

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)

- Article 1 The loans granted by EEL GmbH to FN GmbH on...
Article 2 (1) The loan granted by EEL GmbH to FN GmbH...
Article 3 This Decision is addressed to the Federal Republic of Germany...
Signature

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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 3rd loan agreement of 27 July 2004, but the land charge was not annulled and remain valid, so that the 3rd 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
- (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
- (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
- (28) 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
- (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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