a rating of [...] from all industries, excluding government and the

<sup>(28)</sup> See, for example, Oxera, *Estimating the cost of capital for Dutch water companies*, 2011 (p. 3), or Bloomberg data on underwriting fees for bond issuance. In the remainder of this Decision, a 20 bps fee will be used to arrive at a conservative estimate.

<sup>(29)</sup> Bloomberg-Code EUSA2.

<sup>(30)</sup> Bloomberg-Code EUSA5.

<sup>(31)</sup> Source: Bloomberg.

<sup>(32)</sup> See recitals 24, 25 and 44.

<sup>(33)</sup> See, for example, Moody's, *Updated Summary Guidance for Notching Bonds, Preferred Stocks and Hybrid Securities of Corporate Issuers* (February 2007).

financial sector. The sample for loan 17 (based on three-year CDS rates <sup>(34)</sup>) contains 29 reference entities; the sample for loan 20 (based on five-year CDS rates) contains 38 companies. The median CDS spreads observed on the day the loans were granted are 19 bps for a maturity of three years <sup>(35)</sup> and 28 bps for a maturity of five years <sup>(36)</sup>.

(110) That approach leads to a benchmark rate for loan 17 of 3,12 % <sup>(37)</sup> and for loan 20 of 3,76 % <sup>(38)</sup>. Loans 17 and 20 were granted at rates above those calculated benchmark rates (loan 17 at [...] and loan 20 at [...]) and the Commission considers that to be an indication that the loans were indeed in line with market conditions.

(111) Given the close relationship between LH and T2 Operating Company, as an additional check the Commission has observed the levels of CDS spreads traded on LH itself. The three-year <sup>(39)</sup> CDS rate for LH on the day loan 17 was drawn was [...] bps. The five-year CDS rate for LH was [...] bps. In order to account for the high collateralisation of loans 17 and 20, it is appropriate to adjust the obtained CDS rates downwards. Applying a multiplication factor of 2/3 <sup>(40)</sup>, this approach leads to a benchmark rate for loan 17 of [...] % and for loan 20 of [...] %. This approach also provides a further indication that the risk margins for the loan terms were in line with market conditions.

(112) In view of the above recitals (103 to 111), the Commission notes that loans 17 and 20 were granted at rates above the calculated benchmark rates and can therefore be deemed in line with market conditions.

<sup>(34)</sup> The CDS spread for loan 17 should in principle match the WAL of the loan of [...] years (approximated at two years). However, there are no CDS data available for a maturity of two years at the time the loan was granted. For that reason CDS spreads with the maturity of the loan (three years) have been considered. This approach provides for an upper bound.

<sup>(35)</sup> Source: Bloomberg. Interquartile range (i.e. the range between the first and third quartile): 16-29 bps.

<sup>(36)</sup> Source: Bloomberg. Interquartile range: 23-37 bps.

<sup>(37)</sup>  $3,12 \% = 2,73 \% + 0,19 \% + 0,20 \%$

<sup>(38)</sup>  $3,76 \% = 3,28 \% + 0,28 \% + 0,20 \%$

<sup>(39)</sup> At the time, there was no CDS trade on LH for a maturity of two years or less.

<sup>(40)</sup> The level of collateral 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 insolvency assets; as a consequence, the LGD is inversely proportional to the value of collateral. This is reflected in the difference in LGD between the collateralisation categories 'High' (LGD < 30 %) and 'Normal' (30 % < LGD < 60 %) set out in the 2008 Reference Rate Communication.



*Assessment of the terms of loans 17 and 20 in the light of the 2008 Reference Rate Communication*

- (113) Since Germany did not provide a market benchmark, the Commission will also assess the terms of loans 17 and 20 on the basis of the 2008 Reference Rate Communication. The 2008 Reference Rate Communication establishes a method for setting reference and discount rates that are applied as a proxy for market rates.
- (114) The reference rates are based on a base rate (one-year interbank offered rate - IBOR) to which risk margins have to be added. The margins range from 60 to 1 000 basis points, depending on the creditworthiness of the company and the level of collateral offered. In normal circumstances, 100 basis points are added to the base rate, assuming loans to undertakings with satisfactory rating and high collateral, or loans to undertakings with good rating and normal collateral, or loans to undertakings with strong rating and no collateral.
- (115) In the present case the base rate is defined as the three-month average of the 1-year EURIBOR<sup>(41)</sup> rates for September to November of the preceding year (2004). For the loans in question the applicable base rate can be approximated at 2,34 %.
- (116) The risk margin depends on the rating of the undertaking in question and the collateral offered. As noted in recital 99, the credit rating of T2 Operating Company corresponds at least to [...].
- (117) The Commission further observes that the loans at stake are highly collateralised (i.e. LGD less than 30 %), in particular by [...] <sup>(42)</sup>. The LGD of less than 30 % is based on the level of pledged receivables and pledged assets. The Commission notes that in general the LGD for a loan secured by [...] amounts to approximately 35 % <sup>(43)</sup>. In addition, the loan in question is secured [...] and the level of collateralisation of the loan amounts to [...] %.
- (118) For borrowers with a rating of at least [...] and a high collateralisation of the loan, the 2008 Reference Rate Communication establishes a risk margin of at least

[...] bps. Adding the base rate of 2,34 % and the risk margin of [...] bps results in an interest rate of [...] %.

- (119) The Commission notes that the interest rate on loan 17 is set at [...] and on loan 20 at [...]. Accordingly, the interest rates on both loans are set above the Commission's reference rate.

### 6.1.3. Conclusion

- (120) The Commission can conclude that loans 17 and 20 were granted in line with market conditions. The Commission notes that, in the absence of an economic advantage, it is not necessary to clarify whether the measures are imputable to the State.
- (121) As the cumulative criteria pursuant to Article 107(1) TFEU are not fulfilled, the Commission considers that loans 17 and 20 do not contain any state aid within the meaning of Article 107(1) TFEU.

## 6.2. THE LAND USE AGREEMENT BETWEEN FMG AND IMMO T2

### 6.2.1. Concept of undertaking and economic activity

- (122) As pointed out in recitals 74–81, until December 2000 the legal classification of the operation and construction of airport infrastructures for the purposes of the state aid rules was unclear. Although competition developed gradually in the sector, the Commission and the Member States used to consider those activities to be activities falling within the public policy remit rather than economic activities.
- (123) With regard to the land use agreement between FMG and Immo T2, during the formal investigation procedure Germany clarified that the conditions for the use of land parcels 4935/3 and 4881 were irrevocably agreed in the land-use agreement concluded on 30 March 2000.
- (124) The Commission notes that the conditions for the use of land parcels 4935/3 and 4881 were irrevocably decided prior to the *Aéroports de Paris* judgment (i.e. before 12 December 2000). Consequently, even if that measure implied an advantage, the Commission is not entitled to examine it and call it into question under the state aid rules for the reasons explained in section 6.1.1 of this Decision.

<sup>(41)</sup> The Euro Interbank Offered Rate (hereinafter: 'EURIBOR') is a daily reference rate based on the average interest rates at which eurozone banks offer to lend unsecured funds to other banks in the euro wholesale money market (interbank market).

<sup>(42)</sup> [...].

<sup>(43)</sup> See Bank for International Settlements: International Convergence of Capital Measurement and Capital Standards, <http://www.bis.org/publ/bcbs128.pdf>

**7. CONCLUSION**

- (125) In view of the above, the Commission concludes that it is not entitled to examine and call into question under the state aid rules loans 1, 5, 6, 7, 9, 10, 16, 21 and 23.
- (126) With regard to loans 17 and 20, the Commission can conclude that these loans were granted on market conditions. Since the cumulative criteria pursuant to Article 107(1) TFEU are not fulfilled, the Commission considers that the loans 17 and 20 do not contain any state aid within the meaning of Article 107(1) TFEU.
- (127) With regard to the conditions for the use of land parcels 4935/3 and 4881, the Commission considers that it is not entitled to examine and call into question under the state aid rules the land-use agreement,

HAS ADOPTED THIS DECISION:

*Article 1*

Loans 17 and 20, amounting in total to EUR [...], granted under the loan agreement dated July 2003 by KfW Bankengruppe, Bayerische Landesbank and LfA to FM Terminal 2 Immobilien-Verwaltungsgesellschaft mbH and Terminal 2 Betriebsgesellschaft mbH, do not constitute aid within the meaning of Article 107(1) TFEU.

*Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 3 October 2012.

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*